SUPREME COURT OF QUEENSLAND

CITATION:	*Ware v Gusti & Anor* [2003] QCA 111
PARTIES:	**CAROLYN WARE aka CAROLYN KINGDOM** (plaintiff/applicant) **v** **ADI MADE GUSTI** **MARSHA GUSTI** (defendants/respondents)
FILE NO/S:	CA No 11746 of 2002 DC No 336 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s118 DCA (Civil)
ORIGINATING COURT:	District Court at Southport
DELIVERED EX TEMPORE ON:	14 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	14 March 2003
JUDGES:	McPherson and Jerrard JJA, and White J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Application dismissed**
CATCHWORDS:	APPEAL & NEW TRIAL – PRACTICE & PRCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – GENERALLY – s 118 DCA application for leave to appeal – whether arguability of case is the criterion ordinarily to be applied by court when exercising discretion to give leave
COUNSEL:	S J Given for the appellant S C Williams QC for the respondent
SOLICITORS:	McInnes Wilson for the applicant Jensen McConaghy Solicitors for the respondent

McPHERSON JA: This is an application for leave to appeal against a decision of the District Court at Southport. The parties agreed at the trial that the damages should be assessed at $32,500, with the consequence that leave to appeal

is required under section 118 of the Act before the appeal in this case can proceed.

The plaintiff was injured when she slipped and fell on the driveway of a house owned by the defendants, Mr and Mrs Gusti, which was leased to some people who were friends of the plaintiff. The plaintiff had been a regular visitor before the accident. She babysat for the children of her friends, and also did some cleaning work at the house.

Her evidence was that, on one occasion when she was leaving the house, she slipped on the driveway, which was constructed of pebble-crete and was wet. She fell, and fractured her wrist. Her case was that the defendants had failed to provide a safe, slip-resistant drive. They knew, or ought to have known of the danger, and they failed to warn the plaintiff of it. The Judge, however, dismissed the plaintiff's claim, and gave judgment for the defendants with costs.

The primary ground of the proposed appeal is that his Honour erred in giving undue weight to the mechanism of the appellant's fall on the drive, as it was described by Mr Smolakov, and that he failed to have sufficient regard to the evidence of Mr Stapleton and Mr Smolakov about the condition of the surface of the driveway when wet.

In his reasons for judgment, the trial Judge addressed the issues of credibility which led him to his conclusion. The plaintiff's evidence was that she had reported to the

defendants that the drive was slippery, and therefore dangerous, and had done so on more than one occasion. Both defendants denied this, and the Judge ultimately accepted the evidence of Mr Gusti that no such information had been given to him.

The Judge was concerned about the reliability of the plaintiff's evidence at the trial, because she had on another occasion given a different account of her fall to the expert witness Mr Smolakov, who gave evidence at the trial. I will refer to the detail of that a little later.

The Judge also thought it noteworthy that the tenant of the subject premises, Mrs Langham, had not been called as a witness although she was said to be a friend of the plaintiff and, one would expect, able to give evidence about the condition of the driveway about which the plaintiff was complaining. Her absence from the trial was not explained.

The learned Judge rejected the plaintiff's claim that she had previously complained about the slippery condition of the drive, and he accepted that Mr Gusti was not aware of the danger. In arriving at his conclusion on the matter of the slipperiness of the drive, the Judge was also assisted by the evidence of a Mr Sheather, who had lived in the house for some three years. He said he had never had experienced difficulty in walking down the drive.

The plaintiff's case was supported by two experts, one of whom was Wade Stapleton, who is a cadet engineer for the Gold Coast City Council. He performed slip-resistance testing for the driveway. The standard coefficient of friction for a driveway like this is a mean of .83, with no individual specimen on the drive being below .75. In saying that, I infer that that is what is regarded as the minimum limit for a safe driveway. In this instance, the coefficient of friction when wet was .59. Mr Stapleton was unable to say what was the applicable standard at the time the driveway was built.

The other relevant witness in this regard was a Mr Smolakov, a consulting engineer. He gave evidence that the driveway was unacceptable because it was not slip-resistant enough. He also gave evidence of the version of the accident that had been related to him by the plaintiff at the time he did his testing. She had said then that she had slipped while walking longitudinally down the driveway in wet conditions. At the trial, however, she said that she had crossed the driveway laterally, and had slipped in doing so.

Mr Smolakov agreed that that was not the version that had been given to him at the time of his investigation of the condition of the driveway, and in evidence, he said that the figures that he had worked out with respect to the coefficient of friction for the driveway had no relevance to a person crossing laterally over the driveway, instead of going down it.

What he said, in answer to a question by his Honour in the course of the trial was this: "The effect of the slope does not come into the calculation of the value for the coefficient of friction, in the case", in which a person was proceeding across the driveway in the manner in which the plaintiff described her progress.

In addition, he was cross-examined by Mr Williams QC, on behalf of the defendants, who asked him this question: "So what one could say is that in the incidents I described on the surface, the coefficient of friction was acceptable, that is, on the sunny side of the acceptable limit." Mr Smolakov's answer was yes.

To my mind that leaves really nothing of the plaintiff's case at all. It was urged before us by Mr Given on behalf of the plaintiff that the Judge should have considered whether the traversing of the driveway nevertheless resulted in the plaintiff's fall because of the slipperiness of the surface. But that was not the case presented at the trial, and there was no duty on his Honour to examine a case that was not put to him, and which was not supported by the only reliable expert evidence that would have established, or was intended to establish, the slipperiness of the surface. In my view, the Judge made no error in that regard.

The application is, of course, one to be permitted to appeal in this case, and not an appeal itself. It was submitted that the proposed appeal is "arguable". However, in the hands of

skilled and experienced counsel, almost any proposition or case can be made to appear arguable. I do not consider that arguability is the criterion ordinarily to be applied in exercising the discretion under s 118 of the Act to permit an appeal to proceed.

In any event, I do not consider that in the present case the applicant has succeeded in demonstrating arguability, even in the limited sense in which I have described it. The decision below was founded on findings with respect to the plaintiff's credibility, which are notoriously difficult to upset on appeal, and on findings of fact which were open on and accord with the evidence at the trial.

To give leave to appeal in a case like that would be to reduce to vanishing point the requirement imposed by s 118 of the Act and to enable appeals to be brought practically as of right. That was clearly not the intention of the legislator in enacting s 118. I would therefore dismiss the application for leave to appeal.

JERRARD JA: I agree with the Presiding Judge. I consider that the argument on the application for leave did not identify any fairly or reasonably arguable point on an appeal.

WHITE J: I agree.

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McPHERSON JA: Can you say anything against the costs?

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McPHERSON JA: The order will be that the applicant pay the respondent's costs of and incidental to this application.
