C.A. No. 130391

NOVA SCOTIA COURT OF APPEAL

Freeman, Pugsley, and Hart, JJ.A.
Cite as: Royal Insurance Company v. MacDonald, 1996 NSCA 196

BETWEEN:

Royal Insurance Company of Canada Appellant (Proposed Intervenor) - and - **Mary Darlene MacDonald** and **Jason Mark MacDonald, Lindsay L. MacDonald** and **Chelsey C. MacDonald, by their Guardian ad litem, Mary Darlene MacDonald**, and **Roderick Joseph MacEachern**, and **Mary Brenda Smith,** and **Shawn Graham Delorey** Respondents	S. Raymond Morse, Esq. for the Appellant Daniel MacIsaac, Esq. for the Respondent Appeal Heard: September 13, 1996 Judgment Delivered: September 16, 1996

THE COURT: Application for leave to appeal dismissed, with costs to the Respondents in the amount of $750.00 plus disbursements, per reasons for judgment of Pugsley, J.A.; Freeman and Hart, JJ.A. concurring.

Pugsley, J.A.:

Royal Insurance Company of Canada (Royal) applies for leave to appeal, and if granted, appeals from an Order of a Supreme Court judge in Chambers, dismissing Royal's application to be added as an Intervenor, pursuant to **Civil Procedure Rule 8**, in a consolidated proceeding of four actions instituted by various parties, arising out of a two-car collision that occurred on May 9th, 1993.

One of the actions was commenced by Mary MacDonald, and her three children, for damages suffered arising out of the death of her husband, and their father, Mark MacDonald, who was a passenger in one of the cars, owned and operated by Mary Smith.

Mary Smith, as well as another passenger in her vehicle (Shawn Delorey) also commenced separate actions. A fourth action was commenced by a passenger in the second vehicle.

The defendants in these four actions were Lonas Pelley, operator, and Rhoda Pelley, alleged owner of the second vehicle. Lonas Pelley was uninsured and a defence on his behalf was filed by Judgment Recovery (N.S.) Ltd. We are advised that Rhoda Pelley will likely be released from the action as it appears that the allegation respecting her ownership of the defendant vehicle is unfounded.

Royal is the S.E.F. 44 insurer of Mary Smith, and General Accident the S.E.F. insurer of the deceased, Mark MacDonald.

Broadly speaking, an S.E.F. 44 endorsement provides additional coverage to an insured person who successfully sues a defendant(s) in a motor vehicle accident where that insured person's damages exceed the total of all limits of motor vehicle liability insurance, or kind, available to the unsuccessful defendant(s).

In November 1995, General Accident was joined as an Intervenor to the consolidated action, pursuant to **Civil Procedure Rule 8**, by virtue of a consent order entered into by all parties, including counsel for its own insured Mary MacDonald.

The order provided in part that:

> Upon being made a party to this proceeding, the General Accident Assurance Company of Canada may contest the liability of the defendants to the plaintiffs, contest the amount of any claim made by the defendants and otherwise participate in this proceeding, including the pre-trial procedures and trial, to the same extent as the other parties in this proceeding.

On December 18, 1995, Judgment Recovery paid its statutory limits of $200,000.00 into court on behalf of Lonas Pelley

> "in satisfaction of all the causes of action for which the Plaintiffs' claim in these various actions".

Judgment Recovery, as well, gave notice that it would not be appearing at the trial to provide any defence for Lonas Pelley.

Counsel for Royal advises us that Royal has "carried a watching brief" in the matter since receiving notice from Smith early in 1995, that she would be seeking coverage from Royal pursuant to her S.E.F. 44 endorsement.

Counsel stresses that Royal:

- was invited to attend, and did attend, a pre-trial conference held on April 19, 1995;
- attended discovery examinations held on January 29, 1996, and shared *pro rata* in the costs of the discovery transcript;
- on March 29, 1996, advised the other parties that it wished to intervene in the consolidated action and circulated a draft consent order which was agreed to by the majority of parties, including Royal's insured Mary Smith. It was not, however, consented to by the MacDonalds;

- in April, 1996, Royal was consulted respecting trial dates and agreed with the proposed trial dates of September 23-27, 1996.

Royal failed in its attempts to convince the MacDonalds to agree to Royal's joinder, and accordingly, Royal set down the matter for Chambers for July 11, 1996. Counsel for the MacDonalds appeared to oppose the application. No other parties appeared.

The Chambers Judge in the course of dismissing Royal's application, quoted extensively from the decision of Glube, C.J. in **Leask Estate and Leask v. Crocetti and MacLeod** (1990), 95 N.S.R. (2d) 353 as well as the decision of this court affirming Chief Justice Glube's decision (1990), 97 N.S.R. (2d) 221.

Counsel for Royal points out that there are significant differences between the **Crocetti** case and the case at bar, in particular:

In **Crocetti:**

- the defendant operator was defended throughout by Judgment Recovery;
- the defendants' owner's insurer provided a defence to the plaintiff's claim;
- all parties to the action were opposed to the joinder of the insurer who had issued the S.E.F. endorsement.

In the present case, it is stressed that:

- Royal's insured, Mary Smith, has consented to the joinder of Royal;
- No party is <u>obligated</u> to provide a defence to any of the plaintiffs' claims in view of Judgment Recovery's decision not to appear at trial;
- General Accident has, with the consent of the MacDonalds, been joined as a party.

I note, however, that the consent order is broad enough to enable General Accident to contest the Smith claims as well as the MacDonalds' claims, both as to liability and quantum. Whether any limits should be placed on General Accident's participation at the consolidated trial, in the light of the comments of Zuber, J.A. in **Waterloo Insurance Company v. Zubrigg et al** (1983), I.L.R. 701 (Ont. C.A.) at 6589 as approved by Glube, C.J. in **Crocetti** at 356, will be for the trial judge to determine.

Civil Procedure Rule 8 provides in part:

> 801(1) Any person may, with leave of the court, intervene in a proceeding and become a party thereto where,
>
> > (a) he claims an interest in the subject matter of the proceeding...whether as an incident to the relief claimed, enforcement of the judgment therein, or otherwise;
> >
> > (b) his claim or defence and the proceeding have a question of law or fact in common;
>
> ...
>
> (3) On the application, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the parties to the proceeding and it may grant such order as it thinks just.

While there are obvious distinctions between **Crocetti** and the case at bar, the Chambers Judge rejected Royal's application for three reasons:

- The MacDonalds could possibly be prejudiced if Royal was joined as an intervenor as it would be in the interest of Royal to depreciate the value of the MacDonald claim in order to increase the *pro rata* share of the Smith claim respecting the $200,000.00 paid into court by Judgment Recovery;
- The policy provides a mechanism by which disputes between Smith and Royal may be settled;
- Royal's application was "made very close to the trial date, and I believe could have been advanced in a more timely manner."

I agree with the reasons advanced by the Chambers Judge and the conclusions he reached.

To grant Royal's request for joinder by issuing an order similar to that obtained by General Accident, not only purports to define Royal's ability to contest the claim of its own insured, but also permits Royal to make submissions to limit the claims advanced by the MacDonald family.

The MacDonalds, quite reasonably, object to having their claims challenged by anyone other than the defendants they sued.

Mary Smith's consent to Royal's application is not relevant to the issue of prejudice that would be suffered by the MacDonalds if Royal's application were granted.

While the Chambers Judge might have considered limiting Royal's participation in the consolidated action by restricting Royal from attacking the MacDonald claims, he did not do so, nor apparently was he asked to do so. The draft order presented to him contained the same terms as the order drafted by General Accident.

The granting of Royal's application could unduly prejudice the MacDonalds' rights. The Chambers Judge was required to consider this issue as directed by **Civil Procedure Rule** 8.01(3).

Royal, in my opinion, is not prejudiced by rejecting its application even though no party is obliged to present a defence at trial on behalf of Lonas Pelley. Royal will have a full opportunity to contest any claim advanced against it by its own insured, Mary Smith, pursuant to ss. 4, 5 and 6 of S.E.F. 44, and the arbitration provisions set out in s.s. 3(5) of the Standard Automobile Policy (owner's form). These provisions are, I understand, common to all policies containing the S.E.F. 44 endorsement, were presumably drafted by the insurers licensed in this province, including Royal, and approved by the Superintendent of Insurance, pursuant to s. 108 of the **Insurance Act**.

The Chambers Judge has determined that a pre-trial conducted in April, 1995, disclosed to Royal that Judgment Recovery was then considering paying its limits into court. Judgment Recovery's intention was crystallized when it made the payment into court on December 18, 1995. As of that date it was apparent that Judgment Recovery was not statutorily obliged to continue to present a defence on behalf of Lonas Pelley. Royal's application was not brought until July 11, 1996, almost three months after the September 23, 1996 trial date was selected. Whether Royal acted in a timely manner was an appropriate consideration, for the Chambers Judge.

The test for interference by this court with the exercise of the discretion of the Chambers Judge in an interlocutory matter has been expressed by MacKeigan, C.J.N.S. in **Exco Corp. v. Nova Scotia Savings and Loan Co. et al** (1983), 59 N.S.R. (2d) 331 at p. 333 as follows:

> "This court is an appeal court which will not interfere with a discretionary order, especially an interlocutory one such as this that is now before us, unless wrong principles of law have been applied or patent injustice would result."

I am not satisfied that Royal has established any ground requiring this court to interfere with the discretion exercised by the Chambers Judge.

I would dismiss the application for leave to appeal, with costs to the MacDonald's in the amount of $750.00 plus disbursements.

Pugsley, J.A.

Concurred in:

Freeman, J.A.

Hart, J.A.

C.A. No. 130391

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Appellant

- and -

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Respondents

REASONS FOR JUDGMENT BY:

Pugsley, J.A.