C.A. No. 109557

NOVA SCOTIA COURT OF APPEAL
Cite as: Greencorn v. Musolino, 1995 NSCA 31

Clarke, C.J.N.S., Hart and Jones, JJ.A.

BETWEEN:

WILLIAM F.C. GREENCORN	)	
Appellant	)	Bruce W. Evans for the Appellant
- and -	)	
ROBERT MUSOLINO, KHAN ENTERPRISES LIMITED and WAWANESA MUTUAL INSURANCE COMPANY	)	John Kulik for the Respondent
Respondents	)	Appeal Heard: January 23, 1995
	)	Judgment Delivered: January 31, 1995

THE COURT: Leave to appeal granted, the appeal allowed and the interlocutory judgment in the Supreme Court set aside and the order dated the 30th day of September, 1994 amended by striking out the first paragraph thereof. The issue should be remitted to the Supreme Court for trial of the issue of consent. The appellant is granted costs of $1000.00 plus disbursements against Judgment Recovery and Wawanesa per reasons for judgment of Jones, J.A.; Clarke, C.J.N.S. and Hart, J.A. concurring.

JONES, J.A.:

This is an application for leave to appeal from an interlocutory decision releasing the third party insurer as a party to the action.

The appellant was injured in an automobile accident on May 1, 1991. He was a passenger in a vehicle driven by Robert Musolino and owned by Khan Enterprises Limited. He sued both parties in the present action. As neither Musolino or Khan filed a defence, Judgment Recovery (N.S.) Limited filed a defence on their behalf.

On April 2, 1992, the respondent Wawanesa, the vehicle's insurer was made a third party by court order. The insurer was given the right to defend the action. The order provided Wawanesa would be bound by the judgment and that the question of the rights of the plaintiff against the insurer would be determined in such manner as directed by the trial judge. Wawanesa filed a defence to the action in which it denied that Musolino was operating the vehicle with the consent or as the agent of the defendant Khan. Discoveries were completed in May, 1992.

Mr. Justice Saunders in the Supreme Court ordered that the issues of consent and liability would be heard on October 26, 1994. After reviewing the discovery evidence Judgment Recovery reached a settlement with Wawanesa whereby Judgment Recovery would take over the conduct of the defence and respond to the appellant's claim if the defendants were found liable. By letter of September 6, 1994, counsel for Judgment Recovery advised Mr. Justice Saunders of this agreement and stated that there was no longer an issue of consent to be determined.

On September 13, 1994, the trial judge convened a conference call. Appellant's counsel objected to the agreement and maintained that the appellant had a right to have the issue of consent tried. Justice Saunders heard the submissions of the parties. By letter dated September 13, 1994, Justice Saunders advised the parties of his decision. The trial judge stated:

> "Dealing with the issue of consent it seems to me this is strictly a matter between Judgment Recovery and the insurer. In most cases consent is resolved between those two parties. If it isn't, the matter is litigated. I know of no authority (nor was I given any) for the proposition that the plaintiff could insist that both

> Judgment Recovery and the insurer were obliged to participate. That would render those provisions of the **Motor Vehicle Act** meaningless. It would also open the plaintiff to a claim for costs by the insurer if it was forced to remain a party notwithstanding Judgment Recovery's willingness to respond to the plaintiff's claim if the plaintiff were found to be entitled. Assuming (without deciding) that there are 'differences' to do with collateral benefits and costs, such cannot prevent the insurer from dropping out and Judgment Recovery from agreeing to take over the conduct of the defence."

On September 23 appellant's counsel wrote to the trial judge enclosing additional affidavit evidence and requested that he reconsider his decision. The trial judge confirmed his decision by letter dated September 27, 1994. An order dated September 30, 1994, states:

> "IT IS ORDERED that the settlement agreement between Judgment Recovery (N.S.) Ltd. and the Third Party is binding and that the Plaintiff is not entitled to insist that the issue of consent be tried."

The additional affidavit filed by the appellant's solicitor was not included in the case book on the appeal.

The appellant has applied for leave to appeal from the interlocutory decision. The main issue is whether the trial judge erred in holding that the agreement between Judgment Recovery and Wawanesa is binding and that the appellant is not entitled to insist that the issue of consent be tried. The appellant moved to have the affidavit forwarded to Justice Saunders included in the record on the appeal. Nothing really turns on that as the basic facts are not in dispute and the appellant's rights depend on the relevant provisions of the **Motor Vehicle Act** and the **Insurance Act**. In any event the material was before the trial judge and should be included in the record.

Sections 114, 118 and 133(1) of the **Insurance Act**, R.S.N.S. 1989, c. 231 provide as follows:

> "114(1) Every contract evidenced by an owner's policy insures the person named therein, and every other person who with his consent personally drives

> an automobile owned by the insured named in the contract and within the description or definition thereof in the contract, against liability imposed by law upon the insured named in the contract or that other person for loss or damage
>
> > (a) arising from the ownership, use or operation of any such automobile; and
> >
> > (b) resulting from bodily injury to or the death of any person, and damage to property.
>
> 118 Any person insured by but not named in a contract to which Section 114 or 115 applies may recover indemnity, in the same manner and to the same extent as if named therein as the insured, and for that purpose shall be deemed to be a party to the contract and to have given consideration therefor.
>
> 133(1) Any person who has a claim against an insured, for which indemnity is provided by a contract evidenced by a motor vehicle liability policy, notwithstanding that that person is not a party to the contract, may, upon recovering a judgment therefor in any province of Canada against the insured, have the insurance money payable under the contract applied in or towards satisfaction of his judgment and of any other judgments or claims against the insured covered by the contract and may, on behalf of himself and all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied."

The **Act** also provides that the insurer has the right to be made a third party to an action where it denies liability under the motor vehicle liability policy.

Section 213(1) of the **Motor Vehicle Act**, R.S.N.S. 1989, c. 293 provides that a judgment creditor who obtains a judgment for damages arising out of a motor vehicle accident may apply to Judgment Recovery (N.S.) Ltd. for payment of the judgment. Under s. 214 of the **Motor Vehicle Act** Judgment Recovery is not liable to pay any claim where the claimant is entitled to recover under a motor vehicle liability policy. Section 216 of the **Motor Vehicle Act** provides:

> "216(1) Where

(a) an application is made to Judgment Recovery (N.S.) Ltd. for payment of a claim for loss or damages occasioned by or arising out of the operation, ownership, maintenance or use of a motor vehicle, whether or not an originating notice has been issued or a judgment has been entered;

(b) it appears or is alleged that an insurer may be obligated under a policy of automobile insurance within the meaning of Part VI of the **Insurance Act** to respond to the claim; and

(c) the insurer denies that it is so obligated,

Judgment Recovery (N.S.) Ltd. shall within a reasonable period of time but not to exceed sixty days from the date of such application make an **ex parte** application to a judge of the Trial Division of the Supreme Court or a judge of a county court to set a date for a hearing to determine whether the insurer has such an obligation.

(2) Judgment Recovery (N.S.) Ltd. shall, at least fourteen days before the date set for the hearing, give notice of the hearing by serving a copy of the order in the manner provided in the order on

(a) the insurer appearing or alleged to be obligated to respond to the claim;

(b) the owner and the driver of the motor vehicle referred to in clause (a) of subsection (1); and

(c) the person making the claim.

(4) On the date fixed for the hearing the judge shall hear such evidence as may be adduced by Judgment Recovery (N.S.) Ltd., the insurer and the person or persons referred to in subsection (2) and shall determine whether or not the insurer is obligated to respond to the claim referred to in subsection (1), and the judge may adjourn the hearing and require additional evidence to be called or that the notice of the hearing be served on such additional persons as

> may be necessary to enable the court to determine the question of the insurer's obligation."

Under the above provisions of the **Insurance Act** the appellant is given a statutory right to recover his judgment against an insured from the insurer under a motor vehicle liability policy. He cannot be deprived of that right by the agreement of other parties to the action. The insurer as in this case has the right to deny liability under the policy and to defend the action. It can only deprive the claimant of his right by successfully defending the action.

Under s. 216 of the **Motor Vehicle Act** Judgment Recovery is required to make an application to determine whether an insurer has an obligation to respond to a claim. That Section provides for notice to the claimant and requires that a judge of the Supreme Court shall determine the issue. Notice to the claimant is obviously intended to protect the rights of the claimant both against the insurer and judgment recovery. Under s. 218(2) of the **Motor Vehicle Act** Judgment Recovery may file a defence in an action where the defendant fails to do so and may take any steps that the defendant might take in the action. Judgment Recovery submitted that this provision authorized the settlement with Wawanesa. With respect there is no provision in the **Motor Vehicle Act** which empowers Judgment Recovery or the insurer to compromise the appellants rights under the **Insurance Act**. The defendants could not do so and therefore s. 218(2) confers no wider power on Judgment Recovery. Section 216 simply enables Judgment Recovery to ensure that an insurer will respond to a claim where the insurer is liable.

I would grant leave to appeal, allow the appeal and set aside the interlocutory judgment in the Supreme Court and amend the order dated the 30th day of September, 1994 by striking out the first paragraph thereof. The matter should be remitted to the Supreme Court for trial of the issue of consent. I would grant the appellant total costs of $1000.00 plus disbursements against Judgment Recovery and Wawanesa.

J.A.

Concurred in:

Clarke, C.J.N.S.

Hart, J.A.

C.A. No. 109557

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

WILLIAM F.C. GREENCORN	)	
Appellant	)	
- and -	)	R E A S O N S
FOR		
	)	JUDGMENT
BY:		
ROBERT MUSOLINO, KHAN	)	
ENTERPRISES LIMITED and	)	
WAWANESA MUTUAL INSURANCE	)	
COMPANY	)	
	)	JONES,
	)	J.A.
Respondents	)	
	)	
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