IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Portage Mutual Insurance v. Forrest 2004 NSSC 236

Date: 20041123
Docket: SH 220369(A)
Registry: Halifax

Between:

Portage Mutual Insurance

Applicant

and

Roy Forrest

Respondent

Judge:	The Honourable Justice John M. Davison
Heard:	November 16, 2004 in Halifax, Nova Scotia
Decision:	November 23, 2004
Parties:	Jean McKenna, for the Applicant Roy Forrest, self-represented (did not appear)

Davison, J.:

[1] This is an appeal from a determination of an adjudicator of the Small Claims Court made on April 1st, 2004. The Notice of Appeal states the adjudicator made an error of law in finding an insurance policy was ambiguous and in finding the Appellant was not entitled to pursue a subrogated claim against the Respondent.

[2] The Appellant was represented by counsel. The Respondent did not appear. Nor did he appear at the hearing before the adjudicator of the Small Claims Court. An affidavit of the legal assistant to counsel for the Appellant was filed. A letter was sent to the Respondent dated August 24th, 2004 that attempts will be made to schedule the appeal for November 16th, 2004 and contained a request to the Respondent to confirm agreement to the date. An exhibit attached to the affidavit contained item information which reflected the letter was delivered to the Respondent on September 7th, 2004. I find the Respondent has received service of the date of the hearing.

[3] The Respondent leased a Chevrolet Cavalier from GMAC by a lease agreement dated October 10th, 2001. Under the agreement the Respondent was to

obtain a policy of insurance on the leased vehicle containing a number of risks including collision insurance on the vehicle naming GMAC as "registered owner, lessor and as 'Additional Insured' and loss payee". The policy was issued on October 10th, 2001 and the collision risk had a deductible of $250.00.

[4] A motor vehicle accident occurred on January 13th, 2002 and the Appellant paid to GMAC $16,334.00 under Section C the collision section of the policy. The Appellant reduced the claim in this proceeding to $10,000 to fall within the Small Claims Court jurisdiction.

[5] The Respondent was operating the motor vehicle at the time of the accident. It was found at the time of the accident the Respondent was "impaired" and that the Respondent was convicted of impaired driving at the time of the loss. The issue that was framed by the adjudicator was whether the Appellant has "a contractual right to claim monies back from the defendant that were paid to a third party (GMAC) under the policy?"

[6] The relevant terms of the automobile policy which relate to the loss of or damage to the insured automobile read:

> "The insurer agrees to indemnify the insured against direct and accidental loss of or damage to the automobile, including its equipment... (2) collision or upset - caused by collision with another object or by upset..."

There are exclusions to Section C including:

> The insurer shall not be liable,
>
> (1) Under any subsection of Section C for loss or damage
>
> (g) where the insured drives or operates the automobile
>
> (i) while under the influence of intoxicating liquor or drugs to such an extent as to be for the time being incapable of the proper control of the automobile; or
>
> (ii) while in a condition for which he is convicted of an offence under section 253(a) (impaired driving)...unless he establishes that impairment by alcohol or drugs was not the proximate cause of the accident...

[7] Mr. Forrest, as lessee of the automobile was required under the lease agreement with GMAC to obtain an endorsement to protect the interest of the lessor. There was issued a S.E.F. No. 5 which was a Permission to Rent or Lease Endorsement which reads:

> "Where an application for Standard Automobile Policy S.P.F. 1 (Owner's Form) has been completed by the Lessee as applicant, permission is given to the Lessor for the automobile to be rented or leased to the Lessee."
>
> "The Insurer agrees to indemnify, in the same manner and to the same extent as if named herein as the Insured, the Lessee, and every other person who with the Lessee's consent personally drives the automobile..."

Ms. McKenna, counsel for the Appellant, submits this clause describes the lessee as someone other than the insured. I agree with that submission.

[8] Certain agreements are set out in the standard form of S.E.F. No. 5 including:

> 3) with respect to paragraph 5 of the General Provisions, Definitions and Exclusions of this policy the word "Insured" shall mean the Lessee specified herein.
>
> 5) (b) where either the Lessee or the Lessor contravenes a term of the contract or commits a fraud or willfully makes a false statement in respect of a claim under the policy, a claim by such party is invalid and the right to recover indemnity is forfeited.

[9] Paragraph 5 relates to Sections A, B, and D of the policy. The only portion of paragraph 5 which relates to Section C is the description and meaning of the "described automobile" and "newly acquired automobile".

[10] Section C of the S.P.F. 1 creates a waiver of subrogation against individuals who have care, custody or control of the vehicle with the insured's consent. A

waiver does not apply in the event loss or damage occurs when the operator is convicted of impaired driving. Section 1(b) under the heading in Section C entitled, Additional Agreements of Insurer reads:

> (1) Where loss or damage arises from a peril for which a premium is specified under a subsection of this section, the Insurer further agrees:
>
> > (b) to waive subrogation against every person who, with the insured's consent, has care, custody, or control of the automobile provided always that this waiver shall not apply to any person...who has (i) committed a breach of any condition of this policy or (ii) driven or operated the automobile in the circumstances referred to in (i) or (ii) of paragraph (g) of the Exclusions to section C of this policy.

[11] The adjudicator refers to Section 1(b) and finds it "...allows the insurer to pursue third parties...where they have been in breach of...the impaired exclusion of Section C and that...this exception references all parties other than the named insured". I agree with counsel for the Appellant the section provides a waiver of subrogation not a right of subrogation which arises pursuant to Section 149 of the *Insurance Act*, R.S., c. 231, s. 1.

[12] In her oral submissions Ms. McKenna advanced several submissions in support of her position the appeal should be allowed including the argument a decision against the Appellant runs contrary to public policy in that the law

discourages impaired driving and it would be wrong to choose an interpretation that would impose the cost of impaired driving on the Appellant rather than the guilty party. To place an impaired driver in a better position because he was guilty of impaired driving on the job rather than on his own time would be against public policy.

[13] In *Comairco Equipment Ltd. et. al. v. Breault* [1989] 60 D.L.R. (4th) 119 an appeal was allowed, on facts similar to the facts in this proceeding, from a judgment which precluded an insurer from recovery on the basis the Standard Automobile policy estops the insurer from recovering indemnification from the defendant who was an unnamed insured under the policy.

[14] The three member Divisional Court allowed the appeal and found the trial judge erred in finding the defendant was an unnamed insured. The common law rule an insurer was estopped from claiming against an insured did not apply. The court stated at p. 122:

> We are of the view that the policy of automobile insurance, although one contract, is divisible into the various parts covering different aspects of liability, indemnification and benefits and that the statutory conditions provided in s. 207

> of the *Insurance Act*, R.S.O. 1980, c. 218, apply only to ss. A and B of the policy and have no application to s. C.

[15] The court points out Section A and B of the policy have definitions of named and unnamed insurers but there is no definition of insured in Section C. The court concludes with these words at p. 123:

> If the respondent's position was correct, the unnamed insured would derive more benefits under the contract of insurance than the insured himself. After the statutory condition relating to driving while impaired or intoxicated was deleted in 1973, the insurers proceeded by way of contractual exclusions to limit the recovery of an insured against the collision portion of the policy where that insured has operated the motor vehicle while intoxicated or impaired. Under the exclusion portions of this policy, para. G(i) or (ii), the insured would have no claim against his insurers for collision damage if he has been in breach of those contractual terms. The respondent's position is that the exclusion portions have no application to him and he is not bound by the contractual limitation as an unnamed insured.

> In our view, it is an unreasonable interpretation of s. C of the policy to say that the defendant is an unnamed insured, and even though he is in breach of the condition in s. C of the policy the insurer has no subrogated claim against him. There is no privity of contract between the insurer and the delinquent driver and, as such, the insurer has a subrogated right of action against him.

[16] I adopt the reasoning set out by Chadwick, J. of the Ontario High Court of Justice, Divisional Court in *Comairco Equipment Ltd. et. al. v. Breault* (supra) and allow the appeal. I find the wording of the policy is not ambiguous. I find the

Respondent was not an unnamed insured and the Appellant was entitled to pursue a subrogation claim against the Respondent. The Appellant shall recover ten thousand ($10,000.00) dollars from the Respondent together with a barristers fee not to exceed $50.00.

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Justice John Davison