

** Unedited **

Indexed as:

Carlino v. H.F. Pat Simmonds Insurance Broker

Between

John Carlino, Federico Carlino, and Marjorie Carlino,
plaintiffs, and
H.F. Pat Simmonds Insurance Broker and Kingsway Insurance
Company, defendants

[1995] O.J. No. 4210

No. 19292/90

Ontario Court of Justice (General Division)
Cavarzan J.

Heard: December 11-14, 1995.

Judgment: December 19, 1995.

(9 pp.)

Insurance — Brokers — Relations with clients — Duties of broker — Liability — Negligence, obtaining adequate coverage — Insurers — Negligence or breach of contract — Provision of coverage — Liability.

Action by the plaintiff against the defendants, the insurance broker and the insurer, for damages for personal injuries he sustained and for damage to his Mustang. The plaintiff was involved in a motor vehicle accident on April 26, 1989. He suffered a bruised knee and his symptoms lasted for two months. The issue was whether the plaintiff had arranged to place insurance on the Mustang prior to the date of the accident. The plaintiff used a weather heater during the winter months to save his new Mustang. He had the cars insured alternatively when he used them. He claimed that on April 5, 1989, he telephone his broker and requested that she arrange to transfer coverage to the Mustang which he intended to put on the road the next day. The broker assured the plaintiff that the appropriate coverage would be in place. The plaintiff's co-worker testified that he was present when he made the call. The broker denied that any such conversation took place. The insurer would have covered the loss if the April 5 telephone request had occurred and the broker had processed the substitution within 72 hours.

HELD: The action was allowed against the brokerage firm. The plaintiff was awarded \$17,314 including \$1,000 in general damages and \$1,843 for loss of earnings. The broker was mistaken. The plaintiff always maintained proper insurance coverage on his vehicles and it was improbable that he would have risked driving the Mustang without insurance. The broker was negligent in not taking the requisite action to ensure that the promised coverage was placed with the insurer. The brokerage firm was responsible in law for the broker's negligence and the ensuing damages.

Counsel:

Rocco A. Grilli and Robert Mahler, for the plaintiffs.
Helen Sava, for the defendant, H.F. Pat Simmonds Insurance Broker.
Thomas J. Hanrahan, for the defendant, Kingsway General Insurance Company.

CAVARZAN J.:—

THE ISSUE

¶ 1 On April 26, 1989, the plaintiff John Carlino (Carlino) was involved in a motor vehicle accident on the Queen Elizabeth Highway. He was forced off the road by a pick-up truck which fled the scene and has never been identified. Carlino's Mustang automobile was damaged extensively and he sustained personal injuries.

¶ 2 The central issue in this case is whether or not Carlino had arranged to place insurance coverage on the Mustang prior to the date of the motor vehicle accident. That issue arises in the following circumstances.

BACKGROUND

¶ 3 H.F. Pat Simmonds Insurance Broker (Simmonds) had been Carlino's automobile insurance broker since about 1985. In June of 1987, Carlino purchased a new Ford Mustang which he used for transportation from his home in Hamilton to his place of work at the Ford Motor Co. plant in Oakville. This vehicle was insured by Kingsway General Insurance (Kingsway) under a policy obtained by Carlino through Simmonds. During the winter months Carlino arranged through Simmonds to substitute for the Mustang on that policy, an older Oldsmobile Cutlass, which he used as a "weather beater", in order not to subject the Mustang to the harsh winter road conditions.

¶ 4 The original policy on the Mustang was for the period from June 26, 1987 to June 26, 1988. On October 15, 1987, Kingsway received from Simmonds an endorsement requesting that a 1976 Cutlass be substituted on the policy for the Mustang, effective October 14, 1987. Similarly, on May 4, 1988, an endorsement was received from Simmonds requesting substitution of the Mustang for the Cutlass effective May 3, 1988.

¶ 5 The policy on the Mustang was renewed for a period from June 1, 1988, to December 1, 1988. On December 2, 1988, Kingsway received payment from Carlino for a policy renewal from December 1, 1988 to June 1, 1989, together with a note requesting that that coverage apply to the Cutlass.

¶ 6 Kingsway was never advised thereafter to substitute the Mustang for the Cutlass.

¶ 7 The broker at Simmonds who was primarily responsible for Carlino's file was Debbie

Atkins. Carlino testified that he telephoned Atkins from his place of employment on April 5, 1989, and requested that she arrange to transfer coverage from the Cutlass to the Mustang. According to his testimony, he advised her that he intended to put the Mustang on the road the next day and she assured him that the appropriate coverage would be in place and that he would receive a proof of insurance slip in the mail together with a statement of the premium payable.

¶ 8 Ms. Atkins has no recollection of having received such a telephone call. Based upon what she alleged was her invariable practice of having the client's file before her during such conversations and of making notes, she denies that the conversation took place.

¶ 9 In determining which version is correct, I have had to assess the credibility of the witnesses and to examine carefully all of the surrounding circumstances. As I indicated to counsel at the conclusion of the case, it is my view that none of the witnesses attempted deliberately to mislead the Court in this case. I have concluded, however, that Ms. Atkins is mistaken in her reconstruction of events and that the telephone conversation occurred substantially as testified to by Carlino.

¶ 10 Carlino had always maintained appropriate insurance coverage on his motor vehicles. It is improbable that he would have risked driving the Mustang without having insurance in place. Carlino's co-worker and supervisor John Martyn, testified that he was present when Carlino phoned to arrange insurance coverage on the Mustang. Although he heard only one end of that conversation, he was present in the confined quarters of the "quiet room" within the power plant where they worked. He witnessed Carlino referring to papers during the conversation, witnessed his agitation when advised that the Mustang and not the Cutlass had been insured during the winter months, and observed his obvious satisfaction after the conversation when he believed that the coverage requested for the Mustang would be in place. Finally, I note that the agent's copy of the certificate of automobile insurance showing that the Cutlass was, in fact, the automobile insured during the winter months was probably not in the file when Atkins received the phone call from Carlino in early April. That copy is part of Exhibit 6 in this case. It was received by Simmonds on January 12, 1989, but not entered on computer by the office staff until April 4, 1989. It often took several days after that for the staff to file such documents in the office file. This tends to confirm Carlino's testimony that he was told by Atkins on that occasion that the only coverage shown on the file was for the Mustang. This led to Carlino becoming agitated, as witnessed by Martyn.

¶ 11 Allan Wingfield, the vice-president of Kingsway testified. Kingsway writes all of its insurance business through 3000 independent brokers throughout Canada. It has no contracts with brokers; rather, it accepts business from approved brokers on a non-contract basis. As Wingfield put it, "we accept business by approving the risk, not the broker".

¶ 12 Brokers can bind Kingsway on new policies if three conditions are met. Brokers must forward to Kingsway a duly completed application for insurance, together with full payment for the premium or proof that satisfactory arrangements are in place for financing the premium due. The application and the premium must be submitted to Kingsway within 72 hours. Kingsway sends out offers to renew policies directly to the insured. Wingfield confirmed that brokers can bind Kingsway when substitutions of automobiles are made on existing policies, even if additional premium may be payable as a result.

¶ 13 Kingsway never received any request to substitute the Mustang for the Cutlass after the offer to renew for the period December 1, 1988 to June 1, 1989. When a routine check revealed to Kingsway that Carlino had further undisclosed driving convictions, Kingsway decided to cancel his policy. It did so by registered letter of February 22, 1989, effective April 21, 1989.

¶ 14 There was an issue and conflicting testimony as to whether or not Carlino ever received this notice of cancellation. In the circumstances, I need not rule on that issue. It is clear on the evidence before me that neither Ms. Atkins nor Simmonds ever forwarded to Kingsway the request that Carlino made on April 5, 1989 that the Mustang be substituted for the Cutlass.

¶ 15 The accident of April 26, 1989 was not reported by Atkins to Kingsway until May 9, 1989. In the meantime, Kingsway by letter of May 5, 1989 had reinstated Carlino's policy. Wingfield testified that he did not know why the policy had been reinstated. This action had been taken by a former employee of Kingsway and Wingfield could not account for it. In reply to a question by Ms. Sava on cross-examination, Wingfield agreed that Kingsway would have covered the loss in this case if the April 5, 1989 telephone request had occurred as alleged and if Ms. Atkins had processed the substitution request within 72 hours in accordance with Kingsway's policy.

THE LAW

¶ 16 Ms. Sava relies on the authority of a recent decision by Haines J. in *Hunt et al. v. Brandie et al.* (1995) 25 O.R. (3d) 315 (O.C.J.G.D.) for the proposition that if the insurer would have accepted the risk had the application for coverage been processed properly by the broker, then liability for the loss rests with the insurer. In that case, the court held that the broker's mistake in processing the request for insurance coverage was not the cause of the insurer's loss.

¶ 17 In the *Hunt* case, the broker mistakenly issued a liability certificate to the insured by substituting a snowmobile for a dirt bike on a policy which had already been cancelled by the insured's mother. The critical factor which led the court to decide as it did in the *Hunt* case was that the insurer was the Facility carrier for the broker and had no discretion to refuse coverage upon receipt of a properly completed application for insurance.

¶ 18 In the case at bar, Kingsway is not an insurer in the Facility Association. Neither negligence nor breach of contract on the part of Kingsway has been demonstrated in this case.

¶ 19 Having found as a fact that Carlino made the telephone request to Ms. Atkins on April 5th and that she advised him that he would be covered on the Mustang from and after April 6th, it was negligent on her part not to take the requisite action to ensure that the promised coverage was placed with the insurer. Simmonds is responsible in law for that negligence and for the damages which flow from that act of negligence.

DAMAGES

¶ 20 I find as a fact that the driver of the unidentified pick-up was entirely at fault for the collision of

April 26, 1989, which resulted in the he loss of the Carlino vehicle. Mr. Grilli asked that I assess the value of the Mustang at \$13,861.50 which was the average value for that make of automobile at the date of the accident, without deduction for salvage value, on the basis that the car belongs to the insurer Kingsway. In view of my earlier finding that there was no insurance coverage in place for the Mustang, Kingsway has no claim on the wreck for salvage monies. The plaintiff is entitled to receive from Simmonds the sum of \$13,861.50 representing the value of the Mustang. Simmonds has the right to realize any salvage value out of the wreck which is still in the plaintiff's possession.

¶ 21 No issue is taken with the plaintiff's claim for towing and storage charges which total \$500, nor with an appraisal fee paid by the plaintiff in the amount of \$108.90.

¶ 22 The plaintiff's claim for loss of earnings is allowed at \$1,843.20.

¶ 23 The plaintiff suffered a bruised left knee in the accident. He was on crutches for two weeks, took analgesics for the pain, and wore an elasticized wrap on the knee even after his return to work. His symptoms lasted for two months. I assess his general damages for this injury at \$1,000.

¶ 24 Prejudgment interest is claimed from April 29, 1989 or, at the latest, from October 18, 1989, the date on which the plaintiff's solicitor demanded payment from Simmonds. It was submitted that the applicable rate of interest for this calculation is 14%. In my view calculation of interest at that rate would confer a windfall on the plaintiff. A fairer interest rate would be an average of the rates recorded since the first quarter of 1990. That average is 9.58% which I would round out at 9.5%. That rate should be calculated from October 18, 1989.

¶ 25 The claims by the remaining plaintiffs under the Family Law Act have been abandoned.

RESULT

¶ 26 There will be judgment for the plaintiff John Carlino against the defendant H.F. Pat Simmonds Insurance Broker for \$17,313.60 together with prejudgment interest from October 18, 1989 at the rate of 9.5% and costs.

¶ 27 The plaintiff's action against Kingsway is dismissed with costs, which costs are to be added to the plaintiff's costs against the defendant Simmonds. The cross-claims of Kingsway and Simmonds are dismissed without costs.

¶ 28 Counsel may write to me on the question of costs, if necessary.

CAVARZAN J.

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