

COURT OF APPEAL FOR ONTARIO

CITATION: Benson v. Walt, 2018 ONCA 172

DATE: 20180222

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Sharpe, LaForme and van Rensburg JJ.A.

BETWEEN

Bethany Benson and Robert Stenner

Plaintiffs

and

Paul Robert Walt, Mary La Chapelle-Stenner,
Azhar Warraich, Ideal Logistics Group and/or
Ideal Logistics Group Fleet 002, 2107622 Ontario Inc.
and/or 2107622 Ontario Inc. o/a Ideal Logistics Group and/or
2107622 Ontario Inc. o/a Ideal Logistics Group Fleet 002 and
6305393 Canada Inc. and/or 6305393 Canada Inc.
o/a Ideal Logistics Group Fleet 002

Defendants

(Appellant by policy of insurance issued by Economical Insurance)
(Respondent by policy of insurance issued by State Farm)

D. Zuber and D. Fiorita, for the appellant, Paul Robert Walt, by policy of insurance issued by Economical Insurance

J. Schrieder and L. Furukawa, for the respondent, Paul Robert Walt, by policy of insurance issued by State Farm

Heard: January 29, 2018

On appeal from the order of Justice J. Bryan Shaughnessy of the Superior Court of Justice, dated June 12, 2017, with reasons reported at 2017 ONSC 3612.

Sharpe J.A.:

[1] The issue on this appeal is the priority as between three insurance policies covering the driver of a motor vehicle involved in an accident.

[2] The driver, the defendant Paul Robert Walt, was driving the car involved in the accident with the consent of the owner, the defendant Mary La Chapelle-Stenner. The car was insured under a State Farm Automobile Insurance Policy issued to the owner (policy limit \$300,000). The owner was also insured under a State Farm Personal Liability Umbrella Policy ("PLUP") (policy limit \$1 million). Walt had his own Economical Insurance Automobile Insurance Policy, with a policy limit of \$1 million.

[3] On a Rule 21 motion to determine the priority in which these policies would respond to the plaintiff's claim, the motion judge ruled that they would respond as follows: first the owner's State Farm Auto Policy, then the driver's Economical Insurance Auto Policy, and then the State Farm PLUP.

[4] Economical appeals that order, arguing that:

- (1) pursuant to ss. 277(1) of the *Insurance Act*, R.S.O. 1990, c. I.8, the State Farm PLUP is an owner's "first loss insurance" that should respond before the Economical Insurance Auto Policy which is "excess" insurance and should respond only after the limits of the other two policies have been exhausted; and
- (2) in the alternative, the Economical policy and State Farm PLUP policy are both excess insurance and that, pursuant to ss. 277(2), those policies

are only required to respond for their rateable proportion of any liability exceeding the State Farm Auto Policy limits.

[5] For the following reasons, I would dismiss the appeal.

Analysis

(1) Is the State Farm PLUP an owner's first loss policy?

[6] The State Farm and Economical Auto Policies are standard form OAP 1 policies covering listed vehicles and other automobiles driven by the insured. The defendant Walt was covered as the driver of the owner's vehicle under the State Farm Auto Policy and as the driver of another vehicle under his own Economical Auto Policy. Both the State Farm and the Economical Auto policies are primary policies. Liability attaches under both policies immediately upon the occurrence of the insured event.

[7] The State Farm PLUP provides a very different form of coverage. It covers general personal liability for personal injury or property damage exceeding the coverage provided by the required underlying insurance or losses not covered by the underlying policies. The required underlying policies include automobile, recreational motor vehicle, comprehensive personal liability and watercraft liability policies. In the case of a loss arising from an automobile accident, liability under a PLUP attaches only after the coverage provided by the required underlying automobile policy has been exhausted.

[8] The difference between the nature of coverage provided by a primary policy and an umbrella policy was explained by Charron J.A. in *Trenton Cold Storage Ltd. v. St. Paul Fire and Marine Insurance Co.* (2001), [2001] O.J. No. 183, 199 D.L.R. (4th) 654 at paras. 21-22 (C.A.) and relied upon by MacFarland J.A. in *McKenzie v. Dominion of Canada General Insurance Company*, 2007 ONCA 480, 86 O.R. (3d) 419, leave to appeal refused, [2007] S.C.C.A. No. 471, at para. 39. A primary policy “clearly provides for an obligation to pay and a duty to defend upon the happening of a specified occurrence without any reference to, or requirement that there be, underlying insurance.” An umbrella policy, on the other hand, provides “coverage with respect to certain risks” but limits the insurer’s “liability to the loss in excess to that which may be collected by the insured under any underlying insurance” and “the limits of the underlying policies ... operate as a kind of deductible.” Umbrella policies also provide “drop-down” coverage where there is no underlying insurance.

[9] Subsection 277(1) of the *Insurance Act* provides:

Subject to section 255, insurance under a contract evidenced by a valid owner’s policy of the kind mentioned in the definition of “owner’s policy” in section 1 is, in respect of liability arising from or occurring in connection with the ownership, or directly or indirectly with the use or operation of an automobile owned by the insured named in the contract and within the description or definition thereof in the policy, a first loss insurance, and insurance attaching under any other valid motor vehicle liability policy is excess insurance only.

[10] It is not disputed that, pursuant to ss. 277(1), the first policy to respond is the State Farm Auto Policy insuring the owner of the vehicle involved in the accident.

[11] Economical submits that the State Farm PLUP is also an owner's first loss policy as defined by ss. 277(1).

[12] In my view, the motion judge correctly rejected this submission. While the State Farm PLUP would provide some coverage to the owner or operator of a motor vehicle in some circumstances, it is not, within the meaning of ss. 277(1), an "owner's policy of the kind mentioned in the definition of 'owner's policy' in section 1". That definition reads as follows:

"owner's policy" means a motor vehicle liability policy insuring a person in respect of the ownership, use or operation of an automobile owned by that person and within the description or definition thereof in the policy and, if the contract so provides, in respect of the use or operation of any other automobile [Emphasis added.]

[13] The State Farm PLUP does not, by its terms, provide primary insurance for liability arising from the use of an automobile. The State Farm PLUP, like the umbrella policy at issue in *Keelty v. Bernique* (2002), 57 O.R. (3d) 803, [2002] O.J. No. 83 (C.A.), does not fall within what the court described, at para. 25, as Ontario's "highly regulated" scheme of motor vehicle insurance. It only responds after the limits of the required underlying policy are exhausted, or if the underlying insurance does not provide coverage for the loss. Subsection 277(1) deals with the priorities as between primary motor vehicle insurance policies and its reach does not extend

to any and every other type of policy that might have to respond once the policy limits of applicable motor vehicle policies are exhausted.

[14] In support of its submission that the State Farm PLUP is primary automobile insurance, Economical relies heavily on the decision of this court in *Avis Rent A Car System, Inc. v. Certas Direct Insurance Co.* (2005), 75 O.R. (3d) 421, [2005] O.J. No. 1951 (C.A.), leave to appeal refused, [2005] S.C.C.A. No. 343. That case involved a commercial umbrella insurance policy issued to Avis to provide coverage in excess of two other automobile insurance policies. The court held that on the facts of that case, the umbrella policy was an “owner’s policy” within the meaning of ss. 277(1) and therefore responded as first loss insurance.

[15] In my view, the *Avis* decision is readily distinguishable from the case at bar. The umbrella policy at issue in *Avis* was issued in the United States by an American insurer. This court’s decision that it was an “owner’s policy” turned on the fact that the American insurer had filed an undertaking pursuant to s. 226.1 of the *Insurance Act* agreeing to provide the minimum statutory coverage required by Ontario’s automobile insurance scheme. The effect of the undertaking was to supercede the language of the policy and the coverage it provided and to replace it with the mandated terms of the standard Ontario automobile policy. That meant that when it came to determine how the policy responded in relation to other policies, the wording of the umbrella policy did not govern and the policy had to be

treated as if it were an owner's policy within the meaning of the Ontario automobile insurance scheme.

[16] Economical also relies on *ING Insurance Company of Canada v. Lombard General Insurance Company of Canada* (2009), 94 O.R. (3d) 669 (S.C.), aff'd 2009 ONCA 570, 98 O.R. (3d) 522, leave to appeal refused, [2009] S.C.C.A. No. 384. That case involved an umbrella policy that incorporated a Standard Excess Automobile Policy SPF No. 7 endorsement, which provided coverage for excess loss related to the specific automobiles covered in the required underlying automobile insurance policies. The motion judge found that the endorsement brought the umbrella policy within the definition of an owner's first loss policy under ss. 277(1). The case at bar is distinguishable as it does not involve a Standard Excess Automobile Policy SPF No. 7 endorsement that alters the nature of the coverage provided by an umbrella policy.

[17] Accordingly, I would dismiss the appeal from the motion judge's order that the Economical Auto Policy must respond before the State Farm PLUP Policy.

(2) Are the Economical Auto Policy and the State Farm PLUP both excess policies that, pursuant to ss. 277(2), are only required to respond for their rateable proportion of any liability exceeding the State Farm Auto Policy limits?

[18] In the alternative, Economical submits that by the language of ss. 277(1), the Economical Auto Policy and the State Farm PLUP are both "excess insurance".

Therefore, by virtue of ss. 277(2), Economical should respond only for its rateable proportion of any liability exceeding the State Farm Auto Policy.

[19] Subsection 277(2) provides as follows:

Subject to sections 255 and 268 and to subsection (1) of this section, if the insured named in a contract has or places any *other* valid insurance, whether against liability for the ownership, use or operation of or against loss of or damage to an automobile or otherwise, of the insured's interest in the subject-matter of the contract or any part thereof, the insurer is liable only for its rateable proportion of any liability, expense, loss or damage. [Emphasis added.]

[20] In my view, ss. 277(2) does not apply to the Economical Auto Policy. Subsection 277(2) addresses the situation where there are overlapping non-primary policies. It does not refer to “excess insurance” in the sense of that term in ss. 277(1) but rather applies to “any *other* valid insurance” the insured “named in a contract” has or places. Even though the Economical Auto Policy is “excess insurance” in relation to the State Farm Auto Policy by virtue of ss. 277(1), it remains primary first loss insurance and does not fall within ss. 277(2). In my view, “any *other* valid insurance” must refer to insurance *other* than that described in ss. 277(1). The language of ss. 277(2) – “any other valid insurance, whether against liability for ... or damage to an automobile or otherwise” – is distinguished from the language of ss. 277(1) which uses the term “any other valid motor vehicle liability policy” when determining the priority in which those primary policies are to respond.

[21] As the motion judge correctly held, liability of the insurers turns on the wording of the policies as well as on the provisions of the Act. The Economical Auto Policy remains, by its terms, primary insurance even though ss. 277(1) makes it "excess" in relation to the State Farm Auto Policy. The State Farm PLUP only provides coverage after any other valid and collectible first loss insurance has responded in the priority established by ss. 277(1). The two policies provide very different coverage and they are not required to respond rateably as if they provided the same type of coverage.

[22] Accordingly, I would not give effect to the argument that Economical is only required to respond rateably with the State Farm PLUP for any liability exceeding the limits of the State Farm Auto Policy.

Disposition

[23] For these reasons, I would dismiss the appeal with costs to the respondent State Farm in the amount agreed to by the parties, namely \$15,000 inclusive of disbursements and HST for both the appeal and the motion.

Alto J. Thayer J. Q. B.

I agree. K. van Renswalg J. Q. B.

I agree. K. van Renswalg J. Q. B.