

COURT OF APPEAL FOR ONTARIO

CITATION: Vogler v. Allstate Insurance Company of Canada, 2014 ONCA 825

DATE: 20141120

DOCKET: C58646

Cronk, Gillese and Rouleau JJ.A.

BETWEEN

Edward Randall Vogler

Plaintiff (Appellant)

and

~~Allstate Insurance Company of Canada~~
Tom Lemieux

Defendant

and

Allstate Insurance Company of Canada
Statutory Third Party added by order pursuant to s. 258(14)
of the *Insurance Act*, R.S.O. 1990 c. I.8, as amended

Statutory third party (respondent)

Alan L. Rachlin, for the appellant

R. Shawn Stringer, for the respondent

Heard and released orally: November 13, 2014

On appeal from the order of Justice Ian F. Leach of the Superior Court of Justice, dated July 8, 2013, sitting on appeal as a single judge of the Divisional Court from the order of Master Lou Ann M. Pope of the Superior Court of Justice, dated March 15, 2012.

ENDORSEMENT

[1] The proceeding below was an appeal to a single judge of the Divisional Court from a Master's decision denying the appellant's motion under rules 1.04, 5.04(2) and 26.01 of the *Rules of Civil Procedure* for an order adding the respondent insurer as a named party defendant in the main action.

[2] The appeal judge upheld the Master's ruling, albeit for different reasons. In so doing, the appeal judge, without prior notice to the parties, determined a key contractual interpretation issue under various factual scenarios that he posited. If accepted, the appeal judge's interpretation was conclusive of the coverage dispute between the parties.

[3] With respect, the appeal judge erred by proceeding in this fashion. The proper focus of the inquiry before him was whether the requested amendment should be allowed based on the governing principles for a pleadings amendment of this kind. Although it was open to him to determine whether the appellant's proposed coverage claim against the respondent was tenable at law, it was not open to him to finally adjudicate on a novel question of law under a paradigm not disclosed to the parties and where the underlying relevant facts had yet to be determined. See for example, *Royal Laser Corp. v. Rivas*, 2011 ONCA 655. As a result, the appeal judge's decision cannot stand.

[4] Similarly, the Master's ruling on the amendment motion cannot stand. The Master ruled that the appellant's proposed claim against the respondent is untenable at law. As we have said, the appeal judge agreed, although for different reasons. In the unusual circumstances of this case, the claim sought to be advanced appears to be novel. Neither party could point to any authorities directly on point during this appeal hearing. At this early stage of the proceedings, when material facts remain contested, in our view it cannot be said that the proposed claim is unsound or that it is clearly impossible that the claim could succeed at trial.

[5] The parties accept that if the decisions below are set aside, this court should determine the question of the requested pleadings amendment.

[6] There is no suggestion that the respondent insurer will suffer any prejudice as a result of the proposed amendment that cannot be compensated for in costs. Nor does the respondent any longer claim that the applicable limitation period has expired. In light of these considerations and the unusual nature of the claim raised in this case, the requested pleadings amendment should be allowed.

[7] Accordingly, the appeal is allowed, the appeal judge's and the Master's orders are set aside, and the appellant is granted leave to amend his statement of claim to restore the respondent insurer as a named party defendant. Of course, this relief is without prejudice to any defences that the respondent insurer

may wish to raise and any other motions available to it under the *Rules of Civil Procedure*. The appellant is entitled to his costs of the appeal and both proceedings below, fixed in the aggregate amount of \$22,000, inclusive of disbursements and all applicable taxes.

“E.A. Cronk J.A.”

“E.E. Gillese J.A.”

“Paul Rouleau J.A.”