COURT OF APPEAL FOR ONTARIO

CITATION: Mallory v. Werkmann Estate, 2015 ONCA 71
DATE: 20150202
DOCKET: M44420 & M44451 (C58453)

Strathy C.J.O. (In Chambers)

BETWEEN

Robert Mallory

Plaintiff (Respondent)

and

The Estate of Gabor Werkmann, deceased, Kriztian Nemes, Istivan Mihali

(Appellant/Responding Party)

and

Security National Insurance Company

Defendant (Respondent/Moving Party)

David L. Silverstone and Jeffery T. Booth, for the moving party, Security National Insurance Company

Nestor E. Kostyniuk and Daniel Fenwick, for the responding party, Istivan Mihali

Mark M. O'Donnell, for the proposed intervener, Royal & Sun Alliance Insurance Company

Heard: January 21, 2015

Motion for leave to intervene as an added party brought by Royal & Sun Alliance and motion for directions seeking to remove counsel for the appellant brought by Security National Insurance Company.

ENDORSEMENT

Overview

[1] On February 6, 2005, Robert Mallory's car was struck by an out-of-control motorcycle. Mallory was severely injured and both the motorcyclist and Mallory's passenger were killed. The appellant, Istivan Mihali was held partly liable on the basis of his participation in a joint venture with the motorcyclist who caused the collision. Mihali's appeal has not yet been perfected.

[2] There are two preliminary motions before me. First, the respondent, Security National Insurance Company, moves to remove counsel acting for the appellant on the ground of conflict of interest. Second, the appellant's insurer, Royal & Sun Alliance Insurance Company ("RSA"), moves to intervene as an added party to this appeal under rules 13.01(1) and 13.03(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[3] For the reasons that follow, the motion to remove counsel is granted and the motion to intervene is dismissed.

Background

[4] The events giving rise to this action were shocking and tragic.

The collision

[5] On February 6, 2005, Gabor Werkmann, Kriztian Nemes and the appellant went for a motorcycle ride in York Region, north of Toronto. Each on separate motorcycles, they drove at speeds in excess of 240 km per hour, three times the speed limit. These speeds were confirmed because one of the men had affixed a camera to his motorcycle, capturing both the speedometer and the road ahead.

[6] Werkmann lost control of his motorcycle and struck Mallory's car, killing himself and a front seat passenger in the car. Mallory sustained serious injuries.

[7] Mallory sued the estate of Werkmann, Nemes and the appellant, alleging they were all negligent. He also sued his own insurer, Security National, claiming coverage in the event any liable party was uninsured or underinsured.

The appellant's insurance and non-waiver agreement

[8] The appellant had a policy of insurance with RSA with limits of $1 million. The policy was subject to statutory conditions limiting liability coverage to $200,000 if the driver was engaged in a "race" or "speed test": *Insurance Act*, R.S.O. 1990, c. I.8, ss. 234, 251; O. Reg. 777/93, s. 4(2).

[9] As a result of the potential breach of condition, RSA entered into a non-waiver agreement with the appellant on October 28, 2007. The agreement granted RSA authority to defend and settle the action against the appellant, while

preserving RSA's right to continue investigating the claim and dispute coverage under the policy.

[10] RSA appointed Kostyniuk and Greenside as defence counsel on behalf of the appellant. It also appointed separate counsel to advise on the coverage issues.

The settlement of damages

[11] On May 31, 2013, a settlement was reached between Mallory, RSA (as the appellant's insurer) and Security National (as the potential uninsured carrier), agreeing to fix the amount of damages at $444,850. The appellant, and not RSA, signed the agreement due to his potential uninsured exposure in the event of breach of a condition.

[12] RSA (on behalf of the appellant) and Security National made an initial joint payment of $50,000 without prejudice to their rights to seek indemnity for this payment from each other or from the other defendants.

[13] The agreement also provided that the appellant and Security National would proceed to trial to determine whether the appellant was liable for the plaintiff's damages. If he was not, then Security National would be liable. If the appellant was liable for the plaintiff's damages, then RSA would be liable for at least $200,000 and potentially for the full amount of damages in the event there was no breach of the statutory conditions.

[14] I was advised that there has since been a further joint advance payment of $100,000 by RSA and Security National. However, as of this date, RSA has not decided whether to provide full coverage for the appellant. Its position is that the issue must be determined following this appeal.

[15] This means that almost 10 years after this tragic accident, the plaintiff has not received full compensation for his injuries. Nor has the appellant's liability insurer taken a position on coverage, in spite of its longstanding knowledge of the material facts and now with the benefit of the trial judge's factual findings.

The trial on liability

[16] The issue at trial was whether negligence on the part of the appellant and Nemes caused or contributed to the accident and, if so, to what extent.

[17] The trial judge found that although the appellant and Nemes were not directly involved in the collision, they were responsible for it because they were engaged in a joint venture with Werkmann. During the ride, they incited and encouraged each other to drive in excess of the speed limit and break the rules of the road. The trial judge found the appellant and Nemes each 25% at fault and jointly and severally liable for all the plaintiff's damages.

[18] The trial judge dismissed the plaintiff's claim against Security National, stating, "[s]ince Mr. Mihali was insured at the time of the collision, the claim against the defendant Security National Insurance Company is dismissed."

[19] It is this statement that gives rise to RSA's motion to intervene.

Post-judgment involvement of RSA

[20] The trial judge released her reasons for judgment on February 10, 2014. Eight days later, coverage counsel for RSA wrote directly to the trial judge, and to plaintiff's counsel, counsel for the appellant and counsel for Security National. In the letter, RSA expressed concern about the trial judge's comment about coverage and stated, "the availability, or lack of thereof, of insurance coverage for Mr. Mihali, we submit, was also not an issue before the Court." The letter added that the issue of whether the RSA insurance would respond "given the factual findings" had not yet been determined.

[21] The letter asked the trial judge to advise whether a motion to amend the order in relation to the contentious paragraph was to be brought under rule 59.06(1) and, if so, by whom.

[22] The following day, the judge's secretary wrote to counsel noting that it was inappropriate to correspond directly with a judge about a matter before the court and suggesting that counsel consult the rules and deal with any outstanding matters through the trial co-ordinator.

[23] RSA's counsel did not contact the trial co-ordinator. No further action was taken by RSA until this motion was brought.

Further pursuit of the coverage issue in this court

[24] On March 6, 2014, the appellant's counsel (who remained appointed and paid by RSA) filed a notice of appeal. Eight grounds of appeal were identified, six of which went to the appellant's liability. The two last grounds went to the issue of the appellant's insurance coverage. They were as follows:

> 7. The opening remarks by counsel for the Appellant dealt with the potential for insurance coverage issues to arise depending on the finding of the Court. The Honourable Justice M. Lack indicated that she would not be addressing this issue at Trial and it would be dealt with subsequent to rendering of verdict
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> 8. The Honourable Justice M. Lack erred by addressing the issue of coverage in her decision, indicating this at paragraph 33 of her decision.

[25] Ground 8 forms the basis for the motion to remove counsel for the appellant.

[26] Counsel for the appellant also pursued the coverage issue in its factum filed on October 23, 2014, which stated:

> Justice Lack in paragraph 33 of her decision stated "Mr. Mihali was insured at the time of the collision", although the issue of coverage was not before the court in these proceedings. The Notice of Appeal at paragraph 8 highlighted this issue. O'Donnell, Robertson & Sanfillipo Barristers & Solicitors, separate coverage legal counsel for Royal & SunAlliance, will be promptly filing a motion to the Court of Appeal for further direction on this matter although the issue of coverage was not properly before the Court in these proceedings and RSA was not even a party. This is not an issue dealt with in this factum and it

> is Mr. Mihali's position that his coverage was not an issue properly before the Court in these proceedings.

[27] As alluded to in the factum, a motion was subsequently brought by RSA to intervene in the appeal as an added party. In its factum on the motion, RSA states it "has an interest in the subject matter of the proceeding and may be adversely affected by a judgment in the proceeding if RSA is bound by Justice Lack's finding relative to insurance coverage."

Discussion

The motion to remove counsel

[28] The test on a motion to remove counsel is whether a fair minded and reasonably informed member of the public would conclude that the proper administration of justice compels the removal: *Matfoun v. Banitaba*, 2012 ONCA 786, at para. 4. In my view, removing counsel for the appellant is necessary to protect the integrity of the administration of justice and avoid the appearance of impropriety.

[29] Mr. Kostyniuk acknowledges that it was inappropriate to include para. 8 in the appellant's notice of appeal. I agree. He was appointed and paid by the insurer, but he owed a duty of loyalty and good faith to the appellant: *Ernst & Young Inc. v. Chartis Insurance Co. of Canada*, 2014 ONCA 78, 118 O.R. (3d) 740, at para. 70; *Parlee v. Pembridge Insurance Co*., 2005 NBCA 49, 253 D.L.R. (4th) 182, at para. 17.

[30] It was not in the appellant's interest to include the issue of his own insurance coverage as a ground of appeal. The inclusion of ground 8 gives rise to a clear conflict between the interests of the appellant on the one hand and the interests of his insurer on the other. The same is true of ground 7.

[31] The inclusion of these grounds gives rise to the inescapable conclusion that defence counsel was acting on the instruction of the insurer to advance a ground of appeal contrary to the interests of the insured.

[32] Although there is no evidence on this issue, I am prepared to accept Mr. Kostyniuk's representation that the appellant would like him to continue to act. That, however, is not determinative. Where there is an appearance of impropriety the removal of counsel may still be necessary to protect the repute of the administration of justice: *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235; 781332 *Ontario Inc. v. Mortgage Insurance Co. of Canada* (1991), 5 O.R. (3d) 248 (Gen. Div.), at p. 254.

[33] In the circumstances, it would bring the administration of justice into disrepute to permit Kostyniuk and Greenside to continue to act as counsel for the appellant. The motion to remove that firm is granted. The appellant shall be entitled to retain independent counsel of his own choice, with all reasonable legal fees and disbursements to be paid by RSA. To facilitate an expeditious change in representation, Mr. Kostyniuk is directed to assist the appellant in forthwith

obtaining independent counsel. If the appellant is unable to retain independent counsel, he may bring a motion before this court for directions.

The motion to intervene

[34] I dismiss the motion to intervene for two reasons.

[35] First, RSA has provided no authority for an intervention in these circumstances. RSA does not seek to intervene as a friend of the court under rule 13.02 and it proposes to make no contribution on the liability issues engaged in the appeal proper. Rather, RSA seeks to intervene as an added party under rule 13.01(1)(b), on the basis that it may be adversely affected by a judgment in the proceeding.

[36] RSA's real complaint is that it will be affected by the trial judge's finding that the appellant had insurance coverage. However, RSA has not established how it will be adversely affected by a finding of fact in a proceeding to which it was not a party. Although the judgment had still not been taken out when the parties appeared before me, I am not satisfied that RSA will be adversely affected by the judgment in the proceeding. Therefore, it has not met the test for intervention.

[37] Second, even if the finding could adversely affect RSA's interests, RSA is partly to blame for the situation it finds itself in.

[38] At the opening of trial, the trial judge attempted to clarify the scope of issues that would be addressed. At that time, there were no written minutes of settlement prepared and there was no written agreement about how the trial on liability would proceed. Nor was there any clear definition of the boundaries of the trial, having regard to the fact that there were coverage issues in the background and the appellant was being defended under a non-waiver agreement.

[39] I have read the transcript of the ensuing discussion that occurred with counsel. The trial judge specifically raised the issue of coverage. When defence counsel, who was appointed and paid by RSA, responded that RSA had not made a decision on coverage, the trial judge raised the prospect of a conflict of interest. Counsel then made statements suggesting if the trial judge made no finding of racing or a speed test, the appellant would have coverage and the claim against Security National could be dismissed.

[40] In her reasons for judgment, the trial judge made no finding of racing or a speed test and it is therefore understandable why she concluded the appellant had coverage from RSA.

[41] Long before trial, RSA was aware of the factual circumstances giving rise to the claim and it had the 45 minute video of the three motorcycles on their high-speed ride. It appointed and paid for defence counsel and decided to delay a determination of coverage until after trial. Although RSA may not be bound by

defence counsel's statements regarding its coverage position, an issue I need not address, it would have been well aware of the importance of ensuring its coverage position was properly communicated and the scope of the trial was clearly defined.

[42] It took no steps prior to the judgment being released to clarify these points and bears some responsibility for the resulting confusion. It could have added itself as a statutory third party pursuant to s. 258(14) of the *Insurance Act*, but chose not to.

[43] Moreover, after the trial, RSA failed to pursue the invitation to contact the trial co-ordinator to arrange an appointment before the trial judge. Counsel submits this was not done because RSA had no standing and would not have been permitted to make submissions on the point. This was not a foregone conclusion. The judgment had not been taken out at that time, the judge was not *functus*, and if there was any issue concerning the court's order or any alleged error in the reasons, it should have been brought directly to the attention of the trial judge.

[44] The letter from the judge's secretary did not evidence a refusal to deal with the issue. It simply said the issue should be dealt with through the proper procedure.

[45] RSA is not in a position to now complain on appeal about the confusion surrounding coverage.

Disposition

[46] For these reasons, the motion to intervene is dismissed and the motion to remove counsel for the appellant is granted. Costs, if not resolved, may be addressed by brief written submissions.