

COURT OF APPEAL FOR ONTARIO

CITATION: Legault v. TD General Insurance Company, 2023 ONCA 204

DATE: 20230321

DOCKET: M54110 (COA-22-CV-0478)

Lauwers J.A. (Motion Judge)

BETWEEN

Shelly Legault

Plaintiff/Defendant by Counterclaim
(Moving Party/Appellant)

and

TD General Insurance Company

Defendant/Plaintiff by Counterclaim
(Responding Party/Respondent)

Ashu Ismail, for the moving party

Arie Odinoeki and Mariya Zekel, for the responding party

Heard: March 16, 2023

ENDORSEMENT

[1] The context for the case and this appeal is set in the opening paragraphs of the reasons for judgment:

The plaintiff, Shelly Legault, owned a policy of home insurance issued by the defendant TD General Insurance Company (“TD Insurance”) with an effective date of October 23, 2013 (“the Policy”).

On March 13, 2014, Legault's home located at 200 Jephson Street, Victoria Harbour, was damaged by fire. The Policy was in effect at the time of the fire loss.

There is no dispute that the cause of the loss was a fire that ignited in the kitchen, causing extensive smoke damage and rendering the residence temporarily uninhabitable. TD Insurance does not allege fraud in relation to the fire.

[2] The appellant made a claim under the policy for the replacement value of her dwelling and personal property destroyed due to the fire, as well as funding to pay for temporary housing following the fire, known as additional living expenses ("ALE"). On May 19, 2015, the respondent denied the appellant's claim in its entirety, having concluded that the appellant made willfully false statements with respect to her claim for ALE.

[3] The appellant sued for general, aggravated and special damages. The trial judge ultimately dismissed the case based on the appellant's fraud in claiming her losses. The appellant appeals that decision to this court.

[4] The motion seeks certain relief relating to procedural requirements to constitute the appeal record. The context for the appellant's request for relief is set out in the notice of motion:

On December 22, 2022, the notice of appeal and certificate respecting evidence was served and filed.

On January 5, 2023, the respondent served its certificate respecting evidence requiring that all trial transcripts, all exhibits, and all volumes of the joint document brief be

part of the appeal record in addition to the trial record (over 1,500 pages).

The appeal surrounds the insurer's obligation under s. 135 of the *Insurance Act*, to furnish a proof of loss within 60 days of the loss, neglect of which is a provincial offence.

The question to be answered by this Court is whether damages flow from this fundamental breach and whether a later misrepresentation regarding a living expense forgives or vitiates the insurer's initial fundamental breach of the contract.

The trial transcript will cost approximately \$10,000.

The appellant believes that neither the transcripts nor all the documents / exhibits are required to answer the questions raised on appeal.

The appellant also wishes to amend its notice of appeal and certificate of evidence to include the mid-trial ruling reasons, issued on June 9, 2022.

In the original notice of appeal, the appellant stated her wish to appeal the interim trial ruling permitting the insurer to pay its former employees to prepare for and attend trial, but she did not state her specific grounds of appeal.

Last, on January 26, 2023, the appellant received the costs decision requiring substantial costs be paid, and she seeks to amend her notice to include an appeal thereof.

[5] The respondent insurer takes the position that the entire transcript and all the documents are necessary because the appellant seeks an entirely new trial, which is an extraordinary request in a civil case.

[6] The respondent rightly asserts that the high threshold for ordering a new trial in a civil action, as required by s. 134 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and affirmed by this court on many occasions, permits a new trial to be ordered only where an error amounts to a substantial wrong or miscarriage of justice, or where the interests of justice plainly require so. See *Girao v. Cunningham*, 2020 ONCA 260, at para. 7; *Brochu v. Pond* (2002), 62 O.R. (3d) 722 (C.A.), at para. 68; and *Vokes Estate v. Palmer*, 2012 ONCA 510, 294 O.A.C. 342, at para. 7.

[7] The respondent argues that if the panel hearing this appeal finds that the trial judge made the error that the appellant advances, the full trial record would still permit this court to reach a decision on the merits and avoid the need for a new trial.

[8] This argument is persuasive. The appellant's request to be relieved from the requirement to file all of the trial transcripts is dismissed. However, I point out that this result is not risk-free to the respondent. If the respondent requires more than is necessary for the appeal, regardless of the outcome, it is open to the panel to fix the respondent with cost consequences. I encourage counsel, who were also trial counsel, to be careful and reasonable in picking out the necessary evidence for transcription and reproduction.

[9] The appellant also seeks to amend the notice of appeal as follows:

14. The appellant further appeals the interim decision of the trial judge to permit the respondent insurer to pay for the preparation and testimony of non-expert witnesses the grounds of which are:

(a) there no rules that permit the payment of non-expert witness beyond a witness / summons fee;

(b) it undermines the administration of justice to permit a party, such as an insurer, to pay non-party fact witnesses in excess of that which is permitted by the Rules;

it creates an unlevel playing field and undermines the access to justice principle.

[10] The appellant did not provide a draft of the proposed amendment until after the motion was argued. I forgot to ask for it during submissions, but sent out my request immediately after argument. Although the respondent objected to the lack of notice, counsel for the respondent eventually made the following request:

The Respondent recognizes that the Notice of Appeal may be amended pursuant to r. 61.08 of the Rules of Civil Procedure. We ask that the Appellant comply with the rule by serving on us a Supplementary Notice of Appeal containing the newly revised paragraph 14. This ought to have been done prior to the hearing of the motion, but we are content to move forward with the appeal on the basis of this amendment.

[11] I agree. I grant the appellant leave to amend paragraph 14 of her notice of appeal as set out above, and require that she serve a supplementary notice of appeal on the respondent reflecting these amendments.

[12] Finally, the appellant also seeks leave to amend her notice of appeal to include a prayer for leave to appeal the costs award, which I grant.

“P. Lauwers J.A.”