COURT OF APPEAL FOR ONTARIO

CITATION: Pridmore v. Drenth, 2023 ONCA 606
DATE: 20230915
DOCKET: COA-23-CV-0267

Gillese, Benotto and Copeland JJ.A.

BETWEEN

Breanne Pridmore

Plaintiff (Respondent)

and

Tyler Drenth and The Estate of Theodore Drenth
by its Litigation Administrator, Sandra Drenth

Defendants

and

Novex Insurance Company (Statutory Third Party pursuant
to s. 258(14) of the *Insurance Act*, R.S.O. 1990, c.I-8)

Third Party (Appellant)

Joseph Lin and Kimberly Newton, for the appellant

Alan Rachlin and Sara Auld, for the respondent

Heard: September 6, 2023

On appeal from the judgment of Justice David L. Edwards of the Superior Court of Justice, dated February 1, 2023, with reasons reported at 2023 ONSC 817.

Gillese J.A.:

I. OVERVIEW

[1] This appeal stems from an incident that occurred on Bird Road, a highway in rural Dunnville, Ontario, on March 29, 2014. The respondent, Breanne Pridmore, was a passenger on a four-wheeled all-terrain vehicle (the "ATV") driven by Tyler Drenth. She was thrown from the ATV and suffered serious injuries resulting in complete paraplegia. Tyler had a G1 driver's licence and was operating the ATV with the permission of his father, Theodore Drenth.[1] Theodore has since passed away.

[2] Theodore was the ATV's registered owner. At the time of the incident, he had third party liability coverage of $1,000,000 with the appellant Novex Insurance Company ("Novex"). Theodore and his spouse Sandra Drenth, currently acting as litigation administrator, were named insureds on the policy. Tyler was also insured under that policy when he was operating the ATV with Theodore's permission.

[3] Novex denied Theodore coverage on the basis that he was in breach of Statutory Condition 4(1) ("SC 4(1)") of the insurance policy by permitting Tyler to operate the ATV on a highway when he did not have the requisite driver's licence. SC 4(1) provides as follows:

> The insured shall not drive or operate or permit any other person to drive or operate the automobile unless the

[1] I use the parties' first names for ease of reference.

> insured or other person is authorized by law to drive or operate it.

[4] Breanne brought a summary judgment motion, asking the court to order Novex to provide the full third-party policy limits available to Theodore (the "Motion"). The central issue on the Motion was whether Theodore was in breach of SC 4(1) in granting Tyler permission to use the ATV on the day in question.

[5] After determining that Theodore was entitled to coverage, the motion judge granted the Motion. He also concluded that if Theodore was in breach of the insurance policy, relief from forfeiture was warranted.

[6] Novex appeals. Its primary contention on appeal is that the motion judge erred in his findings relating to Theodore's permission for Tyler's use of the ATV on the date in question.

[7] I see no basis for appellate interference with the motion judge's factual findings. For the reasons that follow, I would dismiss the appeal.

II. BACKGROUND

[8] In 2013, Theodore bought two ATVs. He intended to give the smaller of the two ATVs to his son, Tyler, who was aged 25 at the time, and keep the other ATV for himself. He insured both ATVs with Novex under a standard Ontario automobile policy that includes third party liability coverage of $1,000,000 (the "Policy").

[9] When not in use, both of the ATVs were stored in a locked shed to which only Theodore had a key. Tyler had to obtain the keys and permission from Theodore to take out an ATV by himself.

[10] The Drenth home borders rural Dunnville and is about a half-block from the off-road fields and trails where they rode the ATVs. Their home backs onto Central Lane. They began and ended their ATV rides by driving on Central Lane, or alongside it, to gain access to the off-road trails and fields.

[11] The parties agree that Central Lane is a highway as defined by the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "*HTA*"). However, before the accident, neither Theodore nor Tyler understood that Central Lane was a highway. They thought it was an "alley" or "private laneway."

[12] Theodore knew that a G1 licensee was prohibited from driving alone on an Ontario highway and that a licensed driver had to be seated next to the G1 licensee.

[13] With Theodore's consent, Tyler routinely used an ATV to drive from their home, along Central Lane, to access the off-road fields and trails. The distance from the home to the fields was between 500 and 1,000 yards.

[14] On the day of the incident, a friend asked Tyler to bring his ATV to a field and use its winch to pull out his ATV which was stuck in the mud. Theodore's ATV

was the larger and more powerful of the two Drenth ATVs, so Tyler asked his father if he could take that one. His father consented.

[15] Tyler first drove the ATV to Breanne's apartment, which was about a block away from the Drenth home. Tyler then drove, with Breanne as his passenger, from Breanne's residence, along Central Lane, to the fields. After driving on various trails, Tyler reached his friend and pulled his friend's ATV from the mud. Next, they all went to the friend's home for lunch. During lunch, Tyler drank one or two beers.

[16] On the way home, because of the weather, Tyler drove the ATV along the shoulder of Bird Road, a highway, with Breanne as his passenger. Apparently due to whiteout conditions, the ATV hit a culvert and Breanne was thrown from the ATV. She suffered serious injuries including spinal fractures resulting in complete paraplegia.

[17] Tyler was convicted of two *HTA* offences for having driven the ATV on a highway after consuming alcohol. A G1 licensed driver is prohibited from driving a motor vehicle on a highway unless accompanied by a G licensed driver seated next to him. Moreover, a G1 licensed driver must have a blood alcohol concentration level of zero while driving on a highway.

[18] Because Tyler violated the conditions of his G1 licence on the date in question, he is not entitled to third-party coverage from Novex. The question on the Motion was whether Theodore was entitled to that coverage.

III. THE DECISION BELOW

[19] On the Motion, Novex submitted that, on the day in question, Theodore either: granted Tyler permission to drive on the shoulder of roads because he was under the mistaken impression that the shoulder of a road was not a highway for the purposes of the *HTA*; or, permitted Tyler to drive the ATV when he knew or ought to have known that Tyler would operate it in breach of SC 4(1) by driving on a highway. Accordingly, Novex argued, Theodore was in breach of SC 4(1) and should be denied coverage.

[20] The motion judge expressly recognized that the terms of Theodore's permission to Tyler's operation of the ATV, on the day in question, was an important fact to be determined on the Motion. He began by setting out matters on which the parties were agreed or which had been conceded. In addition to other of the facts set out above, the motion judge noted:

- because Central Lane is a highway within the meaning of the *HTA*, each time Tyler drove an ATV on Central Lane, he breached SC 4(1);
- Tyler breached SC 4(1) on the day in question because he was driving on the shoulder of Bird Road after having consumed a beer or two;

- whether Theodore breached SC 4(1) is a separate question from whether Tyler breached that provision; and
- the breach of SC 4(1) must occur at the time of the incident for coverage to be lost.

[21] The motion judge noted that in *Miller v. Carluccio*, 2008 ONCA 370, 91 O.R. (3d) 638, at para. 6, this court stated that the word "permits" connotes, in the context of SC 4(1), "knowledge, wilful blindness, or at least a failure to take reasonable steps to inform one's self of the relevant facts" (citations omitted). He then found that Theodore ought to have known that a person with a G1 driver's licence driving an ATV on Central Lane without an accompanying licensed driver was a breach of SC 4(1).

[22] The motion judge set out Novex's arguments for why he should find that, on the day of the incident, Theodore permitted Tyler to drive on highways. He rejected those arguments, saying that any ambiguity in the evidence had been clarified by Tyler. He accepted Tyler's evidence that his father did not allow him to drive on the shoulder of roads but, on occasion, he would cross over the road or shoulder to get from one trail to another. The motion judge found that, on the day in question, Theodore provided specific consent to Tyler to drive on only one highway – Central Lane – for the sole purpose of going from their residence to the open field and back home. He further found that Theodore did not otherwise permit Tyler to drive on highways, except for the purpose of crossing the road to access the next trail.

[23] The motion judge concluded that, on the day in question, Theodore's consent to Tyler's use of the ATV was clear and specific. He found that Theodore permitted Tyler: to drive the ATV from their residence onto Central Lane to get to the open field; from there, Tyler was to drive, via trails, to his friend's stuck ATV; and, once the ATV was retrieved, Tyler was to drive home the way that he came.

[24] The motion judge used the reasonable foreseeability test to assess whether a vehicle would be operated in breach of the statutory conditions of an insurance policy. He rejected Novex's submission that since Theodore granted Tyler permission to drive on Central Lane for the purpose of accessing the open fields and returning home, Theodore was precluded from asserting he did not give Tyler permission to drive on any other highway.

[25] The motion judge considered Theodore and Tyler's mistaken belief that Central Lane was not a highway. He found that although their mistake was relevant, since neither Theodore nor Tyler believed that Central Lane was a highway, Theodore had not granted Tyler permission to drive on a highway. He also found that Theodore did not know, and ought not to have known, that Tyler would drive his ATV on any highway other than Central Lane.

[26] The motion judge then considered whether Theodore's breach of SC 4(1) "tainted" the entire trip. He found it did not because the breach of a statutory

condition must be determined at the specific time of the incident and the incident occurred on a highway on which Tyler had not been given permission to drive.

[27] In reaching his conclusion, the motion judge relied on *Becamon v. Wawanesa Mutual Insurance Company,* 2007 CarswellOnt 9747 (S.C.), aff'd 2009 ONCA 113, 94 O.R. (3d) 297. In *Becamon*, Ms. Becamon had a G1 driver's licence so was required to be accompanied by a fully licensed driver seated beside her. She drove to the mall where the accident occurred without the requisite licensed driver seated by her. The insurance company asserted she was in breach of SC 4(1) but the court did not agree. It ruled that the mall parking area was not a highway and, consequently, Ms. Becamon was not in breach of SC 4(1) at the time of the accident. Therefore, the insurance company had a duty to defend and indemnify her.

[28] Based on the reasoning in *Becamon*, the motion judge was satisfied that if the incident had occurred on a trail in a field, Novex would be obliged to defend Tyler. In light of his findings on the limited and specific nature of Theodore's permission for Tyler's use of the ATV, coupled with his finding that Theodore did not know and ought not to have known that Tyler would drive on any highway other than Central Lane, although Theodore breached SC 4(1) that breach did not taint the entire trip. Accordingly, he found that Theodore was not in breach of SC 4(1) at the time of the incident.

[29] The motion judge then considered whether, if Theodore having allowed Tyler to drive on Central Lane did "taint the entire trip," relief from forfeiture was warranted. He relied on *Kozel v. The Personal Insurance Company*, 2014 ONCA 130, 119 O.R. (3d) 55, in which this court applied the three-part test in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.,* [1994] 2 S.C.R. 490. At para. 31 of *Kozel*, this court directed that, in exercising its discretion, the court must consider three factors: (1) the reasonableness of the breaching party's conduct; (2) the gravity of the breach; and (3) the disparity between the value of the property forfeited and the damage caused by the breach.

[30] Before considering the three-part test, the motion judge was required to resolve two threshold questions: *Kozel,* at para. 39. On the first threshold question, the motion judge concluded that Theodore's breach of SC 4(1) constituted imperfect compliance with a Policy term, rather than non-compliance. In so concluding, he found that Theodore's breach was "relatively minor" because:

- Theodore gave Tyler permission to drive the ATV on Central Lane but on no other highway;
- of the short distance Tyler was to take on Central Lane; and
- of the difference in nature between Central Lane and that of a highly travelled highway.

[31] Second, based on *Kozel*, he found that relief was available under s. 98 of the *Courts of Justice Act,* R.S.O. 1990, c. C.43, despite s. 129 of the *Insurance Act*, R.S.O. 1990, c. I.8.

[32] The motion judge then considered the three-part *Saskatchewan River Bungalows* test. On the first factor, he found that Theodore's conduct was reasonable because Theodore gave Tyler permission to drive the ATV on Central Lane solely for the purpose of going from his home to the fields and trails. On the second factor, the motion judge found the gravity of Theodore's breach was minor, given the nature of Central Lane. On the third factor, he accepted Novex's concession that Breanne had satisfied it.

IV. THE ISSUES

[33] Novex raises three issues on appeal. It submits that the motion judge:

1. made a palpable and overriding error in finding that Theodore did not give Tyler permission to drive on the shoulders of roads;
2. erred in finding that Theodore was entitled to coverage despite having breached SC 4(1) and section 1.4.5 of the standard Ontario automobile policy (the "OAP 1"); and
3. erred by, alternatively, granting Theodore relief from forfeiture.

[34] In terms of the second alleged error, Novex argued in its written materials that Theodore also breached section 7.2.2 of the OAP 1 on the date in question.

However, at the oral hearing of the appeal, Novex abandoned this argument because it did not raise it below.

V. THE STANDARD OF REVIEW

[35] The parties are agreed that, given the nature of the alleged errors, this court is to apply the palpable and overriding error standard of review.

Issues 1 and 2 NO ERROR IN FINDING THEODORE IS ENTITLED TO COVERAGE

[36] Novex's submissions on Issues 1 and 2 are so closely intertwined that they are best considered together.

[37] On Issue 1, Novex submits that the motion judge made a palpable and overriding error in finding that, on the day in question, Theodore gave Tyler permission only to drive on Central Lane and then on trails. It says that, in making this finding, the motion judge disregarded, misapprehended, and failed to appreciate relevant evidence. It points to evidence that includes Tyler's past use of Theodore's ATV on Central Lane to get to and from the trails, Tyler's use of his father's ATV to perform snow removal services, and various pieces of evidence that each of Theodore and Tyler gave in these proceedings. It says that, absent these failures on the part of the motion judge, he would have and should have found that Theodore gave Tyler blanket permission to drive on "the shoulders of

roads" under the mistaken belief that the shoulders did not constitute part of a highway.

[38] On Issue 2, Novex submits that Theodore is not entitled to coverage because he breached SC 4(1) by permitting Tyler, an under-licensed driver, to drive his ATV on the shoulders of highways on the date of the loss.

[39] I accept neither submission. Novex concedes that the motion judge applied the correct legal principles in determining whether Theodore was in breach of SC 4(1) at the time of the incident. In my view, the motion judge's findings are not "clearly wrong" nor are they "unsupported by the evidence": *Kerr v. Danier Leather Inc.* (2005), 77 O.R. (3d) 321 (C.A.) at para. 171, aff'd 2007 SCC 44, [2007] 3 S.C.R. 331, citing *H.L.* v*. Canada (Attorney General),* 2005 SCC 25, [2005] 1 S.C.R. 401. Consequently, there is no basis for appellate intervention with the motion judge's determination that Theodore is entitled to the third-party coverage.

[40] In terms of the legal principles, the motion judge correctly approached the critical issue of the terms of the permission that Theodore gave Tyler for use of the ATV on the day in question. He divided his analysis into two parts. First, he set out the law for interpreting "permit," in the context of SC 4(1), in accordance with this court's decision in *Miller.* Permission connotes "knowledge, wilful blindness, or at least a failure to take reasonable steps to inform one's self of the relevant facts": *Miller,* at para. 6*.* Based on that, the motion judge found that Theodore was in

breach of SC 4(1) when he permitted Tyler to drive the ATV on Central Lane, because Central Lane is a highway and Tyler's G1 licence barred him from driving on a highway without a licensed driver seated next to him.

[41] The motion judge then proceeded to the second part of his analysis. The fact that Theodore was in breach of SC 4(1) when he permitted Tyler to drive on Central Lane, to access the fields and to return home, does not automatically disentitle Theodore from coverage under the Policy. As the motion judge stated, to determine whether Theodore was entitled to coverage, the breach of SC 4(1) had to taint the trip, including at the time the incident took place. Based on *Becamon*, because Theodore did not know nor ought to have known that Tyler would drive the ATV on a highway other than Central Lane, the motion judge concluded that Theodore was not in breach of SC 4(1) at the time of the incident.

[42] It is within this framework that Novex's submissions on appeal must be considered. In my view, it is simply not correct that the motion judge's findings are flawed as Novex alleges. He made factual findings as required by the applicable legal principles. In so doing, the motion judge acknowledged and addressed Novex's arguments relating to the facts and gave compelling reasons for rejecting those arguments.

[43] The motion judge's reasons for concluding that Theodore was not in breach of SC 4(1) at the time of the incident include the following. The ATVs were under

lock and key in the shed. Only Theodore had the key. Whenever Tyler wanted to use an ATV, he had to have his father's permission. Theodore knew that Tyler could not drive unaccompanied on a highway because he had only a G1 licence. While Theodore had permitted Tyler to drive on Central Lane, that was based on his mistaken belief that Central Lane was not a highway.

[44] In these circumstances, Novex has not demonstrated that the motion judge's findings are clearly wrong or unsupported by the evidence. Thus, Novex has not established that the motion judge made a palpable and overriding error in finding that Theodore did not give Tyler permission, on the day of the incident, to drive on highways. In my view, the motion judge's reasons are far more than adequate to explain why he rejected Novex's arguments and, instead, found that, on the day in question, Theodore gave Tyler clear and specific permission to: drive the ATV to the fields by means of Central Lane; assist his friend in extricating his ATV that was stuck in the mud; and, then return home following the same path.

Issue 3 NO ERROR IN ALTERNATIVELY GRANTING RELIEF FROM FORFEITURE

[45] Novex's submission that the motion judge erred in granting relief from forfeiture is based on the same argument it made in relation to the first two issues, namely, that the motion judge erred in his factual findings. It reiterates its contention that Theodore's breach of SC 4(1) was serious, repeated, ongoing, non-

correctable, and unreasonably based on ignorance of his responsibilities under the law. It argues that if the motion judge had reasonably considered the nature of Theodore's breach, what caused it, and what (if anything) Theodore attempted to do about it, he would have balanced the *Saskatchewan River Bungalows* factors differently and found that Theodore was not entitled to relief from forfeiture.

[46] As I explain above, I see no basis for appellate interference with the motion judge's findings. Accordingly, this ground of appeal falls away. Simply put, there is no basis for interference with the motion judge's exercise of discretion in granting relief against forfeiture.

DISPOSITION

[47] For these reasons, I would dismiss the appeal with costs to the respondent in the agreed-on amount of $10,000, all inclusive.

Released: September 15, 2023 "E.E.G."

"E.E. Gillese J.A."
"I agree. M.L. Benotto J.A."
"I agree. J. Copeland J.A."