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CASE SUMMARY: COURT ALLOWED ADDING PLAINTIFF'S INSURER AS A PARTY WHERE TORTFEASOR'S INSURANCE LIMITS WERE LIKELY INSUFFICIENT

Insurance law – Automobile insurance – Underinsured motorist – Statutory provisions; Liability insurance – Motor vehicle accidents; Actions – Practice – Third parties – adding a party

MacPherson v. White

A plaintiff's insurer may be added as a party to a tort action where the tortfeasor's insurance limits will likely be insufficient, and the plaintiff intends to seek compensation under its insurer's underinsured liability coverage.

[2016] B.C.J. No 1332

2016 BCSC 1151

British Columbia Supreme Court

June 22, 2016

P.J. Pearlman J.

This action arose out of a head-on collision between the vehicles driven by the plaintiff MacPherson (the "Plaintiff") and the defendant, White (the "Defendant"). The Plaintiff sustained serious injuries in the accident, and the Defendant's liability coverage limits were unlikely to satisfy the Plaintiff's claim. Accordingly, the Plaintiff notified his vehicle's insurer, Northbridge Insurance ("Northbridge"), that he intended to claim under its policy. In particular, the Plaintiff sought coverage under the underinsured provisions of Northbridge's SEF 44 Family Protection Endorsement (the "SEF Policy").

After receiving this notice, Northbridge applied to be added as a defendant in the Plaintiff's tort action. It sought full rights of participation with respect to both liability and damages. The Plaintiff opposed this application on the basis that Northbridge did not have a statutory or contractual right to be a party to the action.

The application was brought pursuant to Rules 6-2(7)(b) and (c) of the BC Supreme Court Civil Rules (the "Rules"). Those Rules state:

At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),

(a) …

(b) order that a person be added or substituted as a party if

(i) that person ought to have been joined as a party, or

(ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and

(c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with

(i) any relief claimed in the proceeding, or

(ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

Justice Pearlman found that Rule 6-2(7)(b) was for remedying defects, and that it was to have a narrow application. In order to be successful, an applicant must satisfy one of two conditions: either the proposed party ought to have been joined as a party, or the proposed party's participation in the proceeding is necessary to ensure that all matters be effectually adjudicated. Justice Pearlman found that Northbridge was not a party that ought to have been added to the Plaintiff's tort claim. Similarly, Northbridge's participation was not necessary to ensure the tort-related matters were effectively adjudicated. Justice Pearlman concluded that Northbridge could not succeed under Rule 6-2(7)(b).

Northbridge's application under Rule 6-2(7)(c) was more contentious. Northbridge argued that if it was not provided the opportunity to participate in this action, particularly with respect to disputing liability and quantum, then it would be entitled to re-litigate those issues before making any payment to the Plaintiff. This created the potential for inconsistent decisions, a multiplicity of proceedings, and unnecessary delays.

In response, the Plaintiff relied on *Pope and Talbot Ltd. (Re)*, 2011 BCSC 548 ("Pope"). There, Justice Walker concluded that, as a matter of general principle, a liability insurer should not be permitted to participate in the defence of the underlying action, either as a party or through its coverage counsel. Justice Walker emphasized the divergent interests of insurers and their insureds, and raised the concern that an insurer could "sculpt" a given tort case to vitiate coverage.

The Plaintiff further argued that Northbridge did not have a statutory or contractual basis to overcome the general rule set out in *Pope*. With respect to the former, the Court noted that the *Insurance (Vehicle) Act*, R.S.B.C. 1996 c. 231, did not provide Northbridge with any rights of participation in the circumstances. With respect to the latter, the Court noted that the SEF Policy did not confer a contractual right to Northbridge to be added as a party.

In response, Northbridge relied on *Tichet v. Jones*, 2002 BCSC 1888 ("Tichet"). In *Tichet*, the Court considered a SEF policy identical to Northbridge's SEF Policy. While the Court found that the policy did not give the insurer the right to participate in the action, it nonetheless concluded that the plaintiff's insurer could be added as a defendant. In doing so, the Court found that the SEF Policy effectively preserved the insurer's right to re-litigate an action where it was not a participant. In particular, clause 5(f) allowed the insurer to argue that it was not bound by a court's finding on quantum or liability unless the insurer was provided with a reasonable opportunity to participate in the proceeding.

Mr. Justice Pearlman appeared to find the *Tichet* decision compelling. Although the facts were not identical, the relevant contractual provision conferred a similar right to Northbridge to re-litigate quantum and liability. As such, Mr. Justice Pearlman decided that Northbridge had satisfied the requirements under Rule 6-2(7)(c). He found that there was a real issue between the parties, and that it was just and convenient to have the relevant issues decided at the same time. He noted that, like *Tichet*, there was no dispute as to coverage and the issues related solely to quantum and liability.

Mr. Justice Pearlman ordered that Northbridge be added as a party, on the conditions that they 1) filed and served their response in 21 days, 2) conducted any independent medical examinations by the end of the year, and 3) did not conduct a separate examination for discovery. These orders were to ensure that there was no significant delay arising from the addition of Northbridge.

This case was digested by Raylene M. Smith and edited by David W. Pilley of Harper Grey LLP. If you would like to discuss this case further, please feel free to contact them directly at rsmith@harpergrey.com or dpilley@harpergrey.com or review their biographies at http://www.harpergrey.com.