

CITATION: Djuric v. Belair Insurance Company, 2024 ONSC 2618
COURT FILE NO.: CV-19-00627257
MOTION HEARD: 20240208

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Gordon Djuric, Plaintiff

AND:

Belair Insurance Company Inc. and Scottish & York Insurance Co. Limited,
Defendants

BEFORE: Associate Justice B. McAfee

COUNSEL: C. A. Stewart, Counsel, for the Moving Party, the Defendant Scottish & York
Insurance Co. Limited

J. Rosenstein, Counsel and Agent for Counsel for the Responding Party, the
Plaintiff

HEARD: February 8, 2024

REASONS FOR DECISION

- [1] The defendant Scottish & York Insurance Co. Limited (Scottish & York) brings this motion pursuant to Rule 26.01 of the *Rules of Civil Procedure* for an order granting leave to amend the statement of defence of Scottish & York. If necessary, Scottish & York also seeks an order pursuant to Rule 51.05 of the *Rules of Civil Procedure* for leave to withdraw an admission in the statement of defence.
- [2] The plaintiff Gordon Djuric (the plaintiff) opposes all proposed amendments.
- [3] On November 3, 2017, the plaintiff, an Ontario resident, was involved in a motor vehicle accident while operating a tractor trailer in Pennsylvania, in the United States of America. It is alleged that the accident was caused due to the negligence of Stephen DeAngelis (DeAngelis), the operator of the other vehicle involved in the collision. DeAngelis was insured by State Farm, and had policy limits of USD \$15,000.00, being the statutory minimum in Pennsylvania.
- [4] On September 12, 2019, the plaintiff commenced the within action in Ontario against Scottish & York and Belair Insurance Company Inc. (Belair) seeking \$5,000,000.00. In the statement of claim at paragraphs 3 and 4 the plaintiff pleads that Belair and Scottish & York insured the plaintiff and that pursuant to policies of insurance are responsible for the plaintiff's damages caused by the negligence of unidentified, underinsured and/or uninsured motorists. At paragraph 4 the plaintiff pleads that the plaintiff was insured under

a policy of motor vehicle liability insurance with Scottish & York bearing policy number LX0195 and that, pursuant to the policy, is responsible for the plaintiff's damages caused by the negligence of unidentified, underinsured and/or uninsured motorists. At paragraph 7 the plaintiff pleads that DeAngelis was underinsured. At paragraph 8 the plaintiff pleads that Scottish & York and Belair are therefore responsible for the plaintiff's injuries and damages pursuant to the coverage of the policies and endorsements thereto.

- [5] Before commencing this action, on June 14, 2019, plaintiff's counsel wrote to Aviva Insurance Company of Canada (Aviva), the parent company of Scottish & York, and asked for "...OPCF-44 limits and any umbrella policies." Aviva did not respond.
- [6] According to the affidavit evidence of plaintiff's counsel of record, "[t]he OPCF-44R is an optional endorsement to the standard policy of automobile insurance which provides coverage for damages sustained in excess of the tortfeasor's liability limits and is commonly known as underinsured motorist coverage."
- [7] On or about October 5, 2020, Scottish & York delivered its statement of defence.
- [8] On March 19, 2021, the action and all crossclaims were dismissed against Belair by order of the registrar.
- [9] This action has not progressed beyond the pleadings stage.
- [10] On December 20, 2021, the plaintiff settled his accident benefits claim with Aviva.
- [11] On February 24, 2022, the office of plaintiff's counsel sent an email to Aviva requesting the policy limits. Aviva responded on February 24, 2022, providing the policy limits. The office of plaintiff's counsel then replied asking for confirmation of whether there was OPCF 44R coverage at the time of the collision and if so, the limits and any umbrella policies.
- [12] On February 24, 2022, Scottish & York's counsel responded by email advising that the policy under which the plaintiff brings this claim does not have OPCF 44R coverage. On February 25, 2022, Scottish & York's counsel wrote to plaintiff's counsel providing a copy of the declarations page and confirming that the policy does not have an OPCF 44 Endorsement. Scottish & York's counsel asked for Scottish & York to be released from the action, otherwise steps would be taken to amend the statement of defence to specifically plead that the policy does not have an OPCF 44 Endorsement.
- [13] Scottish & York's position on this motion is that the proposed amendments do not constitute the withdrawal of an admission and that no non-compensable prejudice will result to the plaintiff if the proposed amendments are granted. Even if the proposed amendments constitute a withdrawal of an admission that there was coverage pursuant to an OPCF 44 Endorsement, Scottish & York submits that the test for withdrawal of an admission has been satisfied.

[14] The plaintiff's position on this motion is that Scottish & York is seeking to withdraw an admission the effect of the which would deny the plaintiff underinsured motorist coverage. The plaintiff submits that the test for the withdrawal of an admission has not been satisfied. Even if it is found that the proposed amendments do not constitute a withdrawal of an admission, the plaintiff submits that there is non-compensable prejudice if the proposed amendments are granted.

[15] Rule 1.04(1) of the *Rules of Civil Procedure* provides as follows:

1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

[16] Rule 26.01 of the *Rules of Civil Procedure* provides as follows:

26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[17] In *1588444 Ontario Ltd. v. State Farm Fire and Casualty Company*, 2017 ONCA 42 Justice Hourigan summarizes the law and general principles for motions for leave to amend as follows at para. 25:

- The rule *requires* the court to grant leave to amend unless the responding party would suffer non-compensable prejudice; the amended pleadings are scandalous, frivolous, vexatious or an abuse of the court's process; or the pleading discloses no reasonable cause of action; *Iroquois Falls Power Corp. v. Jacob Canada Inc.*, [2009] O.J. No. 2642, 2009 ONCA 517, 75 C.C.L.I (4th) 1, at paras. 15-16, leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 367, 2010 CarswellOnt 425; and *Andersen Consulting Ltd. v. Canada (Attorney General)*, 2001 CanLII 8587 (ON CA), [2001] O.J. No. 3576, 150 O.A.C. 177 (C.A.), at para. 37.
- The amendment may be permitted at any stage of the action: *Whiten v. Pilot Insurance Co.* (1996), 1996 CanLII 8109 (ON SC), 27 O.R. (3d) 479, [1996] O.J. No. 227 (Gen.Div.) vard (1999), 1999 CanLII 3051 (ON CA), 42 O.R. (3d) 641, [1999] O.J. No. 237 (C.A.), revd [2002] 1 S.C.R. 595, [2002] S.C.J No. 19, 2002 SCC 18.
- There must be a causal connection between the non-compensable prejudice and the amendment. In other words, the prejudice must flow from the amendments and not from some other source: *Iroquois*, at paras. 20-21; and *Mazzuca v. Silvercreek Pharmacy Ltd.* (2001), 2001 CanLII 8620 (ON CA), 56 O.R. (3d) 768, [2001] O.J. No. 4567 (C.A.), at para. 65.
- The non-compensable prejudice may be actual prejudice, *i.e.*, evidence that the responding party has lost an opportunity in the litigation that cannot be compensated as a consequence of the amendment. Where such prejudice is alleged, specific details must be provided: *King's Gate Developments Inc. v. Drake* (1994),

1994 CanLII 416 (ON CA), 17 O.R. (3d) 841, [1994] O.J. No. 633 (C.A.), at paras. 5-7; and *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1995), 1995 CanLII 7105 (ON SC), 25 O.R. (3d) 106, [1995] O.J. No. 2220 (Gen. Div.), at para. 9.

- Non-compensable prejudice does not include prejudice resulting from the potential success of the plea or the fact that the amended plea may increase the length or complexity of the trial: *Hanlan v. Sernesky*, 1996 CanLII 1762 (ON CA), [1996] O.J. No. 4049, 95 O.A.C. 297 (C.A.), at para. 2; and *Anderson Consulting*, at paras. 36-37.
- At some point, the delay in seeking an amendment will be so lengthy, and the justification so inadequate, that prejudice to the responding party will be presumed: *Family Delicatessen Ltd. v. London (City)*, [2006] O.J. No. 669, 2006 CanLII 5135 (C.A.), at para. 6.
- The onus to prove actual prejudice lies with the responding party: *Haikola v. Arasenau* (1996), 1996 CanLII 36 (ON CA), 27 O.R. (3d) 576, [1996] O.J. No. 231 (C.A.), at paras. 3-4; and *Plante v. Industrial Alliance Life Assurance Co.* (2003), 2003 CanLII 64295 (ON SC), 66 O.R. (3d) 74, [2003] O.J. 3034 (Master), at para. 21.
- The onus to rebut presumed prejudice lies with the moving party: *Family Delicatessen*, at para. 6.

[18] With respect to withdrawing an admission, Rule 23.06(1)(b) and Rule 51.05 of the *Rules of Civil Procedure* are applicable:

23.06(1) A defendant may withdraw all or part of the statement of defence with respect to any plaintiff at any time by delivering to all parties a notice of withdrawal of defence (Form 23C), but,

(a) where the defendant has crossclaimed or made a third party claim, leave to withdraw must be obtained from the court; and

(b) where the defendant seeks to withdraw an admission in the statement of defence, rule 51.05 (withdrawal of admission) applies.

...

51.05 An admission made in response to a request to admit, a deemed admission under rule 51.03 or an admission in a pleading may be withdrawn on consent or with leave of the court.

[19] The proposed amendments are found at paragraphs 3A, 3B, 6A, 7, 10, 11 and 25 of the proposed amended statement of defence. The plaintiff concedes that the proposed amendments at paragraphs 3A and 3B do not amount to the withdrawal of an admission.

- [20] In my view, the proposed amendments do not amount to the withdrawal of an admission within the meaning of Rule 51.
- [21] In *Hughes v. Toronto-Dominion Bank*, [2002] O.J. No. 2145 (Ont. S.C.J.) Master MacLeod, as he then was, states at para. 10 that an admission is "...an unambiguous deliberate concession to the opposing party." An admission occurs when a party admits that a set of facts posed by the opposing party is correct (*Belsat Video Marketing Inc. v. Zellers Inc.*, 2003 CanLII 44163 (Ont. S.C.J.) at para. 16).
- [22] In *Zellers Inc. v. Group Resources Inc.*, [1995] O.J. No. 5 (Ont. Gen.Div.) Justice Wilkins states at para. 45:
- Customarily, admissions in a pleading are made boldly and baldly and they are, in general, specific and identifiable as admissions.
- [23] Paragraph 1 of the statement of defence denies "each and every fact and allegation" in the claim "unless expressly stated herein" and "specifically denies that the plaintiff is entitled to the relief sought in paragraph 1 of the statement of claim." At paragraph 4 Scottish & York admits that it issued a standard policy of insurance LX0195 and at paragraph 5 admits that the plaintiff was an additional named insured on the policy. At paragraph 6 Scottish & York denies that Scottish & York bears any liability or responsibility for the damages alleged and puts the plaintiff to the strict proof thereof. At paragraph 7 Scottish and York pleads that "...any right of recovery as against it is limited and defined by the Policy provisions and "...pleads and relies on the terms of the Policy, which speak for themselves."
- [24] Paragraphs 10 and 25 of the statement of defence reference an OPCF 44 Endorsement. At paragraph 10 Scottish & York pleads that "...the Plaintiff's right to recover damages against Scottish & York are limited by the Policy, the OPCF 44R Family Protection Coverage Endorsement on the Policy, as well as the provisions of s.258 of the *Insurance Act*, and Ontario Regulation 676." Paragraph 25 states "Scottish & York pleads that the Plaintiff is not entitled to prejudgment interest from Scottish & York which due to his failure to comply with the notice provisions contained in the Policy, and more specifically in sections 11 and 15 of the OPCF 44R Endorsement to the Policy."
- [25] The statement of defence does not contain an unambiguous deliberate concession or a specific and identifiable admission that the plaintiff had underinsured coverage through an OPCF 44 Endorsement attached to the policy. References to an OPCF 44 Endorsement at paragraphs 10 and 25 of the statement of defence are not clear, bold and bald admissions that such coverage existed.
- [26] Leave to amend is not required under Rule 51.05 because the current pleading does not amount to an admission.
- [27] In opposing the amendments, the plaintiff alleges non-compensable prejudice. The plaintiff argues that the plaintiff's claim for accident benefits was materially compromised because

of the belief that underinsured coverage was available to the plaintiff under an OPCF 44 Endorsement.

[28] In support of this position, the plaintiff relies on the affidavit evidence of plaintiff's counsel. It is the evidence of plaintiff's counsel that when advising the plaintiff regarding the settlement of the accident benefits claim, plaintiff's counsel believed that the plaintiff had coverage pursuant to an OPCF 44 Endorsement. The evidence of plaintiff's counsel is that this belief was of central importance when forming his opinion with respect to settlement of the accident benefits claim. It is the evidence of plaintiff's counsel that had plaintiff's counsel believed that the plaintiff did not have OPCF 44 coverage, plaintiff's counsel would have recommended against settling the accident benefits claim for the agreed upon amount and plaintiff's counsel believes that the plaintiff would have taken his advice.

[29] I am not satisfied that the alleged prejudice is the type of prejudice contemplated by Rule 26. *Hanlan* states the following at para. 2:

With respect, we see no prejudice resulting from the amendment. The only prejudice is that which would be inevitable as a result of any successful plea. Such prejudice is not the type referred to in Rule 26. If it were, only unmeritorious amendments would be allowed – an obvious ludicrous proposition.

[30] In *Howell-Lillepool v. Smith*, 2012 ONSC 4385 (Ont. S.C.J.), on a motion to withdraw an admission, Justice Healey states at para. 9 that prejudice does not arise where the plaintiff is being denied insurance benefits that he may never have been entitled to in the first place.

[31] In *Stickel v. Lezzaik*, 2015 ONSC 4659 (Ont. S.C.J.), on an appeal from a decision permitting the withdrawal of an admission, Justice Perell states at para. 39 that "...the unavailability of additional insurance limits is not a prejudice that can arise from the withdrawal of an admission so that an action can be decided based on the truth of the case...". Citing *Howell-Lillepool* Justice Perell states: "...prejudice cannot be said to occur if the plaintiff is denied benefits that he or she may have never been entitled to in the first place."

[32] In the case before me, I am not satisfied of non-compensable prejudice where the defendants seek to specifically plead that the plaintiff did not have coverage that the plaintiff may never have been entitled to in the first place.

[33] To the extent that the plaintiff takes issue with certain affidavit evidence filed by Scottish & York and, in particular the evidence with respect to part two of the test for the withdrawal of an admission, it was not necessary for me to consider that evidence having determined that the proposed amendments do not amount to a withdrawal of an admission.

[34] For these reasons, leave is granted to amend the statement of defence of Scottish & York pursuant to Rule 26.01.

[35] With respect to the issue of costs of the motion, if successful, Scottish & York seeks costs of the motion on a partial indemnity basis in the all-inclusive amount of \$7,840.50. The plaintiff agrees that if Scottish & York is successful, Scottish & York is entitled to costs, but in the amount of \$7,420.50. The parties agree that costs would be payable within 30 days.

[36] Costs of this motion are fixed in the all-inclusive amount of \$7,420.50, payable by the plaintiff to the Scottish & York within 30 days.

[37] Order to go as follows:

1. Leave is granted to amend the statement of defence of Scottish & York in the form of the proposed amended statement of defence attached as Exhibit "G" to the affidavit of R.K. McCartney sworn December 13, 2022.
2. Costs of the motion are fixed in the all-inclusive amount of \$7,420.50, payable by the plaintiff to Scottish & York within 30 days.

Associate Justice B. McAfee

Date: May 6, 2024