CITATION: Williams v. York Fire & Casualty Insurance Company, 2007 ONCA 479
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COURT OF APPEAL FOR ONTARIO

BLAIR, MacFARLAND AND LAFORME JJ.A.

BETWEEN:

GUY WILLIAMS

Plaintiff (Respondent)

and

YORK FIRE & CASUALTY INSURANCE COMPANY

Defendant (Appellant)

William G. Scott for the appellant York Fire & Casualty Insurance Company

Michael Rotondo for the respondent Guy Williams

Heard: March 19, 2007

On appeal from the judgment of Justice Keith A. Hoilett of the Superior Court of Justice dated June 23, 2006.

MacFARLAND J.A.:

[1] The appellant appeals from the judgment of Hoilett J. dated June 23, 2006 and asks that the judgment be set aside and in its place a judgment issue dismissing the within action with costs.

[2] This appeal raises the issue of whether a trial judge has discretion pursuant to s. 129 of the *Insurance Act*, R.S.O. 1990, c. I.8 [the "*Insurance Act*"] to grant relief from

forfeiture of insurance in circumstances where the insured was unaware that his driver's licence was suspended.

[3] For the reasons that follow, I find that the trial judge did not have discretion to grant the respondent relief from forfeiture in the circumstances of this case. Accordingly, I would allow the appeal.

FACTS

[4] In the early hours of May 16, 2004, the respondent lost control of his vehicle while driving on the highway in British Columbia, causing it to roll over and sustain serious damage both to the vehicle and to a custom sound system contained therein.

[5] On May 20, 2004, the respondent reported his claim to his insurer – the appellant – and on September 29, 2004 he filed a sworn proof of loss form with supporting documentation.

[6] The appellant admits that at the relevant time it insured the respondent's vehicle under an Ontario Automobile Policy, which provided standard automobile coverage for the subject vehicle.

[7] However, the parties agree that at the time of the accident, the respondent's driver's licence was suspended. The Notice of Suspension of Driver's Licence from the Ontario Ministry of Transportation was dated May 4, 2004 and stated that effective May 16, 2004 – the day of the accident – the respondent's driver's licence would be suspended for failure to attend a demerit point interview.

[8] As a result of this suspension, the appellant says that the respondent was in breach of s. 7.2.2 of his policy of insurance and was therefore not entitled to indemnity. The respondent was informed of this policy violation by letter dated October 6, 2004.

[9] The respondent did not dispute that he had four speeding tickets in Ontario in the year preceding the accident, which he did not pay. He claimed to be unaware that one of the repercussions that might result from an accumulation of unpaid fines was the suspension of his driver's licence.[1]

[10] The respondent said that he was away from the province of Ontario from early December 2003 to the date of the accident. The parties agreed that during this time any

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[1] The Ontario system at the time was that after a certain number of demerit points were accumulated by a driver, that driver was called in for an interview. Failure to attend such an interview could result in suspension of the driver's licence.

notices to the respondent from the Ministry of Transportation would have been delivered to his home address in Toronto.

[11] The respondent, although aware that if the Ministry needed to contact him it would do so at this address, did not think it necessary to notify the Ministry if he was going to travel or be on vacation. He did not provide any forwarding address to the Ministry while he was away.

[12] Because he was away and had not seen the notice, the respondent was unaware at the time of the accident that his licence had been suspended just hours before. In fact, Mr. Williams was unaware his licence had been suspended until he was stopped for speeding in June or July following the accident. The appellant became aware of the suspension just before October 6, 2004 when it did a motor vehicle abstract following receipt of the respondent's proof of loss form.

[13] Most of Mr. Williams' driving experience prior to the action in question was in British Columbia. He understood that the practice in that province, when traffic fines remained unpaid, was to refuse the renewal of a person's driver's licence until the fines were paid. He was unaware that a person's driver's licence could be suspended between renewals because of a failure to pay accumulated fines.

[14] The appellant conceded that, subject to its suspension argument, there is no issue that the respondent had a valid policy of insurance at the time of the accident.

[15] At trial, this case was reduced to the sole issue of whether, on the facts as outlined above, the respondent should be relieved of forfeiture pursuant to s. 129 of the *Insurance Act*.

ANALYSIS

[16] The respondent's policy of insurance is a standard Ontario automobile policy which provides coverage for collision or upset involving the insured automobile.

[17] Section 7.2.2 is titled "Illegal Use" and provides, *inter alia*:

> We won't pay for loss or damage caused in an incident:
>
> …
>
> - if you drive the automobile while not authorized by law.

[18] The statutory conditions, which are part of every automobile policy of insurance in Ontario, provide:

> AUTHORITY TO DRIVE
>
> 4. (1) The insured shall not drive or operate or permit any other person to drive or operate the automobile unless the insured or other person is authorized by law to drive or operate it.

[19] From the appellant's perspective, the case below was argued solely on the basis that because the respondent's driver's licence had been suspended at the time of the accident, the contractual coverage conditions as well as the statutory conditions, both quoted above, were breached. In these circumstances, there is no coverage under the policy.

[20] Section 129 of the *Insurance Act* provides:

> Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss and a consequent forfeiture or avoidance of the insurance in whole or in part and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just.

[21] However, the appellant says this section does not assist the respondent because, by its own language, s. 129 clearly pertains only to post-loss aspects of non-compliance. In addition, the appellant relies on the decision of the Supreme Court of Canada in *Falk Bros. Industries Ltd. v. Elance Steel Fabricating Co.*, [1989] 2 S.C.R. 778. In *Falk* the court considered s. 109 of the *Saskatchewan Insurance Act*, R.S.S. 1978, c. S-26 [the "*Saskatchewan Act*"], which is identical to s. 129 of the Ontario *Insurance Act.*[2]

[22] The facts in *Falk* are set out succinctly in paragraph 2 of the judgment:

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[2] Section 109 of the *Saskatchewan Act* provides:

> Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss and a consequent forfeiture or avoidance of the insurance in whole or in part and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just.

> Elance Steel Fabricating Co. Ltd. claimed under a bond issued by the Canadian Surety Company on account of a debt due and owing, together with interest for supply of metal to Falk Bros. Industries Ltd. Elance failed to give notice of its claim within the period specified in the bond, making its claim 28 days after expiry of the 120-day period for notice provided in paragraph 6 of the bond.

[23] The issue before the court in *Falk, supra* was whether s. 109 empowered the court to grant relief against forfeiture for breach of a contractual condition prescribing a period within which notice of a claim must be given. The two sub-issues were (i) whether s. 109 was confined to statutory conditions as opposed to contractual provisions; and (ii) if s. 109 extends to contractual conditions, whether failure to give notice within the time prescribed by the bond constitutes "imperfect compliance" within s. 109 or, alternatively, "non-compliance".

[24] As in the first issue the court concluded that s. 109 should be read as empowering the court to grant relief from forfeiture for breaches of terms of insurance contracts in addition to statutory conditions.

[25] The court reviewed the recent jurisprudence and concluded that generally courts tend to treat failure to give notice of claim in a timely fashion as imperfect compliance whereas failure to institute an action within the prescribed time period has been viewed as non-compliance, or breach of a condition precedent:

> [C]ourts have generally been willing to consider granting relief from forfeiture where notice of claim has been delayed[.]
>
> …
>
> On the other hand, cases in which failure to meet a time requirement has been held to be non-compliance rather than imperfect compliance have largely been cases in which the time period was for the commencement of an action rather than giving notice[.]

See *Falk, supra* at paras. 18 and 19.

[26] The court went on at para. 20 to note, however,

> [Section] 109 gives the court power to relieve from such forfeiture or avoidance. But it is only in respect of such

> statutory conditions as to proof of loss or other matters or things that are required to be done or omitted with respect to the loss that the court has this power. [Emphasis added.]

[27] In conclusion, the court stated at para. 21:

> I agree that failure to give notice of claim within a given period is a less serious breach than failure to bring an action within a stipulated time. I also agree that it relates to "proof of loss" or "any other matter or thing required to be done or omitted by the insured with respect to the loss." I am therefore of the view that relief from forfeiture can be granted in respect of delayed notices of claim.

[28] In answer to the appellant's arguments, the respondent relies on a decision of Salhany J. in *Quarrie v. State Farm Mutual Automobile Insurance Co.* (1997), 32 O.R. (3d) 421 (Gen. Div.). In that case, Quarrie, the insured, was unaware that his driver's licence had expired some four hours before he was involved in an accident. He had received no notice from the Ministry of Transportation of the expiry of his licence. The insurer, State Farm, refused Quarrie's claim on the basis that he was not authorized by law to drive since he lacked a valid licence and had thereby violated his policy and s. 8(4)(1) of the statutory conditions. The issue was whether Quarrie was entitled to relief under s. 129 of the *Insurance Act.*

[29] The court stated the issue in *Quarrie* at para. 9 as follows:

> The issue which I have to decide on this motion is whether the statutory or contractual conditions must be interpreted strictly or whether the plaintiff is entitled to relief under section 129. To put it another way, is a driver who had an honest belief that he was licenced to drive, when in fact he was not, entitled to relief from forfeiture under section 129 on the basis that it would be inequitable that his insurance should be forfeited or avoided because of failure to comply with a statutory or contractual condition?

[30] Salhany J. held that in these circumstances Quarrie was entitled to relief from forfeiture pursuant to s. 129.

[31] In my view, however, *Quarrie* was incorrectly decided. Section 129 does not give judges a broad discretion to "grant relief from forfeiture" generally where the conditions

of an insurance policy are breached. To do so would grant the court power to alter the terms of a policy or conditions of coverage; this power was never envisioned by s. 129.

[32] It is clear from *Falk*, as Madam Justice McLachlin stated, that "it is only in respect of such statutory conditions as to proof of loss or other matters or things that are required to be done or omitted with respect to the loss that the court has this power." [Emphasis added.]

[33] The court's power under s. 129 is only in relation to things or matters required to be done, in relation to the loss, that is, after a loss has occurred. The discretion a court has under s. 129 is a narrow one pertaining only to those policy conditions – statutory or contractual – that relate to proof of loss. It does not apply generally to all policy conditions.

[34] Where there is an issue in relation to coverage or other policy conditions (i.e. conditions other than those that relate to proof of loss), that issue remains to be determined in the usual way in relation to the interpretation of insurance policies.

[35] Whether or not an insured was "authorized by law to drive" an automobile at the time of an accident is an issue of coverage where the language of the policy falls to be interpreted in the usual way. It is not a condition as to the proof of loss.

[36] In this court respondent's counsel argued that even if s. 129 is of no application, his client nevertheless was not in breach of section 7.2.2 of his policy. However, the case below was not argued on policy interpretation but, rather, solely on the applicability of s. 129. The record below therefore is lacking in respect of the necessary factual detail required to determine this case on the basis of policy interpretation. Before the trial judge there was only one issue as he put it "whether on the essentially undisputed facts, the plaintiff should be relieved from forfeiture." The trial judge said in his endorsement:

> For the purposes of this endorsement, I find as a fact that the plaintiff did not know of the suspension, nor do the circumstances warrant imputing such knowledge to him.

[37] It was an agreed fact at trial that at the time of the motor vehicle accident, the plaintiff's driver's license was suspended. No issue was joined on whether or not the suspension equated with a lack of authorization to drive as per the policy wording.

[38] For this reason, I would not decide this appeal on the basis of policy interpretation, but leave for another day that question where it arises on a proper record before this court.

[39] In conclusion, on the basis of s. 129, I am of the view that the judgment below must be set aside. Section 129 is not available in the circumstances of this case. The

breach does not relate to imperfect compliance as to the proof of loss (i.e. after the loss). The breach, if there is one, occurred before the loss in question, albeit only hours before, and, accordingly, s. 129 is of no application.

[40] As to the respondents' alternative argument, relying on s. 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, in my view this court's decision in *Stuart v. Hutchins* (1998), 40 O.R. (3d) 321 is dispositive of that argument.

[41] I would allow the appeal, set aside the judgment below, and in its place issue a judgment dismissing the action with costs. The appellant is entitled to its costs of this appeal fixed in the sum of $3,500 inclusive of disbursements and GST – the figure to which counsel are agreed.

RELEASED: June 27, 2007 "RAB"

"J. MacFarland J.A."
"I agree R.A. Blair J.A."
"I agree H.S. LaForme J.A.