CITATION: Keam v. Caddey, 2010 ONCA 565
DATE: 20100831
DOCKET: C51735

COURT OF APPEAL FOR ONTARIO

Rosenberg, Goudge and Feldman JJ.A.

BETWEEN

Glen Keam and Heather Keam

Plaintiffs (Appellants)

And

James Caddey and Alma Jean Caddey

Defendants (Respondents)

Lawrence W. Hatfield, counsel for the appellants

Robert H. Rogers and Matthew C. MacIsaac, counsel for the respondents

August 11, 2010

On appeal from the order of Justice Alan C.R. Whitten of the Superior Court of Justice dated November 13, 2009, with reasons reported at 2009 CanLII 51262 (ON S.C.).

Feldman J.A:

OVERVIEW

[1] The appellants successfully sued the respondents for damages suffered in a motor vehicle accident. Prior to trial, the appellants twice asked the respondents, as represented

by their insurer, to participate in mediation, but, contrary to its statutory obligation, the respondents' insurer refused, on the basis that it did not believe that Mr. Keam's damages would meet the statutory threshold under s. 267.5(5) of the *Insurance Act*, R.S.O. 1990, c. I.8. When dealing with costs following trial, the trial judge accepted the insurer's position as legitimate and declined the appellants' request for substantial indemnity costs as a remedy for its failure to participate in mediation, pursuant to s. 258.6(2) of the *Insurance Act*.

[2] The issue on appeal is whether any cost consequence should attach to the insurer's failure to participate in statutorily mandated mediation.

FACTS

[3] The parties were involved in a motor vehicle accident on April 10, 2003, in which Mr. Keam suffered personal injuries. This action was commenced in May, 2004 and defended in October, 2004 by the respondents' insurer.

[4] Following examinations for discovery, counsel for the appellants made the first of two formal requests for private mediation under s. 258.6(1) of the *Insurance Act* by letter of September 13, 2006. The letter suggested several names as potential mediators, and stated that if the respondents did not participate, the letter would be referred to after trial on the issue of costs. The respondents apparently did not respond to this first request.

[5] By letter of June 26, 2007, counsel renewed the request that the respondents' insurer participate in private mediation of the claim, and again referred to costs consequences following trial if the insurer failed to participate.

[6] By letter of July 3, 2007, respondents' counsel replied that they were of the opinion that Mr. Keam's injuries did not meet the threshold test under the *Insurance Act*, and "[a]ccordingly, my client is unwilling to undergo private mediation of this claim." In that letter, the respondents offered to consent to dismissal of the action without costs.

[7] A year later, with the trial scheduled for October, 2008, the respondents served an offer to settle on July 16, 2008 for $17,500 for general damages plus prejudgment interest from April 17, 2003 to September 30, 2004, and partial indemnity costs. This offer effectively acknowledged that Mr. Keam's claim could meet the statutory threshold test, and therefore mediation would not necessarily have been futile.

[8] On October 1, 2008, the respondents served a further offer to settle for $17,500 for general damages, plus prejudgment interest at 5% from November 27, 2003, and partial indemnity costs.

[9] On the same date, the appellants served an offer to settle for general damages of $60,000, 5% prejudgment interest from November 27, 2003, special and pecuniary damages of $130,000, damages of $15,000 under the *Family Law Act*, R.S.O. 1990, C. F.3, and partial indemnity costs, including disbursements.

[10] No offer was accepted and the action proceeded to trial. Following an 11-day trial in October, 2008, the jury awarded the appellants $70,000 in general damages (resulting in an award of $55,000 after the statutory deductible was subtracted), $22,500 for the *Family Law Act* claim, $1,200 for past loss of income, plus prejudgment interest of $19,360.20. As a result, although there were no Rule 49 costs consequences, having won their case, the plaintiffs were entitled to partial indemnity costs in the ordinary course. The trial judge also determined that Mr. Keam's claim met the statutory threshold under the *Insurance Act.*

[11] The parties subsequently filed written submissions on costs, and on September 10, 2009, they made oral submissions. The trial judge issued written reasons dealing with the issue of costs on September 29, 2009.

[12] Both before the trial judge and in oral submissions on this appeal, the appellants took the position that they were entitled to substantial indemnity costs as a result of the insurer's refusal to participate in mandatory mediation. The trial judge followed suit and treated the question of the effect of the insurer's refusal to attend mediation as a choice between the partial and substantial indemnity rate.

[13] The trial judge referred to the Supreme Court of Canada's decision in *Young v. Young*, [1993] 4 S.C.R. 3, at p. 134, where the court described the type of conduct by a party to litigation that would attract an award of substantial indemnity costs as "reprehensible, scandalous or outrageous."

[14] The trial judge treated the statutory obligation to participate in mediation as part of the duty to try to settle, and assessed the conduct of the insurer in that context, stating:

> There is a range of behaviour between a refusal to mediate or settle based on an apparent reasonable assessment, and high handed behaviour. If the refusal to mediate or settle, can be characterized as a genuine available position based on a review of all the known circumstances, then the cost consequences can not be any more than the extra costs generated as a consequence of the litigation not ending at that juncture.

[15] In other words, where the defendant's insurer's refusal to mediate was a "genuine available position", then the plaintiff who was successful at trial, and therefore already entitled to partial indemnity costs, would receive nothing more in costs as a result of the insurer's pre-trial conduct.

[16] The trial judge concluded that in this case the insurer's decision not to mediate could not be characterized as malevolent. Rather, the position that the damages would not meet the threshold, and therefore mediation would be futile, was a legitimate position to take and did not warrant the imposition of substantial indemnity costs.

ISSUES

(1) Did the trial judge err in failing to award substantial indemnity costs?

(2) If not, what was the proper cost consequence for the insurer's failure to attend and participate in statutorily mandated mediation?

ANALYSIS

Statutory Framework

[17] The statutory framework for the analysis is found in ss. 258.6(1) and (2) of the *Insurance Act*, which read as follows:

> 258.6(1) A person making a claim for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile and an insurer that is defending an action in respect of the claim on behalf of an insured or that receives a notice under clause 258.3(1)(b) in respect of the claim *shall*, on the request of either of them, *participate in a mediation of the claim* in accordance with the procedures prescribed by the regulations. [Emphasis added.]
>
> (2) In an action in respect of the claim, a person's failure to comply with this section *shall be considered by the court* in awarding costs. [Emphasis added.]

[18] Section 3 of O.Reg. 461/96 prescribes the procedure and time limits for appointing a mediator and conducting the mediation, and provides that the defendant's insurer is to pay the reasonable fees and expenses of the mediator.

[19] Two other sections of the *Insurance Act*, ss. 258.5(1) and (5), also provide relevant context for this analysis:

> 258.5(1) An insurer that is defending an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile on behalf of an insured or that receives a notice under clause 258.3(1)(b) from an insured shall attempt to settle the claim as expeditiously as possible.
>
> [Subsections 2, 3 and 4 require an insurer that admits liability to make advance payments in defined amounts.]

> (5) In an action for loss or damage from bodily injury or death arising directly from the use or operation of an automobile, an insurer's failure to comply with this section shall be considered by the court in awarded costs.

Insurer's Duty to Attempt to Settle and to Mediate

[20] Sections 258.5(1) and 258.6(1) are directed at an insurer that is defending a claim for personal injuries arising out of an automobile accident. The sections impose two obligations on the insurer. Section 258.6(1) makes participating in mediation mandatory when requested, while s. 258.5(1) requires the insurer to attempt to settle the claim as expeditiously as possible. Sections 258.6(2) and s. 258.5(2) provide the sanction for non-compliance with the statutory duties: the court is required to consider the insurer's failure to comply when awarding costs following trial.

[21] The legislature has clearly determined that in every case where one party is willing, mediation is the best way to try to promote the settlement of claims and to avoid the expense of a possibly lengthy and certainly costly trial. The legislature has provided no exceptions to this policy or to the obligation to mediate that it has imposed to implement the policy.

[22] Because there are no exceptions to the obligation, the insurer has no option whether or not to participate. There can be no legitimate reason to refuse to participate because to elect not to participate constitutes a breach of the insurer's statutory obligation.

[23] In this case, the respondents' insurer took the position that the claim did not meet the threshold and therefore there was nothing to negotiate. However, it is this approach that the legislature has disavowed by making mediation mandatory. Rather, the legislature's approach recognizes that participation in mediation could have a salutary effect on one or both sides, with input from an experienced and respected mediator.

[24] In this case, the trial judge referred to the position of the respondents' insurer as "playing hardball". Indeed, the insurer did appear to be playing hardball because prior to trial it changed its position on whether Mr. Keam's claim could meet the threshold by making an offer to settle. Another effect of requiring insurers to attend mediation is to prevent them from playing hardball without first participating in serious settlement endeavours, including through the mediation process.

Cost Consequences of an Insurer's Failure to Participate in Mediation

[25] In order to make the insurer's statutory obligation to participate in mediation meaningful, the legislature had to find a way to put teeth into it by providing a consequence for failure to comply.[1] Where the claim is settled prior to trial, there is no mechanism for any such consequence. However, following trial, where an insurer has not complied, the trial judge is required to consider the appropriate cost consequence of the insurer's actions.

[1] In *McCombie v. Cadotte* (2001), 53 O.R. (3d) 704, this court held that costs were the only remedy for failure to comply and that a party could not obtain a court order for compliance with the statutory duties intended to promote early settlement.

[26] The cost consequences will follow whether the plaintiff or the defendant has been successful at trial, so that, for example, where a plaintiff's claim is dismissed, the trial judge may deprive the winning defendant – represented by the insurer that refused to accept a request to mediate– of all or part of its costs that would normally follow the event.

[27] The reason a costs sanction for failure to comply with provisions intended to facilitate early settlement is an appropriate legislative choice was explained by Morden J.A. in *McCombie v. Cadotte,* at para. 18:

> [F]ailure to comply with a request in s. 258.3(1) [plaintiff required to attend a defence medical before commencing an action] can lead only, in some cases, to a claim not being settled as soon as it might otherwise have been settled if there had been compliance. In these circumstances, the consequence is that more time and expense would have been spent on the claim than, possibly, should have been spent. It seems to me that the possible costs sanctions provided for in ss. 258.3(9), 258.5(5), *and 258.6(2)* are responses logically tailored to remedy the effect of non-compliance. The failure to settle sooner results in increased costs; accordingly, the *remedial penalty* is to be incorporated in the costs order in the proceeding. [Emphasis added.]

[28] Morden J.A. describes the costs sanction as a "remedial penalty". It is remedial because it is intended not only to compel compliance by insurers with an important statutory purpose, but also to provide a remedy to the other party who was deprived of the opportunity for an early settlement of the claim. It is a penalty, because it is not intended to be merely compensatory of costs unnecessarily incurred by the other party or parties, as that objective is already addressed by other costs provisions of the *Rules of*

Civil Procedure, R.R.O. 1990, Reg. 194, but to provide a meaningful consequence to an insurer that elects not to comply.

[29] The legislature chose not to provide a specific cost consequence for an insurer's failure to participate in mediation, such as substantial indemnity costs against a losing defendant or deprivation of full costs of a winning defendant. Instead, the trial judge is accorded the discretion to determine the appropriate cost consequence in each case. In summary, where an insurer breaches s. 258.6(1), s. 258.6(2) requires the trial judge to ascertain the appropriate remedial costs penalty in the circumstances.

Appropriate Cost Consequence in this Case

[30] The trial judge erred in law by finding that the insurer's decision not to participate in mediation was a legitimate one and a genuine available position, as that decision constituted a breach of the insurer's statutory obligation. Based on his characterization of the insurer's decision as legitimate and available, the trial judge decided to impose no cost penalty on the insurer. In fairness to the trial judge, as discussed above, the plaintiff sought only an award of substantial indemnity costs and it was only that option that the trial judge considered.

[31] Approaching the issue afresh, the factors that in my view impact on the magnitude of the costs penalty that ought to have been imposed include: (1) the fact that the insurer twice refused to mediate, the first time two years before trial and the second time over one year before trial; (2) the fact that it decided to "play hardball" by taking the easy

position that the claim did not meet the threshold; (3) the fact that shortly before trial it served an offer to settle, which, while low, amounted to acceptance that there was a potential claim to litigate – and therefore to mediate; (4) the size of the recovery; and (5) the 11-day duration of the trial.

[32] The appellants' substantial indemnity bill totalled $196,144.90, plus $9,807.25 GST, and its partial bill was $130,352.20, plus GST. The trial judge awarded the appellants partial indemnity costs, which he fixed at $110,000 plus GST for fees. Although the insurer's conduct may not have risen to the level required for the imposition of substantial indemnity costs, in my view, a significant remedial penalty was required in all the circumstances. I would order an increase of $40,000 in the costs award to reflect the censure of the court and to provide an appropriately significant recovery for the appellants.

CONCLUSION

[33] I would allow the appeal, and increase the quantum of the fee portion of the costs awarded to the appellants at trial from $110,000 to $150,000 plus applicable taxes. Counsel advised the court at the hearing that costs of the appeal were agreed, and did not require an order from the court.

Signed: "K. Feldman J.A."
"I agree M. Rosenberg J.A."
"I agree S. T. Goudge J.A."

RELEASED: "MR" AUGUST 31, 2010