COURT OF APPEAL FOR ONTARIO

CITATION: Lingard v. Milne-McIsaac, 2015 ONCA 213
DATE: 20150331
DOCKET: C59414

Lauwers, Hourigan and Pardu JJ.A.

BETWEEN

Timothy Nicholas Lingard

Plaintiff (Appellant)

and

Jesse Dalton Milne-McIsaac and Shawn W. McIsaac

Defendants

Mireille Dahab and Niyousha Ghomashchi, for the appellant

Jasvinder K. Singh, for the respondent Wawanesa Insurance Company

Heard: March 6, 2015

On appeal from the order of Justice Peter Douglas of the Superior Court of Justice, dated January 14, 2014.

By the Court:

[1] We are of the view that the appeal must be allowed.

[2] The appellant was injured when his vehicle was rear-ended by another car on October 28, 2008. The Motor Vehicle Accident Report ("MVA Report") prepared by police at the scene of the accident identified Shawn McIsaac as the

owner of the other vehicle ("the McIsaac vehicle") and his son, Jesse Milne-McIsaac, as the driver. The MVA Report listed Security National Insurance Company as the insurer for Mr. McIsaac.

[3] On June 29, 2010, the appellant met with a doctor who determined he needed back surgery. The surgery occurred on July 23, 2010. The appellant issued a statement of claim on September 24, 2010 seeking damages from Mr. McIsaac and Mr. Milne-McIsaac.

[4] The appellant received an email from Mr. McIsaac on January 25, 2011 stating that Mr. Milne-McIsaac owned the McIsaac vehicle at the time of the accident and was likely insured by State Farm Insurance Company. Security National confirmed that Mr. McIsaac's policy had been cancelled before the accident, but a Ministry of Transportation search revealed he still owned the vehicle at that time.

[5] Since the McIsaac vehicle was uninsured, on February 16, 2012, the appellant brought a motion for leave to amend his statement of claim to claim uninsured motorist coverage from his insurer, the respondent Wawanesa Insurance Company ("Wawanesa").

[6] The motion judge framed the issue before him as whether the appellant had acted with due diligence in discovering the factual basis of his claim against Wawanesa. The motion judge found that the appellant should have taken

"additional steps" such as making inquiries with the insurer listed in the MVA Report. He found that the evidence of due diligence fell short of the standard set out in *Wakelin v. Gourley* (2005), 76 O.R. (3d) 272 (S.C.), and dismissed the motion for leave to add Wawanesa as a party.

[7] In our view, decisions after *Wakelin v. Gourley* have clarified the principle of due diligence in discovering claims.

[8] In *Toneguzzo v. Corner*, (2009), 75 C.P.C. (6th) 165 (Ont. Div. Ct.), the plaintiff relied on the identity of the vehicle's owner set out in the police report. The individual identified as the owner delivered a statement of defence. The identified owner's insurer provided the plaintiff with a certificate of insurance that identified Lakes Leasing Corporation as a lessor. The Divisional Court held, at para. 17, that receipt of this document did not trigger an obligation for the plaintiff to conduct further inquiries into the vehicle's ownership. The courts in *Bremer v. Foisy* (2009), 82 C.P.C. (6th) 133 (Ont. S.C.), and *Burtch v. Barnes Estate* (2006), 80 O.R. (3d) 365 (C.A.), reached similar conclusions.

[9] In *Velasco v. North York Chevrolet Oldsmobile Ltd.*, 2011 ONCA 522, 106 O.R. (3d) 332, the plaintiff relied on the identification of the other vehicle's owner set out in the motor vehicle accident report. The plaintiff's counsel later received a 732-page Crown brief, which contained a page revealing that the real owner was a car dealership. Although counsel had possession of this information, the

identity of the real owner did not come to counsel's attention until two years later during preparation for discovery. The plaintiff then issued a statement of claim against the car dealership. This court concluded, at para. 9, that the plaintiff's counsel had acted with "reasonable diligence" in continuing to rely on the identification of the owner set out in the police report until information to the contrary actually came to their attention; it was not until then that the limitation period began to run.

[10] Most recently, in *Patterson (Litigation guardian of) v. Ontario (Minister of Transportation)*, 2014 ONCA 487, 97 E.T.R. (3d) 171, this court held, at para. 5, that while it may not be wise for plaintiff's counsel to rely on police accident reports for vehicle ownership information, there is no iron-clad rule that failure to conduct an ownership search is fatal on the issue of discoverability, in the light of the decision of this court in *Velasco.* The court went on to note, at para. 6, that the motion judge properly took into account "all the circumstances relevant to the issue of discoverability in a manner consistent with the approach in *Velasco*". We consider that this reasoning applies, with necessary modifications, to the existence of insurance.

[11] The motion judge erred in imposing a standard of reasonable diligence that was significantly higher than that in *Velasco*, *Toneguzzo*, *Bremer* and *Burtch*. By relying on the statement in the MVA Report that the McIsaac vehicle defendant was insured, until receiving actual notice that it was not, the appellant acted

reasonably. It was reasonable for the appellant to assume that the police officer who completed the MVA Report asked Mr. Milne-McIsaac for proof of insurance. There was no reason for the appellant to treat insurance coverage as a live issue until the appellant became aware of a potential coverage issue when he received Mr. McIsaac's email on January 25, 2011. The fact that the McIsaac vehicle was uninsured was not confirmed until February 3, 2011. The limitation period in respect of Wawanesa therefore began on January 25, 2011, or alternatively, on February 3, 2011. The appellant brought his motion well within this limitation period.

[12] Wawanesa does not, and could not, claim prejudice in having to provide uninsured vehicle coverage to the appellant, which is precisely what he purchased from Wawanesa with his insurance premium:. See *Abarca v. Vargas*, 2015 ONCA 4, 380 D.L.R. (4th) 120, at para. 42. Wawanesa has been fully engaged as the appellant's statutory accident benefits provider since the accident occurred, as acknowledged by counsel: See *Tomescu v. Sarhan*, 2013 ONSC 1358, 115 O.R. (3d) 396, at para. 28.

[13] The appeal is allowed, with costs to the appellant in the amount of $9,000, all-inclusive. The costs order in the court below of $5,000 plus HST is reversed, and the respondent shall pay the same amount to the appellant.

Released: March 31, 2015 "PL" "P. Lauwers J.A."

"C.W. Hourigan J.A."
"G. Pardu J.A."