CITATION: Van Bastelaar v. Bentley, 2011 ONCA 660
DATE: 20111021
DOCKET: C53633

COURT OF APPEAL FOR ONTARIO

MacPherson, LaForme and Epstein JJ.A.

BETWEEN

Jeremey Van Bastelaar and Kirsty Van Bastelaar

Plaintiffs (Appellants)

and

Randall Mark Bentley, Sonya Mardina Bentley, Kevin Van Bastelaar, Charlene Toth and TD Home and Auto Insurance Company a.k.a. Primmum Insurance

Defendants (Respondents)

Mary-Anne C. Strong, for the appellants

William G. Woodward, for the respondents

Heard: October 18, 2011

On appeal from the order of Justice John F. McGarry of the Superior Court of Justice dated March 29, 2011.

ENDORSEMENT

[1] The appellants Jeremey and Kristy Van Bastelaar appeal from the order of McGarry J. of the Superior Court of Justice dated 29 March 2011 granting summary judgment in favour of the respondent TD home and Auto Insurance Company a.k.a. Primmum Insurance ("Primmum").

[2] The appellants hold an insurance policy from the respondent. The policy includes underinsured coverage defined by the OPCF 44R Family Protection Endorsement. This endorsement provides that where an "inadequately insured motorist" injures the policyholder in a car accident, the issuer will indemnify the policyholder for certain damages beyond the injuring motorist's insurance coverage. For the purposes of the endorsement, "inadequately insured motorist" is defined as a motorist whose motor vehicle liability insurance is less than the injured party's OPCF 44R family protection coverage amount.

[3] The Van Bastelaars' insurance policy has a family protection coverage amount of $1 million. The defendant Bentley's insurance policy limit is $1 million.

[4] The Van Bastelarrs, both of whom were seriously injured, are concerned that Bentley's $1 million coverage will be apportioned among four injured parties. Hence they joined Primmum as a defendant with a view to accessing their OPCF 44R coverage to make up any difference between what they might obtain from Bentley and $1 million.

[5] The crucial provision to be interpreted is paragraph 4 of the OPCF 44R endorsement:

> The insurer's maximum liability under this change form, regardless of the number of eligible claimants or insured persons injured or killed or the number of automobiles insured under the Policy, is the amount by which the limit of family protection coverage exceeds the total of all limits of motor vehicle liability insurance, or bonds, or cash deposits, or other financial guarantees as required by law in lieu of such insurance, of the inadequately insured motorist and of any person any person jointly liable with that motorist.

[6] The motion judge stated that the definition of "inadequately insured motorist" and paragraph 4 of the OPCF 44R endorsement provided a clear answer: "An underinsurer's obligation to pay does not arise until the total amount of insurance held by the tortfeasor at the moment of the accident is less than the family protection coverage liability limit." He concluded that since "the policies of the parties are evenly matched, so therefore, the underinsurer had no exposure to liability".

[7] The appellants contend that their insurance policy is ambiguous and should be interpreted *contra proferentem* the respondent insurer to permit access to the underinsurance coverage if the injuring party's insurance may be apportioned among several plaintiffs, thereby creating a potential shortfall (i.e. less than $1 million) for the appellants.

[8] We do not accept this submission. The motion judge relied on this court's decision in *Romas v. Prudential Insurance Co. of Canada*, [1996] O.J. No. 4185 ("Romas"), which is explicitly on point, especially at paras. 2-4.

[9] The Van Bastelaars submit that the decision of the Supreme Court of Canada in *Somersall v. Friedman* 2002 SCC 59 has overtaken this court's decision in *Romas*. That

is, the reality of the situation is what must be considered; not simply that the endorsement is only applied when the plaintiff's policy limits exceed that of the injuring driver's insurance limits.

[10] We disagree. The principal issue in *Somersall* related to whether an agreement between the plaintiffs and the injuring driver to limit their claims to the available policy limits prevented them from advancing a claim against their own insurer for coverage provided by the SEF 44. It was not about whether the injuring driver had adequate policy limits which were equal to those provided by the SEF 44. That is not this case.

[11] The appeal is dismissed. The respondent is entitled to its costs of the appeal fixed at $7000, inclusive of disbursements and HST.

"J.C. MacPherson J.A."
"H.S. LaForme J.A."
"G.J. Epstein J.A."