

2018 ONCA 339
Ontario Court of Appeal

Ernst v. Northbridge Personal Insurance Corporation

2018 CarswellOnt 5277, 2018 ONCA 339, [2018] I.L.R. I-6051, 24 M.V.R. (7th) 179, 290 A.C.W.S. (3d) 843, 79 C.C.L.I. (5th) 31

**Greg Ernst, Laurie Ann Stewart and Andrew Ernst (Applicants / Respondents)
and Northbridge Personal Insurance Corporation (Respondent / Appellant)**

C.W. Hourigan, G. Pardu, Grant Huscroft JJ.A.

Heard: April 4, 2018
Judgment: April 5, 2018
Docket: CA C64340

Proceedings: affirming *Ernst v. Northbridge Personal Insurance Corp.* (2017), 2017 ONSC 5099, 2017 CarswellOnt 13619, 71 C.C.L.I. (5th) 269, 15 M.V.R. (7th) 259, Gibson J. (Ont. S.C.J.)

Counsel: Andrew A Evangelista, Jennifer Kent, for Appellant
Gordon A. Marsden, for Respondents

Subject: Civil Practice and Procedure; Insurance

Related Abridgment Classifications

Insurance

X Actions on policies

X.1 Commencement of proceedings

X.1.d Obligations of insurer

X.1.d.ii To defend

X.1.d.ii.C Allegation in pleadings

Headnote

Insurance --- Actions on policies — Commencement of proceedings — Obligations of insurer — To defend — Allegation in pleadings

Insured agreed to purchase property and all-terrain vehicle (ATV) from vendor and paid fee for storage and access to it prior to closing — Before sale closed insured’s son and his friend went for ride on ATV on property after obtaining vendor’s permission — ATV collided with tree, and son and friend were severely injured — Friend and his family members commenced action against insured, his son, and vendor for damages — Insurer denied coverage on basis that ATV did not constitute “newly acquired automobile” under policy — Insured and son brought successful application for declaration that insurer had duty to defend them — Trial judge ruled that insurer’s duty to defend was triggered since claim might fall into policy’s coverage — At trial, any combination of factual allegations contained in statement of claim could be proved, and alternative pleading at issue, if proven, would cause ATV to fall within coverage of insured’s policy — Insurer appealed — Appeal dismissed — Trial judge did not misapply pleadings rule — That trial judge explored possible outcomes rather than simply evaluating pleadings was not error — Trial judge gave pleadings widest latitude as required — Trial judge acknowledged that statement of claim did not specifically allege that owner of ATV and occupier of property were different people at time of accident — Pleadings alleged facts that would permit finding that vendors, and not insured were occupiers at relevant time, and that was sufficient to trigger insurer’s duty to defend — Allegations against insured and his son did not have to be expressly pleaded in alternative for duty to defend to arise — Trial judge did not wrongfully explore possible outcomes of trial but read pleadings widely and adopted reading that was open to him.

Table of Authorities

Cases considered:

Monenco Ltd. v. Commonwealth Insurance Co. (2001), 2001 SCC 49, 2001 CarswellBC 1871, 2001 CarswellBC 1872, 274 N.R. 84, 204 D.L.R. (4th) 14, [2001] I.L.R. 1-3993, 155 B.C.A.C. 161, 254 W.A.C. 161, 32 C.C.L.I. (3d) 165, [2002] 2 W.W.R. 438, 97 B.C.L.R. (3d) 191, [2001] 2 S.C.R. 699, 2001 CSC 49 (S.C.C.) — followed

Statutes considered:

Off-Road Vehicles Act, R.S.O. 1990, c. O.4
Generally — referred to

APPEAL by insurer from judgment reported at *Ernst v. Northbridge Personal Insurance Corp.* (2017), 2017 ONSC 5099, 2017 CarswellOnt 13619, 71 C.C.L.I. (5th) 269, 15 M.V.R. (7th) 259 (Ont. S.C.J.), of order requiring them to defend claim.

Per curiam:

1 The appellant insurer appeals from the order of the application judge requiring it to defend the appellants in an action arising from an accident involving an ATV on July 11, 2015. The plaintiff in the action was a passenger on an ATV driven by the respondent Andrew Ernst.

2 The Ernst's automobile insurance policy extends coverage to an ATV if it is owned by the respondents and the respondents were not occupiers of the property on which the accident occurred. The facts involving the purchase of the ATV and other chattels by the respondents from the Hellers — whose rural property they were purchasing — are set out in the decision of the application judge and need not be repeated here. The accident occurred before the closing date for the sale of the ATV and the other chattels, which was August 19, 2015.

3 The appellant insurer denied coverage on the basis that, at the time of the loss, the ATV was not required to be insured because it was being operated on private property, and so did not fall under the definition of “automobile” in the OAP 1, and was considered an off-road vehicle pursuant to the *Off-Road Vehicles Act*, R.S.O. 1990, CHAPTER O.4.

4 The appellant submits that although the application judge properly articulated the pleadings rule, he erred in applying it. In particular, he explored possible outcomes rather than simply evaluating the pleadings, and wrongly assumed that the respondents could not be occupiers of the property because the Hellers were also occupiers of the property.

5 We disagree.

6 The law governing pleadings is not in dispute. As the Supreme Court explained in *Monenco Ltd. v. Commonwealth Insurance Co.*, [2001] 2 S.C.R. 699, 2001 SCC 49 (S.C.C.) at para. 28:

Whether an insurer is bound to defend a particular claim has been conventionally addressed by relying on the allegations made in the pleadings filed against the insured, usually in the form of a statement of claim. If the pleadings allege facts which, if true, would require the insurer to indemnify the insured for the claim, then the insurer is obliged to provide a defence. This remains so even though the actual facts may differ from the allegations pleaded.

7 The threshold is not high. As the court stated at para. 29,

[I]t is not necessary to prove that the obligation to indemnify will in fact arise in order to trigger the duty to defend. . . . The mere possibility that a claim falling within the policy may succeed will suffice.

8 The application judge was required to give the pleadings the widest latitude, and did so. He acknowledged that the statement of claim did not specifically allege that the owner of the ATV and occupier of the property were different people at the time of the accident. It included allegations both that the respondents were owners of the ATV and occupiers of the property, and that the Hellers were the owners of the ATV and occupiers of the property at the relevant time. Although it is possible for more than one party to be the occupier of property at a time, the pleadings alleged facts that would permit a finding that the Hellers, and not the respondents, were the occupiers at the relevant time, and that was sufficient to trigger the appellant's duty to defend. There is no requirement that the allegations against the respondents be expressly pleaded in the

alternative for the duty to defend to arise.

9 The application judge did not wrongfully explore possible outcomes of the trial, as the appellant asserts. He read the pleadings widely and adopted a reading that was open to him.

10 The appeal is dismissed.

11 The respondent is entitled to costs in the agreed amount of \$10,000, inclusive of taxes and disbursements.

Appeal dismissed.

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