Case Name:

Boyd v. Cooper

Between
Karen Leslie Boyd and Linda Boyd (plaintiff/moving party), and
John Lewis Cooper and Jude Marie Cooper (defendants/responding parties)

[2005] O.J. No. 1415

29 C.C.L.I. (4th) 291

2005 CarswellOnt 4058

Lindsay Court File No. 003464

Ontario Superior Court of Justice
Divisional Court

P.H. Howden J.

March 29, 2005.

(11 paras.)

Civil procedure -- Appeals -- Leave to appeal -- Insurance law -- Insurers -- Liability -- Tort law -- Occupiers' liability.

Motion by the plaintiff, Boyd, for leave to appeal an order that allowed the insurer of the defendant, Cooper, to be added as a party defendant. Boyd was injured on Cooper's farm and sued for damages. The defendant's insurer refused to defend the action, taking the position that the damages arose in the course of Boyd's employment with Cooper and as such was excluded under the policy. The pleadings were exchanged on the basis that Boyd was an independent contractor. Cooper refused to bring an application to the Workplace Safety and Insurance Tribunal to rule on whether the injury was sustained in the course of employment. Only a party to the court action could bring an application to the Tribunal.

HELD: Motion dismissed. The insurer's position in the action would be to raise a defence not otherwise raised and to bring an application to the Tribunal for a ruling as to whether Boyd's claim was

statue barred. This was not a position adverse to Cooper's position in the action. There was no decision conflicting in principle with the decision to allow the insurer to be added and there was no reason to doubt its correctness. As such, leave could not be permitted.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rules 13.01, 13.01(2), 62.02(4).

Workplace Safety and Insurance Act.

Counsel:

Ms. J.V.C. Chum, for the Plaintiffs/Moving Parties

Mr. M. Forget for the Defendants/Responding Parties

ENDORSEMENT

1 **P.H. HOWDEN J.** (endorsement):-- The Plaintiffs seek leave to appeal to the Divisional Court from the order of Salmers J., of February 4, 2005. Salmers J. allowed the insurer of the defendants to be added as a party defendant under Rule 13.01. That rule permits a person claiming an interest in the proceeding, or that may be adversely affected by judgment in such proceeding, to be added, subject to the court's discretion and in particular (Subrule 13.01(2)), to considerations of undue delay or prejudice to "the determination of the rights of the parties to the proceeding". The defendants took no position on this motion and were not represented at the hearing.

2 The plaintiff Karen Boyd was injured at the defendants' farm. This action for damages arises from that incident. The defendants' insurer, Fanners Mutual Insurance Company, refused to defend the action, taking the position that the damages arose in the course of the plaintiff's employment with the defendants. The policy excludes coverage for injury claims sustained by an employee in the course of employment. On a prior motion, it was ordered that the defendants could retain counsel of their choice at the insurer's expense. Cooper v. Farmer's Mutual Insurance Co., [2001] O.J. No. 3504 (S.C.J.); aff'd. [2002] O.J. No. 1949 (Ont. C.A.).

3 Pleadings were exchanged on the basis that the plaintiff was an independent contractor at the time of the accident, not an employee. The statement of defence failed to plead that the action was barred by the Workplace Safety and Insurance Act. The insurer had obtained statements and other documents from the defendants (its insureds) as part of their duty to disclose, indicating that the plaintiff was an employee at the material time. The defendants refused to amend their pleading or to bring an application to the Workplace Safety and Insurance Tribunal ("WSIT"), the body delegated with the exclusive right to rule on whether injury was sustained in the course of employment. Counsel agree that, by statute, only a party to the court action may bring such application to the WSIT.

4 On a motion for leave to appeal from an interlocutory order like this one, Rule 62.02(4) applies:

> Leave to appeal shall not be granted unless,

(a) there is a conflicting decision by another judge or a court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or

(b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

5 The plaintiffs argue that the decision of the motion judge conflicts with Waterloo Insurance Company v. Zurbrigg Estate, [1983] O.J. No. 148 (Ont. C.A.) and Porretta v. Stock (1988), 67 O.R. (2d) 628 (H.C.J.). The proposition put to me by plaintiffs' counsel was that Waterloo, which Porretta followed, governs the adding of a party's insurer where there is a conflict between its own interests and that of the insured. That was a case where the insured was a plaintiff, the defendant was uninsured, a counterclaim against the insured plaintiff was likely, and the plaintiff's policy contained uninsured motorist coverage. The Court of Appeal held as follows:

> It is obvious that if Waterloo were added as a party defendant it would be, to say the least, in a strange position. As the liability insurer of Zurbrigg, it is obliged to defendant its insured and, indeed, the insured is obliged to cooperate in this defence. As a party defendant seeking to avoid liability on the uninsured automobile coverage, it would be at liberty to seek to maximize the liability of its own insured and minimize his damages. This would surely put Waterloo in an impossible position in which it would have to choose between its own interests and that of its insured.
>
> There are, of course, many examples of lawsuits between an insurer and its own insured and each seeks to protect its own interest. This case, however, is different. Here, the insurer seeks to intervene in a contested action between its insured and another and take a position adverse to its insured. In my respectful view, the clearest mandate would be required before such a situation could be tolerated.

6 That is simply not the case here. The insurer's position in the action would be to raise a defence not otherwise raised and to bring an application to the WSIT for a ruling as to whether the plaintiff's claim was statute barred. That is not a position adverse to the defendant insureds' position in the action. This case is more closely captured by the reasoning in World's Finest Chocolate Canada Ltd. v. Quinte Warehousing Ltd., [1998] O.J. No. 1535 (O.G.D.) where the defendant failed to defend the action and the insurer was added so that liability was not determined on a faulty basis. Defendants are not vigorously defending a claim where they refuse to raise a relevant defence. Waterloo does not govern or conflict with the ruling in this case.

7 The more troublesome point to me is the plaintiffs' alternate position. It is submitted that there is good reason to doubt the correctness of the decision because there is prejudice to the defendants as insureds because of their duty to disclose to their insurer. On reflection, however, the problem with that submission is that the persons who would be prejudiced are the plaintiffs who are not the insured parties subject to duties of disclosure. Porretta, at page 10 of the report given me, clarified that the prejudice of concern is prejudice to the insured, particularly where it is the insured as plaintiff having to face his/her own insurer armed with disclosure. Again, that is not the case here. The

defendants are not seeking to appeal and they are not the parties whose claim may be barred on the employment issue.

8 It was not put to me, as it was to the motion judge, that the defendants could be subject to WSIT sanctions which the motion judge simply ruled to be not relevant as they are not within this action, nor is it clear what those sanctions were and how they would be triggered. That issue is not before me.

9 I simply do not accept the additional submissions that the complexity of this issue or the determination of indemnification at trial form any ground for doubting the order before me. Nichols v. American Home Assurance Co., [1990] 1 S.C.R. 801, dealt with determining when the insurer's duty to defend arises, not with indemnification issues at trial.

10 On the record and submissions before me, I find that there is no decision conflicting in principle with the order in question and I do not have reason to doubt its correctness. The motion judge exercised the discretion granted him under Rule 13.01 and added terms to the order to meet concerns over undue delay and length of cross-examination of the defendants. It should be added that after the WSIT ruling occurs, I was given no real reason for the insurer's continued presence as a party, if the action survives.

11 Motion for leave is denied. Cost submissions may be made in writing to me at Barrie within 30 days, unless counsel are able to agree.

P.H. HOWDEN J.

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