Indexed as:

Kalkinis (Litigation guardian of) v. Allstate Insurance Co. of Canada

Between
Stella Kalkinis, by her Litigation guardian Patty Stephan, Nitsa Kalkinis, Joanna Kalkinis, and the said Patty Stephan, personally, plaintiffs (respondents), and Allstate Insurance Company of Canada, defendant (appellant)

[1998] O.J. No. 4466

41 O.R. (3d) 528

117 O.A.C. 193

1998 CanLII 6879

83 A.C.W.S. (3d) 480

1998 CarswellOnt 4255

Docket Nos. C24381 and M22209

Ontario Court of Appeal
Toronto, Ontario

Finlayson, Catzman and Abella JJ.A.

Heard: October 14 and 15, 1998.
Judgment: October 30, 1998.

(12 pp.)

Insurance -- Agents -- Liability of agent -- Duty to inform insured of available coverage -- Negligence, duty of agent to inform and to obtain coverage -- Courts -- Judges -- Powers -- To grant relief notwithstanding pleadings.

This was an appeal by the defendant insurer from a judgment for indemnity under an insurance policy. Kalkinis and her children brought an action for injuries sustained as passengers in the vehicle driven by the insured husband. The action was settled for one million dollars. The husband had purchased the vehicle from his son-in-law who operated a used car business and insured it under a $500,000 policy. On the advice of the insurer's agent, the husband increased coverage to one million dollars. The insurer claimed that the son-in-law subsequently called to cancel the increased coverage when he learned of the change. The insurer claimed that the limit of coverage was $500,000. The husband denied receiving the renewal based on $500,000 coverage and brought an action against the insurer to recover the full amount of the settlement. The trial judge found that the cancellation of the increased coverage had been communicated to the husband. However, the trial judge found that the insurer's agent was negligent for failing to advise the husband that cancellation was not in his best interests and inappropriate in the circumstances. The husband did not raise this issue in his claim.

HELD: Appeal allowed and action dismissed. The trial judge had erred in finding liability on grounds not pleaded. The finding of negligence by the agent was highly prejudicial to the insurer where the matter had proceeded as an action in contract. It was too late to now permit an amendment to the pleadings to include a claim of negligence by the agent. In any case, there was no basis on which to claim in negligence. The problem was not the advice given but the failure to act on it so that no liability arose. It could not be argued that the agent failed to talk the husband out of his decision to limit coverage where he denied making such a decision.

Statutes, Regulations and Rules Cited:

Insurance Act, R.S.O., s. 258(1).
Ontario Rules of Civil Procedure, Rules 25.06, 26.01, 26.02(c).

Counsel:

Sheldon Gilbert, Q.C. for the appellant.
Steven Bellissimo, for the respondents.

The judgment of the Court was delivered by

1 FINLAYSON J.A.:-- This is an appeal by Allstate Insurance Company of Canada, from the judgment of Lederman J., of the Ontario Court (General Division), directing the appellant to pay to the respondents the sum of $500,000, post-judgment interest and costs. The respondents cross-appeal and ask that the judgment be varied to award pre-judgment interest on the sum of

$1,000,000 and that the costs be assessed on a solicitor client basis from September 21, 1993. In addition, the respondents move, if necessary, for leave to amend their statement of claim to include a claim in negligence as against the defendant in the original action.

2 The action in appeal arose out of the disposition of a personal injury action in which the respondents, Stella Kalkinis, the wife of Christos Kalkinis, and her children sued Christos Kalkinis, pursuant to s. 258(1) of the Insurance Act, R.S.O. 1990, c. I. 8, for extensive injuries Stella Kalkinis received on October 2, 1989 while a passenger in a Chevrolet Caprice owned and driven by her husband and insured by Allstate. That action, founded on the negligence of Christos Kalkinis, was settled on the basis of a judgment issued in favour of the respondents against Christos Kalkinis in the amount of $1,000,000. Allstate, as the automobile insurer of Christos Kalkinis, paid $500,000 in respect of that judgment on behalf of Christos Kalkinis on the basis that $500,000 was the limit of coverage under the policy issued to Christos Kalkinis and in effect at the time of the accident. Asserting that the limits of coverage were $1,000,000 and not $500,000, the successful plaintiffs in the personal injury action commenced the action in appeal against Allstate for a declaration that its policy of insurance on the Caprice automobile owned by Christos Kalkinis "is for $1,000,000" and for payment by Allstate "of the difference between the $1,000,000 and any moneys already paid under the policy". The plaintiffs also sought pre-judgment interest, punitive and exemplary damages, and costs.

Background

3 The son-in-law of Christos Kalkinis, Robert Stephan, operated a used car dealership and had dealt in the course of his business with the Allstate agent, Alex Vezer. In 1986, when Christos Kalkinis purchased a vehicle, a 1982 Datsun, from Stephan, he was introduced by Stephan to the Allstate agent Vezer and obtained a policy of automobile insurance from Allstate with liability coverage of $500,000 on that vehicle.

4 In July 1987, Christos Kalkinis purchased a second vehicle, a 1978 Mercury Cougar, from Stephan, who then arranged through the Allstate agent Vezer to have coverage placed on that vehicle with liability coverage of $1,000,000 resulting in the coverage on the 1982 Datsun vehicle being automatically increased to that same amount. In October 1987, Christos Kalkinis replaced the Mercury Cougar with a 1978 Chevrolet Caprice and Stephan advised the Allstate agent Vezer accordingly of this change.

5 On June 6, 1988, in accordance with instructions received from Stephan on behalf of Christos Kalkinis, the Allstate agent Vezer reduced the limits of liability coverage provided under the policy issued to Christos Kalkinis in respect of the Datsun and Caprice vehicles from $1,000,000 to $500,000.

6 On August 24, 1989, the Allstate agent Vezer met Christos Kalkinis at a new home Kalkinis had purchased in Aurora for the purpose of assessing the home and placing appropriate homeowner's insurance on it. Stephan was not a participant in that meeting as he was out of the

country at that time. In the course of that meeting, the Allstate agent Vezer took the opportunity to advise Christos Kalkinis that, given he was now residing outside of Metropolitan Toronto in a less populated area, he could obtain a higher limit of $1,000,000 liability coverage for his motor vehicles under the Allstate policy for the same premium he was paying for his existing limit of coverage of $500,000. Without the involvement of Stephan, Christos Kalkinis agreed to increase his coverage from $500,000 to $1,000,000 in response to the Allstate agent's suggestion. The Allstate agent then placed a request with Allstate showing both a change of address for Mr. Kalkinis as well as a request for an increase of the limits of liability coverage under the auto policy from $500,000 to $1,000,000 effective August 25, 1989.

7 While Alex Vezer, the Allstate agent, testified at trial that he had no independent recollection of receiving any telephone call or calls from the insured or any member of his family, the Christos Kalkinis file at Allstate revealed a request form in Vezer's handwriting which stated that the policyholder had called on September 7, 1989 and wanted to cancel the increase in his third party liability coverage, effective August 25, 1989. Since this instruction followed so closely on the request for an increase in the coverage, no change in the coverage was made and it remained at $500,000. Because the Kalkinis policy was to expire on October 20, 1989, the Allstate computer automatically printed out a renewal offer on September 20th and it was mailed on September 21, 1989 directed to the current address of Christos Kalkinis in Aurora and showing coverage for the Caprice vehicle for the term October 20, 1989 to October 20, 1990, in the amount of $500,000. The accident took place on October 2, 1989, with the limits remaining at $500,000.

8 The insured Kalkinis and all members of his family, including his son-in-law Stephan, testified and denied making any telephone calls to Allstate on any subject; in addition, Christos Kalkinis denied receiving notice of the renewal of the policy. The trial judge rejected the evidence of Stephan at least, and concluded that Christos Kalkinis did receive the renewal offer from Allstate at his address in Aurora before the accident occurred. He found "in all probability" that Stephan, after his return from Australia on September 5, 1989, and upon learning of the increase in the insurance coverage to $1,000,000 during his absence, had contacted the Allstate agent on behalf of Christos Kalkinis to cancel the request for the increase in coverage and leave the limits of coverage at $500,000. Stephan's motivation was to secure a reduced premium that would attach to a $500,000 policy in Aurora as opposed to Metropolitan Toronto. Acting on those instructions, Allstate sent a renewal policy for $500,000 to the insured. The trial judge held that "it is difficult to accept that Christos [the insured] did not receive the renewal notice".

Issues

9

(a) Was the trial judge entitled to find liability on a basis that was not pleaded?
(b) In any event, was there any basis for finding on this record that the Allstate agent had breached a duty of care to the insured with respect to providing him

> with information as to the availability and suitability of coverage underwritten by Allstate?

Analysis

10 The only live issue in this action as pleaded was whether Allstate had received and acted upon instructions from the son-in-law of the insured Christos Kalkinis to cancel the increase in coverage originally agreed upon with Vezer and maintain the coverage at $500,000. After closely reviewing all of the evidence, the trial judge found in favour of the appellant on this issue. This should have been the end of the matter. However, on the basis of an argument raised by counsel for the respondents for the first time after both parties had closed their respective cases, the trial judge embarked upon an analysis of the duty that the agent of the appellant had to the insured to give him advice about a prudent level of coverage. Relying upon Fletcher et al. v. Manitoba Public Insurance Co., (1990) 74 D.L.R. (4th) 636 (S.C.C.), the trial judge found Allstate's agent negligent for not having advised its insured that the cancellation was not in his best interests and was inappropriate in the circumstances, stating: "Specifically, he should have advised him that, based on recent damage awards, $500,000 was insufficient coverage for his requirements". The trial judge concluded:

> With the appropriate advice, one cannot conclude that Christos would not have kept this coverage at $1,000,000. Accordingly, the plaintiffs will have judgment against the defendant for $500,000.

11 In my opinion, this fresh analysis was highly prejudicial to the appellant. The parties, certainly the appellant, were proceeding on the basis that this was an action in contract on an insurance policy. The record had been developed within the confines of the cause of action as pleaded. Accordingly, it was impermissible for the trial judge to entertain an argument founded on totally different legal principles.

12 In this court, the respondents sought to remedy this problem by moving to amend their pleading to allege in the alternative that Allstate "through its agent Alex Vezer was negligent in failing to alert, advise and promptly explain to Christos Kalkinis the adequacy of the insurance coverage, the foreseeable risk of the reduced coverage and the deficiency in the policy coverage. In addition, the [respondents] state that [Allstate] has breached and failed to fulfil the duty of care required of a skilled agent".

13 This amendment is exactly what is required to enable the court to deal with the disposition of this case at trial. However, it is much too late. It has long been established that the parties to a legal suit are entitled to have a resolution of their differences on the basis of the issues joined in the pleadings: see Rule 25.06. The trial judge cannot make a finding of liability and award damages against a defendant on a basis that was not pleaded in the statement of claim because it deprives the defendant of the opportunity to address that issue in the evidence presented at trial. Any amendment to the pleadings to have them conform to the evidence after the parties have closed their cases is a matter for discretion but should only be exercised where no prejudice results that cannot be

compensated for by costs or an adjournment: see Rules 26.01, and 26.02(c).

14 An example of a case where leave to amend pleadings was denied on appeal is found in Sutton, Mitchell & Simpson Limited v. Kelore Mines Limited, [1956] O.W.N. 648 (Ont. C.A.). There, the plaintiff drilling company asserted in its pleadings that it had entered into an oral contract with the defendant requiring the defendant to pay for its drilling services on the basis of quantum meruit. Particulars were provided on this basis, and in its statement of defence the defendant denied the existence of any such contract. At trial, the trial judge did not determine whether a contract existed as pleaded, but rather found that there was a contract obliging the defendant to pay the plaintiff its drilling costs plus 10%. Laidlaw J. A., speaking for the court stated at 649:

> With great respect, it is our opinion, that the learned trial judge did not direct his mind to the issues joined on the pleadings and the issue which the parties sought to have determined. He directed his mind to an altogether different issue and he decided an issue which was not before him for trial.
>
> *In this Court the plaintiff moved to have the statement of claim amended so as to make it conform with the judgment as delivered and with the evidence given at trial. Counsel for the appellant quite properly takes the position that the amendment would create an issue which he did not endeavour to meet at trial, to which he did not direct his cross-examination, and which is so different in character and in substance that an injustice would be done to his client by the proposed amendment, and that he ought to have an opportunity to meet a new issue fully and squarely.* The question whether or not an amendment should be permitted is a matter in the discretion of the Court, and that discretion should be exercised at all times so that no injustice is done to either party. What the applicant seeks to do now is to create in this Court an issue that has not been tried. We think that is not right. [Emphasis added.]

15 This court has been critical of trial judges for ignoring the pleadings in situations much less serious than this case. For example, in Roncato v. Caverly (1991), 5 O.R. (3d) 714 (C.A.), the plaintiff asserted in its pleadings that the defendant, the plaintiff's chartered accountant, had been negligent in failing to notice that the plaintiff's book-keeper, whom the defendant had recommended to the plaintiff, had been stealing money from the plaintiff. However, in his judgment, the trial judge found the defendant liable for having negligently misrepresented the bookkeeper's qualifications and reliability when he recommended that the plaintiff hire her. Speaking for the court, I stated at 717:

> Thus, the trial judge enlarged the pleading of negligence to embrace the tort of negligent misrepresentation. In my respectful opinion, the trial judge was in error in attempting to recognise a cause of action that was basically an afterthought.

16 Reference can also be made to Bedford Construction Company Limited v. Gilbert et al., [1956] O.W.N. 293 (Ont. C.A.); Allan et al. v. New Mount Sinai Hospital et al. (1981), 33 O.R. (2d) 603 (C.A.) and Vaughan Masonry Inc. v. Toronto Aged Men's and Women's Homes, [1994] O.J. No. 3045 (Gen. Div.).

17 In this case, the respondents made no attempt to amend the pleadings at trial. The trial judge appeared to think that it was unnecessary. This is illustrated by his treatment of the issue of pre-judgment interest, one of the two issues raised in the cross-appeal, which demonstrates that he misconceived the magnitude of his departure from the original pleading. He relied upon the judgment of this court in Pagliarella v. Di Biase Brothers Inc. (1989), 68 O.R. (2d) 597 (C.A.), leave to appeal to S.C.C. dismissed (1989), 69 O.R. (2d) x, to deprive the successful respondents of pre-trial interest on $1,000,000 because there was nothing in the Insurance Act, R.S.O. 1980, c. 218, s. 214 that precluded the insurer from limiting its liability under the policy of insurance. Included within that limitation is pre-judgment interest that, unlike post-judgment interest and costs, is a component of the damages against which the insured is indemnified by the policy. Pagliarella would have been applicable had the respondents succeeded in their claim as pleaded for a declaration that the limit of Christos Kalkinis's policy with Allstate was $1,000,000, however, the judgment that the trial judge rendered was not under the policy; it was for damages for negligence. Accordingly, as the award made was not for moneys payable under the policy, the trial judge was entitled to award pre-judgment interest on the $500,000 damage award.

18 This resolution of the first issue is sufficient to allow the appeal. However, the question remains: should a re-trial be ordered on the basis of a claim in negligence? In Sutton, Mitchell & Simpson Limited v. Kelore Mines Limited, supra, the court set aside the judgment below and ordered a new trial on proper pleadings. I do not think such a disposition is appropriate in this case because the facts in evidence are totally at odds with a breach of duty on the part of the appellant's agent and point directly to the fact that Allstate's agent consistently advocated that the insured increase his coverage to the maximum available, namely $1,000,000. There was no breach of duty. To the extent that he was cross-examined as to his practice relating to appropriate coverage, Vezer testified to the effect that while as an agent he would try to get the best coverage for the customer at the lowest premium he would not lower the premium to the detriment of the customer.

19 The problem in this case was not the advice but the failure to act on it. The insured did not rely upon the Allstate agent for insurance advice, he relied upon his son-in-law. It was the son-in-law who persistently recommended that the emphasis should be on the cost of the premium not the quality of coverage. On the critical occasion when he learned of what had occurred during his absence, the son-in-law overrode the advice of the agent given directly to his father-in-law to increase the policy limits to the maximum offered by Allstate and instructed Vezer on behalf of the insured to reduce the coverage back to $500,000.

20 In addition to complying with instructions given by the customer with regard to the coverage he or she wants, a private insurance agent owes a duty to that customer to provide information about

available coverage and advice as to which forms of coverage meet that customer's needs: see Fine's Flowers Ltd. v. General Accident Insurance Co. (1977), 17 O.R. (2d) 529 (Ont. C.A.). However, in addition to proving a failure to perform such a duty, the customer must demonstrate reliance upon the agent to provide such information. In Fletcher et al. v. Manitoba Public Insurance Co. supra, Wilson J., speaking for the Supreme Court of Canada, set out (at 651) three requirements that must be met before a duty of care could arise as between the insured and Vezer. As applied to this case, they are: (1) Christos Kalkinis relied upon the information that Vezer was in a position to supply to him as to the appropriate level of the coverage for him; (2) Kalkinis's reliance was reasonable; and (3) Vezer knew or ought to have known that Kalkinis would rely on the information.

21 Requirements (1) and (3) are entirely absent in this case. As to (1), there was no evidence from the insured that he relied upon the expertise of the agent Vezer to give him advice as to coverage and indeed the record is replete with evidence that for this type of advice he always deferred to his son-in-law who was in the business of selling cars. A reasonable reliance upon the judgment or skill of the person having the specialised knowledge is an essential element of an action based on breach of fiduciary duty. As to (3), Vezer was well aware, on the basis of his past experience with Stephan and the insured, that the insured relied upon the judgment of his son-in-law and not Vezer in all matters relating to insurance.

22 The trial judge has misapplied Fletcher. The evidence he accepted was that the son-in-law had telephoned and cancelled the increase in coverage recommended by the agent. However, the insured denied that he had authorised such a call and the son-in-law denied that he made it. The insured's position was that he had accepted the recommendation of the agent to increase the coverage. In these circumstances, is it logical to posit a liability based on a failure by the agent to attempt to talk the insured out of a decision that he swears he never made? I think not. The second issue in this appeal must be decided in the negative.

Disposition

23 Accordingly, for the reasons stated above, I would allow the appeal, set aside the judgment below and enter a judgment dismissing the action with costs. The cross-appeal should also be dismissed but without costs. The appellant is entitled to its costs of this appeal.

FINALYSON J.A.
CATZMAN J.A. -- I agree.
ABELLA J.A. -- I agree.

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Time Of Request: Monday, June 13, 2016 12:24:25