COURT OF APPEAL FOR ONTARIO

CITATION: Abarca v. Vargas, 2015 ONCA 4
DATE: 20150107
DOCKET: C57916

Laskin, Rouleau and Lauwers JJ.A.

BETWEEN

Teodoro Abarca, Magaly Abarca,
Jorge Leiva by his Trustee in Bankruptcy, Mathew & Associates Ltd.,
Maria Leiva by her Trustee in Bankruptcy, Mathew & Associates Ltd.,
and Brunilda Munoz

Plaintiffs (Appellants)

and

Sandra Vargas, The Wawanesa Mutual Insurance Company and
Economical Mutual Insurance Company

Defendants (Respondent)

and

The Wawanesa Mutual Insurance Company, added by order pursuant to
s. 258(14) of the *Insurance Act*, R.S.O. 1990, c. I.8

Third Party

William G. Scott, for the appellants

George Kanellakos and Kevin Lasko, for the respondent

Heard: April 28, 2014

On appeal from the order of Justice Wendy M. Matheson of the Superior Court of Justice, dated October 18, 2013, with reasons reported at 2013 ONSC 6499.

Lauwers J.A.:

[1] Jorge Leiva and Maria Leiva were passengers in Teodoro Abarca's car when it collided with the car operated by Sandra Vargas. Ms. Vargas is insured by Wawanesa Mutual Insurance Company, but in the circumstances she is potentially underinsured. The Leivas' insurer for the purpose of underinsured automobile coverage is Economical Mutual Insurance Company.

[2] The motion judge ordered that para. 12 of the Leivas' statement of claim, in which they claimed underinsured automobile coverage from Economical Mutual, be struck out. The effect of doing so was to potentially deprive the Leivas of up to $800,000 in insurance coverage, which is the difference between the limited proceeds of $200,000 that the Leivas might be able to access from Wawanesa and the underinsured automobile coverage of $1,000,000 they purchased from Economical Mutual.

[3] The motion judge concluded this was the appropriate consequence for what she found to be an abuse of process committed by the Leivas' lawyer.

[4] For the reasons set out below, I would allow the Leivas' appeal. The unreasonable result of the motion judge's order, which risked the elimination of the Leivas' underinsured automobile coverage, is disproportionate to the abuse of process that it seeks to punish. Further, the decision is not consistent with the principles by which the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

("ROCP"), are to be interpreted and applied, or with the principles underpinning motor vehicle accident insurance law.

[5] Since the fresh evidence application establishes that the Leivas released all claims to statutory accident benefits ("SABs") from Economical Mutual, I would dismiss as moot the appeal from the motion judge's decision striking the paragraphs of the statement of claim related to SABs.

A. BACKGROUND FACTS

[6] The accident happened in the Town of Innisfil on August 26, 2007. The allegation is that Ms. Vargas ran a red light at a high rate of speed and collided with Mr. Abarca's car. The Leivas and the other plaintiffs, Magaly Abarca and Brunilda Munoz, were Mr. Abarca's passengers.

[7] The coverage limit under Ms. Vargas' policy with Wawanesa is $1,000,000. Wawanesa took an off-coverage position against Ms. Vargas on the basis that her licence was suspended when the accident occurred. If Wawanesa's off-coverage position is sustained at trial, its insurance payment on Ms. Vargas' behalf will be limited to the statutory minimum limit for automobile liability insurance of $200,000. This payment would be allocated to the various claimants on a *pro rata* basis.

[8] The Leivas' insurance policy with Economical Mutual includes underinsured automobile coverage in the form of the OPCF 44R Family

Protection Coverage Endorsement, which obliges Economical Mutual to respond if the defendant, Ms. Vargas, is underinsured. In the circumstances of this case, Economical Mutual's obligation is only triggered if Wawanesa's off-coverage position is ultimately determined to be valid and the various claims against Ms. Vargas exceed $200,000.

B. PROCEDURAL HISTORY

[9] The Leivas' counsel started a tort action against the responsible driver, Ms. Vargas,[1] on behalf of the Abarcas and the Leivas in Newmarket, which is the judicial district where the accident took place.

[10] When Wawanesa took an off-coverage position with respect to Ms. Vargas, it had itself added to the Newmarket action as a statutory third party under s. 258(14) of the *Insurance Act*, R.S.O. 1990, c. I.8.

[11] In September 2010 the Leivas' counsel brought a motion in writing, without notice, for a court order "granting leave to amend the Statement of Claim by adding Wawanesa Mutual Insurance Company and Economical Insurance Group as party defendants". This would allow the Leivas to access the underinsured automobile coverage from Economical Mutual, if necessary. The potential application of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, to bar the

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[1] The Manufacturers Life Insurance Company was also named as a defendant because Jorge Leiva had filed a claim for long-term disability benefits under a policy that does not appear to be related to any motor vehicle. It plays no role in this decision.

claim against Economical Mutual was in issue because the accident had occurred in August 2007. In the notice of motion, counsel therefore asserted that he relied on the "Discoverability Rule as my office only learned of the defendant, Vargas' licence suspension on March 22, 2010."

[12] The motion came before Quinlan J. on October 1, 2010 as a "basket motion", to be handled in writing in chambers along with other administrative orders, consent orders, and so on. She refused the Leivas' motion, stating in her endorsement that "the statutory limitation period, subject to discoverability, has expired. This motion is to be brought in open Court on notice to the parties and proposed [defendants]."

[13] Counsel did not pursue the motion in the Newmarket action on notice to Wawanesa and Economical Mutual, despite Quinlan J.'s direction. Instead, he started a new action in Toronto on May 9, 2011. The Toronto statement of claim largely duplicated the Newmarket pleading, but added three parties: Brunilda Munoz, another passenger in the Abarca car, as a plaintiff; Wawanesa, as the defendant responsible for the Abarcas' underinsured automobile coverage; and Economical Mutual, as the defendant responsible for the Leivas' underinsured automobile coverage.

[14] After some skirmishing, Economical Mutual brought the motion that is the subject of this appeal. The other defendants named in the Toronto action did not join Economical Mutual's motion.

C. THE DECISION UNDER APPEAL

[15] The motion judge found that it was an abuse of process for the Leivas to start a separate action in Toronto against Economical Mutual instead of bringing a motion on notice to add it as a defendant in the Newmarket action. She struck out the Leivas' claim against Economical Mutual for underinsured automobile coverage, taking the view that this court's decision in *Maynes v. Allen-Vanguard Technologies Inc*., 2011 ONCA 125, was the ruling precedent.

[16] Since Economical Mutual was the only defendant that moved for relief against the Toronto action, the motion judge's decision left two lawsuits pending related to the car accident: one in Newmarket and the other in Toronto. In due course the Superior Court will be required to determine the place of the trial at the instance of one of the parties.

[17] The most significant result of the motion judge's order, from the Leivas' perspective, is the potential loss of their OPCF 44R underinsured automobile coverage from Economical Mutual by the operation of the limitation period.

D. THE POSITIONS OF THE PARTIES

[18] The Leivas argue that it was not an abuse of process for them to start the Toronto action against Economical Mutual as their insurer for the purpose of underinsured automobile coverage. In their view, doing so was a legitimate alternative to moving on notice to add Economical Mutual to the Newmarket action. Even if starting the Toronto action was technically an abuse of process, they argue that the motion judge did not pay due regard to the principles underlying the ROCP, and that the order to strike was a disproportionate punishment. The Leivas concede the fresh evidence shows they settled their SABs claim.

[19] Economical Mutual argues the Leivas should have brought a motion on notice to add it as a defendant in the Newmarket action under rule 26.02(c) of the ROCP, as directed by Quinlan J. Economical Mutual's position is that the appellants improperly circumvented this rule by starting the Toronto action, and deprived it of the advantage of the onus under rule 26.02(c), which requires the moving party to persuade the court that adding the new party is necessary. Economical Mutual submits that the motion judge properly struck out the Leivas' claim against it as an abuse of process, consistent with this court's decision in *Maynes*.

E. ANALYSIS

[20] I agree with the motion judge that the Leivas abused the court's process by disregarding Quinlan J.'s direction to bring the motion on notice in the Newmarket action, but I do not agree that starting a new action was necessarily abusive, as I explain below. More importantly, the motion judge's decision left the Leivas to pursue adding Economical Mutual to the Newmarket action, which put them at risk of losing their underinsured automobile coverage by operation of the limitation period. This result was not, in my opinion, consistent with the principles by which the ROCP are to be interpreted and applied, nor with the principles underpinning motor vehicle accident insurance law. Further, this result was not compelled by this court's decision in *Maynes*. I consider each of these points in turn.

(1) Failing to Follow Quinlan J.'s Direction was an Abuse of the Court's Process

[21] Case law offers many examples of the various ways parties can abuse the court's process. The cases commonly involve the use of the court's process in a way that "would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute." (*Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227, at para. 40, quoting Goudge J.A., in dissent in *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55) The motion judge, quite fairly in my view, took umbrage

at what she considered to be counsel's cavalier and recalcitrant attitude, which extended to his explanation for his actions. (Paras. 2(e), 8) She did not err in finding that the Leivas had abused the court's process by failing to follow the direction set by Quinlan J.

(2) Starting the New Action was not an Abuse of the Court's Process

[22] However, the motion judge erred in finding that, absent the direction by Quinlan J., it was an abuse of process for the Leivas to start a new lawsuit against Economical Mutual in relation to the underinsured automobile coverage issue, for the reasons that follow.

[23] Automobile accident claims can be quite complex. Factual complexities, legal complexities, and procedural complexities all interrelate. These inherent complexities make automobile accident lawsuits a case management task for the trial courts. They must corral the lawsuits and the lawyers, set a common venue, and marshal into logical order the pre-trial steps in order to get the related cases to trial in the manner that best responds to the circumstances, the fair application of s. 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"), and the joinder rules.

[24] In cases involving two or more motor vehicles, the factual complexities can accumulate quickly. There are different parties and can be different insurers, all of whom have a legitimate stake, and who are represented by different lawyers.

This often leads to multiple lawsuits about the same set of occurrences. In many cases the full range of potential claims is not entirely clear at the outset and almost invariably evolves. The evolution of the Leivas' claims against the various defendants in both the Newmarket and Toronto actions is not unusual.

[25] The legal complexities stem from the intersection of tort law, contract law, and insurance law, which can also lead to multiple lawsuits. The procedural complexities build on the factual and legal complexities. While the tort claim frequently takes pride of place, the public policy considerations and the different procedural paths for obtaining SABs also play a role. This leads to lawsuits and claims procedures that are related but can be out of sequence.

[26] Because the parties are obliged to mediate SABs claims before bringing an action, the timing of any Financial Services Commission of Ontario dispute resolution process from the beginning to the end can be completely out of sync with the tort action. Consequently, it is impractical and unnecessary, from the timing standpoint, for the court to insist that any lawsuit over SABs must always be joined with the related tort action. To the extent that the motion judge's decision implies such mandatory joinder, it is incorrect.

[27] In view of the fairly advanced state of progress of the Newmarket action, in my opinion it would have been appropriate, and therefore not abusive, for the

Leivas to start a new lawsuit against Economical Mutual alone in relation to the underinsured automobile coverage issue.

(3) The Penalty is Disproportionately Prejudicial to the Appellants

[28] I agree with the motion judge that, having concluded the Leivas committed an abuse of process, her next task was to determine the appropriate remedy. The abuse of process to be sanctioned was the Leivas' failure to follow the direction of Quinlan J.

[29] There is no law supporting the conclusion that an abuse of process must lead inevitably to the dismissal of the associated claim. In each case the court must assess the gravity of the abuse in determining the severity of its response, bearing in mind the principle of proportionality. This approach is not surprising, since instances of abuse of process fall across the spectrum from egregiously contemptuous conduct to relatively minor breaches of procedural rules. In view of my finding that starting an action against Economical Mutual was not abusive, I would place the Leivas' disregard of Quinlan J.'s direction towards the minor end of this spectrum.

[30] In considering how it will respond to an abuse of its process, the court should take into account the entire litigation context of the matter in issue. With respect, the motion judge failed to do so in this case. The abuse at issue in this case was minor. The motion judge made an error in principle by failing to fully

consider and balance the parties' competing interests in light of the degree of that abuse.

(i) The Full Litigation Context

[31] The underlying motion in this case had special saliency because of Economical Mutual's possible limitation defence. This issue was raised by the Leivas' counsel and noted by the motion judge, at para. 17, but she appears to have disregarded it in crafting the remedy.

[32] Some of the steam may have gone out of this issue with the release of this court's decision in *Schmitz (Litigation guardian of) v. Lombard General Insurance Co. of Canada*, 2014 ONCA 88, 118 O.R. (3d) 694, at para. 20, where it was determined that the applicable limitation period only starts to run the day after a demand for indemnity is made. I note that the precise application of *Schmitz* to the facts in this case was not fully argued by the parties, and counsel asserts that some uncertainty remains.

[33] The impact of a limitation defence on the plaintiff is one of the burdens to be balanced by the court in considering how it should respond to an abuse of process. In my view, the motion judge did not give due consideration to this factor in striking the Leivas' claim for underinsured automobile coverage.

(ii) The Penalty is not Consistent with the Principles of the ROCP

[34] The general objectives of the ROCP reflect a balancing approach, as this court explained in *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544, 112 O.R. (3d) 67. This court has taken a similar balancing approach to the application of s. 138 of the *CJA*, which provides that the multiplicity of legal proceedings should be avoided. While the provisions of the ROCP related to joinder, consolidation, and pleading amendments (Rules 5, 6, and 26) reflect a preference for minimizing the number of proceedings related to a particular claim, this court has not interpreted s. 138 of the *CJA* as inevitably requiring dismissal of an action where a party has not complied rigorously with the section. See *Taylor Made Advertising Ltd. v. Atlific Inc.*, 2012 ONCA 459, 111 O.R. (3d) 221, at para.36.

[35] In striking the Leivas' claim against Economical Mutual, the motion judge failed to balance the technical procedural requirements of the ROCP and the *CJA* in the interests of justice.

(iii) The Penalty is not Consistent with Insurance Law Principles

[36] In seeking to balance the respective interests of the parties in the circumstances, the court must advert to the interests at stake in the underlying action – in this case, to insurance principles. In my view, the motion judge failed to give due consideration to this requirement. Automobile insurance is well

understood to be a form of consumer protection. The Supreme Court of Canada has endorsed the observation of Professor Craig Brown that "[i]n one way or another, much of insurance law has as an objective the protection of customers." (*Smith v. Co-Operators General Insurance Co.*, 2002 SCC 30, [2002] 2 S.C.R. 129, at para. 11)

[37] Automobile insurance policies are, consequently, more than mere commercial contracts. The entire regulatory structure of automobile insurance has become part of the social contract, and forms “part of an integral social safety net that attempts to balance economic feasibility with sound risk management principles for not just drivers and partner insurers, but anyone injured by an automobile accident.” (Erik Knutsen, “Auto Insurance as Social Contract” (2010-2011) 48 Alta. L.R. 715 at 716-17, 739)

[38] The automobile insurance system has recognized that some drivers will inevitably be uninsured or underinsured, and that this risk too must be accommodated. Underinsured automobile coverage began in Ontario in 1981 in an effort to provide “financial relief for insureds and their families from the hardships and inequities of any shortfalls in insurance compensation”, (*Despotopoulos v. Jackson*, [1992] I.L.R. 1645 (Gen. Div.), at para. 8, aff’d *sub nom Romas v. Prudential Insurance Co. of Canada*, [1996] O.J. No. 4185 (C.A.)). This court further explained the purpose of this type of coverage in *Beausoleil v. Canadian General Insurance Co.* (1992), 8 O.R. (3d) 754 (C.A.):

> The responsible citizen insures himself for the amount he considers adequate and expects other motorists to do the same. He obtains the special endorsement (and pays the additional premium) to insure himself against the eventuality of an injury caused by an irresponsible motorist who has not so conducted himself. (Para. 9)

[39] Unlike uninsured automobile coverage, which is a statutory entitlement, underinsured automobile coverage is created by contract between the insurer and the insured. The OPCF 44R endorsement provides a back-up source of liability coverage, and entitles the injured policyholder to claim against his or her own insurer for the compensatory damages he or she is "legally entitled to recover" from the inadequately insured, at-fault driver (*Chomos v. Economical Mutual Insurance Co.* (2002), 61 O.R. (3d) 28 (C.A.), at para. 22).

[40] By buying underinsured automobile coverage from Economical Mutual, the Leivas were behaving as responsible motorists seeking to protect themselves and others. The corollary of the insurance principles at issue, particularly the objective of consumer protection, is that the Leivas should only be deprived of this coverage for the very gravest of reasons.

(4) Conclusions on Balancing the Interests of the Parties

[41] While I agree with the motion judge that, by evading the direction in Quinlan J.'s endorsement, the Leivas abused the court's process, the motion judge erred in principle by failing to fully consider and balance the competing

interests of the parties before striking the claim against Economical Mutual. With respect, the Leivas' minor abuse of process does not justify the potential loss of underinsured coverage.

[42] The potential loss of this coverage by operation of the limitation period could be catastrophic for the Leivas. By contrast, aside from the legal fees associated with the two proceedings, which could be compensated by a costs award, there is no real prejudice to Economical Mutual in being obliged to provide the underinsured insurance coverage for which the Leivas paid.

[43] As the Supreme Court observed in *Sommersall v. Friedman,* 2002 SCC 59, [2002] 3 S.C.R. 109, at para. 74, the court leans away from a result "that would grant the insurer a windfall in escaping its presumed obligations while depriving the insured of the amount she would have expected to have been paid to her in the normal course of business."

[44] The principles by which the ROCP are to be interpreted and applied and the principles underlying automobile accident insurance law suggest that the Leivas' potential loss of underinsured automobile coverage is disproportionate to the minor abuse of process. The balance plainly favours the Leivas, not Economical Mutual, and the motion judge erred in failing to take this into account.

[45] In my view, cost consequences would strike the appropriate balance in the circumstances.

(5) *Maynes* is Not the Ruling Precedent

[46] The motion judge concluded that, in principle, this court's decision in *Maynes* was on all fours with the motion before her. With respect, I disagree.

[47] In *Maynes*, the plaintiffs were senior executives of Med-Eng Systems Inc. They acquired shares in Med-Eng through the company's stock option plan. Med-Eng was entitled under certain circumstances to repurchase these shares. When Med-Eng exercised the share repurchase option, the plaintiffs claimed that the repurchases were invalid. Mr. Maynes and Mr. Robichaud collectively started an action against Med-Eng and its directors in 2006, while Mr. Gingrich did so in 2007, seeking declaratory relief and an order directing Med-Eng to repurchase their shares at a price equal to fair market value.

[48] Later in 2007 Med-Eng was the subject of a successful takeover bid by Allen-Vanguard Corporation (AVC). AVC offered to purchase the outstanding shares of certain Med-Eng shareholders holding a combined interest of 70 per cent of Med-Eng's stock (the Offeree Shareholders). The Offeree Shareholders accepted and compelled the minority shareholders to sell their shares to AVC.

[49] AVC then merged Med-Eng with one of its subsidiaries to form Allen-Vanguard Technologies Inc. An escrow fund was also established, to which AVC would have recourse if Med-Eng's representations or the representations of the

Offeree Shareholders were incorrect. Otherwise, the escrow fund would be released to the Med-Eng shareholders who tendered their shares to AVC.

[50] After the close of pleadings in the original actions, the plaintiffs sought to combine their two actions and to add the Offeree Shareholders, AVC and the escrow agent as defendants. The prospective defendants refused to consent to being added. Instead of bringing a motion to add them with leave of the court under rule 26.02(c) of the ROCP, the plaintiffs started a new action against both the original and some additional defendants. This court affirmed the motion judge's decision that the new action constituted an abuse of process, and upheld the decision to strike both the plaintiffs' statement of claim in the new action and the plaintiffs' cross-motion seeking to join the new claim to the pre-existing actions.

[51] At paras. 36-46 of this court's decision, Weiler J.A. discussed the law relating to abuse of process. She found, at para. 46, that issuing the new statement of claim was an abuse of process "because it duplicates claims in the two Ongoing Actions with respect to the Original Defendants and undermines the integrity of the administration of justice by circumventing rule 26.02(c) with respect to the Added Defendants."

[52] There are a number of distinguishing features that, in my view, render *Maynes* an inapt decision to apply to this case. First, the Leivas seek relief from

Economical Mutual that is distinct from the relief claimed against the other defendants. They assert a claim against Economical Mutual for underinsured automobile coverage, which they cannot assert against any of the original defendants. This was not the case in *Maynes*, where five of the six claims asserted in the plaintiffs' new action were "virtually identical" to the original claims, and the sixth claim was for declaratory relief alone. With respect to the new claim in *Maynes* for declaratory relief, this court relied on the principle that a court should refuse to grant a declaration when other remedies are available. This court also concluded that the sixth claim disclosed no reasonable cause of action. Here, the claim against Economical Mutual is not for declaratory relief alone, and there is no suggestion that the claim fails to disclose a reasonable cause of action.

[53] Second, the Toronto action involved a claim against Economical Mutual, which was not named as a defendant in the original Newmarket action. The Leivas point out that the claim against Economical Mutual had not even been discovered at the time the Newmarket action was commenced. By contrast, at para. 28 in *Maynes*, this court noted the motion judge's finding that "key representatives" of the new defendants were already involved in the original actions. Further, Med-Eng's successor corporation remained a defendant in the original action. In *Maynes* the "new" defendants were not so new at all – a fact that is not present in the appeal before the court.

[54] Third, there is a real possibility that the claim against Economical Mutual would be out of time if it were necessary to add it to the Newmarket action, a factor that I have found to be relevant to the motion judge's selection of a proportional remedy for the abuse of process in failing to follow the direction of Quinlan J. A limitations argument was also made in *Maynes* – the plaintiffs justified commencing a new action on the basis that a "potential limitation period was approaching" (para. 30). But in *Maynes*, the significance of this fact would have been minimal given the court's conclusion that the sole new claim disclosed no reasonable cause of action. Moreover, there was no apparent risk that the plaintiffs in *Maynes* would not be able to recover from the original defendants if the new claim was struck. In contrast, the risk that the Leivas will experience a shortfall in insurance coverage – the precise risk that they paid premiums to Economical Mutual to avoid – is very real.

[55] I do not quarrel in the slightest with the legal principles discussed in *Maynes*, but they do not compel the result reached by the motion judge.

F. DISPOSITION

[56] I would allow the appeal and set aside paragraph one of the motion judge's order. This will leave the two actions in place. The parties will eventually have to determine the location of the trial, which will then affect the case management process.

[57] The parties submitted that the costs for the appeal should be $9,000 in total for the victor, with the motion costs of $6,700 following the result in this court.

[58] In my view, as a form of penalty for the Leivas' abuse of process, they should not recover the costs of the motion in the court below. I would therefore decline to set aside paragraph two of the motion judge's order. For the same reason, I would not award the Leivas the costs of this appeal.

Released: January 7, 2015 "JL"

"P. Lauwers J.A."

"I agree John Laskin J.A."

"I agree Paul Rouleau J.A."