

IN THE MATTER of a loss transfer dispute between insurers pursuant to
s. 275 of the *Insurance Act*, R.S.O. 1990, c.I.8 and
Ontario Regulations 664/688 thereunder and
The *Arbitrations Act*, S.O. 1991, c.17;

AND IN THE MATTER of an Arbitration

BETWEEN:

UNICA INSURANCE INC.

Applicant

- and -

STATE FARM INSURANCE COMPANY

Respondent

AWARD

Appearances:

Unica Insurance Inc. (Applicant): Philip Tyborski

State Farm Insurance Company/Certas (Respondent): Cary N. Schneider

Introduction:

This matter comes before me pursuant to the *Arbitration Act*, 1991, to arbitrate a dispute as between insurers with respect to a claim for loss transfer pursuant to Section 275 of the *Insurance Act*, R.S.O. 1990, c.I.8 and its Regulation 664/90.

This claim is with respect to a motor vehicle accident that occurred on August 12, 2013. As a result of that accident Jovita Estardo sustained injuries and submitted a claim for Statutory Accident Benefits to Unica Insurance Inc. (hereinafter referred to as "Unica"). The accident benefit claim of Jovita Estardo was settled. In this loss transfer matter quantum is agreed upon net of the \$2,000.00 statutory deductible at \$25,461.21.

When this arbitration was commenced initially there were issues with respect to limitation periods and laches. Those resolved prior to the arbitration and the only issue before me was one of liability/applicable rule under the fault chart.

Unica claims that State Farm Insurance Company (hereinafter referred to as "Certas") should reimburse it on a 100% basis in accordance with fault chart rule 19 (a). Certas takes the position that liability rests entirely with the Unica driver and the most applicable rule under the fault chart is 16 (4) and therefore no monies are owing pursuant to the provisions of loss transfer.

Issue:

An Arbitration Agreement was signed by both parties marked as Exhibit 1. The issue before me was stated under paragraph 2 (a) as follows:

Is the Applicant entitled to reimbursement of accident benefits paid by it to and on behalf of the claimant herein, Jovita Estardo, as a result of her involvement in the motor vehicle accident of August 12, 2013?

As noted above the crux of this issue is how this accident happened and which rule under the fault chart applies in the circumstances.

Result:

I conclude that rule 16 (4) is the rule that is applicable in the facts of this case as I have found them and outlined below. Therefore I find that Certas is not obliged to reimburse Unica with respect to the accident benefits paid to Jovita Estardo as a result of the accident of August 12, 2013.

Exhibits:

The following documents were made exhibits at the arbitration hearing which took place before me on a single day on January 23, 2018:

Exhibit 1: Arbitration Agreement dated January 23, 2018

Exhibit 2: Book of Documents of the Applicant Unica Insurance Inc.:

Tab 1 – Self Reporting Collision Report of Angelito Vicente dated August 12, 2013

Tab 2 – Statement of Jovita Estardo dated August 23, 2013

Tab 3 – Self Reporting Collision Report of Avelino Suero dated August 21, 2013

Tab 4 – Transcript from the EUO of Jovita Estardo dated February 6, 2017

Tab 5 – Transcript from the EUO of Angelito Vincente dated May 24, 2017

Tab 6 – Transcript from the EUO of Avelino Suero May 24, 2017

Exhibit 3: Photograph of Suero's ice cream truck.

In addition 2 witnesses attended to give oral evidence at the hearing: Jovita Estardo and Avelino Suero. Although requested to attend and a Summons was issued Angelito Vincente did not attend to give evidence.

Facts:

Many of the facts were not in dispute but there was a significant dispute with respect to how the accident occurred on August 12, 2013. The main dispute is the movement of each vehicle at the time the accident occurred. Each party take different positions as to whether their clients were backing up, moving forward or stopped at the time of this accident.

The accident itself occurred in a parking lot located at 94 Kenhar Drive. On that day Mr. Suero (the Certas insured) was operating a Chevrolet P30 ice cream truck. At the same time Mr. Angelito Vincente (Unica insured) was operating a 2005 Pontiac Sunfire. Ms. Estardo was a passenger in that vehicle. There was a collision between these 2 vehicles. Certas takes the position that the ice cream truck was stopped at the time of the accident and the collision occurred when Mr. Vincente was reversing out of a parking space.

Unica takes the position that the ice cream truck was reversing at the time of the accident. It claims Mr. Vincente was making a left turn into a parking space when it was struck by the reversing ice cream truck.

One other possible version that arises out of some of the evidence is that both vehicles were reversing when the accident occurred.

I carefully reviewed all the written evidence before me and in particular the transcripts of the EUOs conducted of the 3 parties. In addition I was given an opportunity to see and hear the evidence of Mr. Suero and Ms. Estardo and assess their credibility. I found Mr. Suero to be a credible and believable individual. While there were some inconsistencies in his evidence given at the hearing as compared to information on the collision centre report and his evidence on the EUO I felt that those inconsistencies were satisfactorily explained during the course of his evidence at the hearing. On the other hand I found Ms. Estardo to be a very poor witness. She was ill on the day she attended the hearing and I did take that into consideration. There were

even more inconsistencies between her evidence at the hearing and the evidence on the EUO and I did not find the explanation given with respect to that to be at all compelling.

Mr. Vincente did not attend. I did review his evidence under oath and within that there were a number of inconsistencies. I draw an adverse inference against the Applicant that Mr. Vincente did not attend. Overall I found the explanation as to how the accident occurred as presented by Mr. Suero to have more credibility than the scenario presented by Unica's witnesses.

Evidence of Mr. Vincente

The place I start in reviewing this gentleman's evidence is the Self Reporting Collision Report which was completed on the day of the accident. The evidence suggests quite strongly that this document was not completed by Mr. Vincente but completed by Ms. Estardo because Mr. Vincente's English was not satisfactory. According to his EUO Mr. Vincente could not remember who completed the document. When asked whose handwriting it was he responded he could not remember. He indicated he could read English. Clearly it was not his handwriting but he couldn't say who did write it or how that information was generated. He makes reference to the individual who completed it being a "he" when Ms. Estardo's evidence is that it was she that completed it. According to the document Mr. Vincente's speed at the time of this incident was 15 kilometres per hour. The description of the collision is:

"We are about to park and the car in front of us suddenly was backing and he hit my passenger side at the back."

There is then a diagram in which Mr. Vincente's vehicle is shown as making a left turn and the ice cream truck is in front of Vincente's vehicle. When asked on his EUO whether he told an individual that he was going at 15 kilometres an hour he indicated that he didn't remember talking about the speed. While he admitted it was his signature at the bottom his evidence on his EUO was that "I just know I was very slow".

As to the person who completed the document he states:

"Yes I remember describing what happened but I don't know who wrote it. I'm not sure if the one who wrote was accompanied me in that accident or somebody else did."

As to the accident itself Mr. Vincente's evidence was that he was about to enter the parking lot. He says he was already entering the parking space when a vehicle that was going fast quickly reversed and struck them. He says as he entered into the parking spot he saw the vehicle standing there. It was stopped when he first saw the truck. There was no one buying ice cream from the truck at the time. He says that at no time from when he first saw the truck until after the accident occurred did he hear any "beeping noises". This is an important piece of evidence and makes reference to the sound that the ice cream truck makes when it is placed into

reverse. Mr. Vincente could not give the speed as to which the truck was reversing but describes it as “really fast”. He estimated that the time from when he first saw the truck until the accident happened was 2 seconds.

Counsel for Certas pointed out inconsistencies/confusing evidence of Mr. Vincente at his EUO (see pages 18 to 21). I carefully reviewed these and I agree that the evidence was confusing. On one hand Mr. Vincente reported that the truck was reversing when he first saw it and later he says that it was stopped. His evidence was also confusing and changed on whether he himself had stopped at some point or whether he made one continuous left turn into the parking space. Without having an opportunity to hear Mr. Vincente’s evidence and assess his credibility directly I found his evidence of his examination under oath and his evidence with respect to the completion of the collision report to be very unsatisfactory.

Evidence of Jovita Estardo

Ms. Estardo was examined under oath, provided a statement and as well attended at the hearing. We also know from her evidence that she was the person who completed (presumably with assistance from Mr. Vincente) the report for the collision reporting service.

Ms. Estardo gave a statement to Unica on August 26, 2013. In her statement she says that she was a passenger in the Pontiac Sunfire. She says the vehicle belonged to her friend, Angelito, but she does not remember his last name. He is the driver of the vehicle. She says they had left a friend’s house and were on the way to check out some car parts on Weston Road. There was another individual in the passenger rear seat and she was in the passenger side front seat. She says they were proceeding on Kenhar Drive westbound with an intention to park in the parking lot. Angelito began to make a left hand turn into the parking lot but before they were able to enter the lot a previously stopped ice cream truck reversed into the passenger side. She says Kenhar Drive is one lane east and one lane west. The ice cream truck was parked on an industrial road. She could not recall whether its 4 way signals were on indicating he was stopped and she did not see any customers at the ice cream truck window.

Ms. Estardo’s EUO took place on February 6, 2017. A review of her EUO suggests that she was more or less unable to answer most questions put to her. Her number one response was “I don’t remember anymore I can’t – I don’t know.” For example she couldn’t remember the parking area where the accident occurred, she couldn’t remember the name of the store they were going, she couldn’t recall whether the car was turning into a parking spot or reversing from a parking spot. At one point she said “I think we were parked when the truck hit us.” She didn’t recall hearing any beeping noises to indicate that the ice cream truck was reversing. When asked whether her car was entering or leaving the parking spot when she came into contact with the truck she responds “I think we were just – I think we were leaving.” She also didn’t seem to remember whether they had been to the store they were planning to go to before or after the accident.

At the hearing Ms. Estardo offered an explanation with respect to her remarkable lack of memory during the course of the EUO. She says she had worked the nightshift prior to attending the EUO and had driven there straight from work. Her explanation therefore was that she was tired. However she also acknowledged that she did not tell anyone that she was tired. She never complained of it. She never offered that as an excuse during the course of the EUO as to a reason why she could not remember. She says she tried her best. I did not find this explanation to be credible. I believe if a witness had attended to give an EUO where they would have to give evidence under oath and that they were so tired that they could not remember anything that they would have asked not to proceed at that time.

Ms. Estardo's evidence at the hearing was remarkable for what she could now remember. She did say that she still had a poor memory and that she struggled to remember the accident but that she remembered more than she did when she had been examined under oath almost a year earlier. Ms. Estardo could not remember whether they were entering a parking lot or a parking spot. She says there were cars parked in the area. However she could remember that the car she was in was going forward and that the truck hit the side of their car. She couldn't recall hearing a beeping noise. She couldn't recall speaking to the other driver. She did recall going to the collision center and helping to complete the form but the handwriting on the form was not hers.

Her statement given to Unica was put to her and she didn't recall completing the statement but acknowledged it was her signature. She suggested that her memory problems could be because she was a passenger and therefore she was not really paying attention. At one point during cross examination when asked if she could now remember which way the car was going as compared to her EUO contrary to her earlier evidence she said she didn't remember which way their car was going. I do not accept Ms. Estardo's evidence as credible. At best she has little or no memory of how this incident happened.

Evidence of Mr. Suero

Mr. Suero was examined under oath on May 24, 2017. He also attended approximately 9 days after the accident at the collision reporting center with his daughter where with her assistance he completed a report. Looking as a whole at Mr. Suero's evidence I find he presents of all the individuals involved in this accident as having given the same evidence most consistently as compared to the others. While there were some inconsistencies I felt that they were satisfactorily explained. Also taking into consideration all the facts his evidence as to how this accident occurred made the most sense particularly taking into consideration this key issue of the noise the ice cream truck would make if put into reverse.

Mr. Suero gave his evidence through a Spanish interpreter both at the hearing and at the EUO. With respect to the report made at the collision reporting centre. He went with his daughter as he did not speak or read enough English. He did not attend the reporting centre until 9 days

later because his decision to do so was prompted by the fact that he had been contacted by an adjuster at Unica and also understood that a report had been made by Mr. Vincente.

It is to be noted that the collision report has written on it under item number 18 the following "improper lookout". Counsel confirmed that that was not written in as part of the actual report and was probably written in by somebody at one of either counsels' office or the insurer's office when reviewing the document.

The report indicates that Mr. Suero was going at 2 kilometres per hour when his vehicle was struck. He states:

"In the parking lot I backed up my truck slowly because one car was in front of me another car was backing up from his parking spot and hit my truck."

During cross examination much was made of the fact that Mr. Suero in this document "admitted" that he was backing up his truck slowly. His evidence was, which I believe, that he was describing the entire incident. In both his EUO and at the hearing he said his vehicle had backed up first because of the car in front of him, it had been stopped and it was when he was stopped that he was struck by Mr. Vincente's vehicle. His plan was to move forward to exit the parking lot. I found that to be a reasonable explanation of how the incident had been reported on the collision report centre document.

Mr. Suero's evidence from his EUO and at his hearing were consistent. Ms. Suero is 48 years old. His wife owned the ice cream truck and he had been in the ice cream truck business since 2008. The location where the accident occurred (the parking lot) is one where he would go every day to sell his ice cream. On the day of the accident he had been parked on the feeder lane to the parking spots for about 5 minutes. When he had finished with his customers he was preparing to leave and noted that there was a car in front of him and in order to get into the lane to leave the parking lot he would have to back up to move around the vehicle in front of him. He says he backed up slowly. He put his vehicle in reverse. When it was in reverse the "beeping" to indicate the truck was reversing went on. He describes this beeping as medium loud. The beeping only is initiated when the vehicle is in reverse not in either neutral, park or drive. He had finished his reversing and had stopped his truck, taken it out of reverse and had put it in neutral. It was at that time that he states that Mr. Vincente's vehicle reversed into him coming out of the parking space. He estimates the time between putting his vehicle into neutral and the time of the accident as being no more than 3 seconds. He did not see Mr. Vincente's vehicle before the accident because he was not looking back as he was planning to go forward. Mr. Suero claims that after the accident he got out of the vehicle and the other driver said he did not see him.

There is inconsistent evidence between Mr. Suero and Mr. Vincente as to what happened during this conversation. Mr. Vincente will say that Mr. Suero refused to give him insurance information and told him to go to Canadian Tire to get the small mark on his vehicle spray

painted. Mr. Suero says the conversation with the driver, Mr. Vincente, was that he didn't have time to go to the police station he had something to do. He says he gave Mr. Vincente his business card. There was no damage to the ice cream truck.

On cross examination Mr. Suero was questioned very hard with respect to whether he was reversing or stopped at the time of the accident. Mr. Suero remained firm that he had reversed but had stopped by the time the collision occurred.

With respect to the reverse beep Mr. Suero reported that it could be heard at least 20 metres away. It is one beep at least every second. The beep comes from the rear of the truck on the corner (see Exhibit 3) and has a noise like a horn.

Position of the Parties:

Unica submits that this is a case which falls within rule 19 (a). That rule states as follows:

Rule for Other Circumstances

19. The driver of automobile "A" is 100 percent at fault and the driver of automobile "B" is not at fault for an incident that occurs

a) When automobile "A" is backing up.

Unica takes the position that the evidence supports that the Certas ice cream truck was reversing at the time this accident occurred while their vehicle was moving forward into a parking lot and accordingly Certas should be found 100 percent responsible. Unica points to the evidence of Ms. Estardo and the evidence of Mr. Vincente to support their version of events. They also submit that the collision reports of both Mr. Vincente and Mr. Suero support their version of events. They submit they have provided reasonable explanation with respect to the discrepancies between Ms. Estardo's evidence at her EUO and at the hearing. They submit that her statement should be considered in which it is clear that Mr. Suero reversed into them. Unica submits that she is an honest witness and that I should accept her initial account as set out in her statement albeit it is clouded by her later evidence. Unica submits that Mr. Vincente is a reliable and credible witness where Mr. Suero's evidence is self-serving and not supported by the facts. With respect there is little support for Mr. Vincente being a reliable and credible witness in that he did not attend the hearing.

Certas' position is that this is a case that occurred entirely within a parking lot and as such rule 16 should apply. The relevant portion of rule 16 is outlined below:

16.

(1) This section applies with respect to incidents in parking lots.

(2) The degree of fault of the driver involved in an incident on a thoroughfare shall be determined in accordance with this regulation as if the thoroughfare were a road.

(3) If automobile "A" is leaving a feeder lane and fails to yield the right of way to automobile "B" on a thoroughfare the driver of automobile "A" is 100 percent at fault and the driver of automobile "B" is not at fault for the incident.

(4) If automobile "A" is leaving a parking space and fails to yield the right of way to automobile "B" on a feeder lane or a thoroughfare, the driver of automobile "A" is 100 percent at fault and the driver of automobile "B" is not at fault for the incident.

Certas submits that this incident and the facts as they ask me to accept fall squarely within rule 16 (4). Certas submits that as this accident did occur in a parking lot and that is not a contested fact that I should start to look at the question of loss transfer liability with rule 16. Certas submits that Mr. Suero was in a feeder lane or a thoroughfare at the time this incident occurred. Certas says that the evidence supports that Mr. Suero had backed up ice cream truck but at the time of the accident was stopped intending to proceed forward. Certas relies heavily on the fact that Mr. Suero says his reverse "beeper" would go off if he was reversing and that neither Mr. Vincente nor Ms. Estardo heard that noise. Therefore he could not have been reversing at the time the incident occurred but rather he was stopped and in neutral as was his evidence. Certas submits that Mr. Suero's evidence that he was not reversing is supported by the objective fact that his reverse warning signal was working on the date of loss and that considering its location, how loud it would be and the nearness of the Vincente vehicle that had he been reversing they would have had to have heard the warning reverse sound. Certas submits that Mr. Suero's evidence while having some inconsistencies is more credible than that of Ms. Estardo or Mr. Vincente at least the latter based on the inconsistencies set out in his examination under oath. Finally Certas submits that Unica has the onus of proof and if there is any doubt in my mind with respect to how this accident happened that should be resolved in favour of Certas on the grounds that Unica did not discharge its burden of proof.

Analysis and Conclusion:

This is a claim in loss transfer which is based on Section 275 (1) of the *Insurance Act* which provides as follows:

"The insurer responsible under Section 282 (2) for the payment of Statutory Accident Benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the

regulations involved in the incident from which the responsibility to pay the Statutory Accident Benefits arose.”

Section 275 and its regulations are a complete code that cover loss transfer as between insurers that fall within its provisions. There is no dispute in this case that the ice cream truck falls within the class or classes of automobile that is covered under Section 275 in that it is “a heavy commercial vehicle” as defined under regulation 664 (9) (1).

While counsel for Certas did give some alternative rules under the fault chart that I might consider depending on the conclusion that I drew from the evidence as to how this accident occurred, I am satisfied that the applicable rule is 16 (4). There is no dispute that this incident occurred in a parking lot and I agree with Certas that therefore one should start with this rule and if the facts fall within that rule that it should be applied.

I am satisfied that rule 16 (4) is applicable to the facts as I have found them. I find that Mr. Vincente (automobile A) was leaving a parking space. I find that the ice cream truck (automobile B) was on a feeder lane or a thoroughfare. There was not a great deal of evidence as to whether this was a feeder lane or a thoroughfare. Thoroughfare means a main road for passage into, through or out of a parking lot. A feeder lane is a road in a parking lot other than a thoroughfare. I believe from the description most parties gave that this was most likely a thoroughfare but whether it was a feeder lane or a thoroughfare it makes little difference as Rule 16 (4) is still applicable. I find that Mr. Vincente’s vehicle was reversing out of the parking space and that he failed to yield the right of way to the ice cream truck which was stopped in the feeder lane.

I make these findings based on my review of both the written evidence and the oral evidence provided to me. While the stories were diametrically different as to how this accident occurred I find that the most likely version of events was that offered through Certas’ witnesses and the evidence of Certas. This is primarily based on the fact that I found Mr. Suero, the ice cream truck driver, to be a more credible individual than Ms. Estardo. I find that Unica did not meet its burden of proof in that their evidence presented was inconsistent and in many areas not credible.

As I have concluded that rule 16 (4) is applicable to the facts as I have found them, I hold Mr. Vincente 100 percent responsible for this incident pursuant to the fault determination rules. Accordingly pursuant to Section 275 and Section 668 of the *Insurance Act* regulations Unica is not entitled to indemnification from Certas.

Costs:

Pursuant to paragraph 10 of the Arbitration Agreement the costs of the arbitration including the Arbitrator’s fees, expenses, disbursements and the cost of examination under oath is to be borne by the unsuccessful party: Unica. In addition the agreement provides that the successful

party should be awarded costs of the arbitration on a partial indemnity basis those costs to be fixed by the Arbitrator. While I award costs of the arbitration to Certas payable by Unica I am not fixing those costs at this time and I would ask counsel to make efforts to reach an agreement. If they are unable to reach an agreement then we will schedule a brief resumption so that counsel can make some submissions on the amounts that they propose I fix costs.

DATED THIS 10th day of April, 2018 at Toronto.


Arbitrator Philippa G. Samworth
DUTTON BROCK LLP