COURT OF APPEAL FOR ONTARIO

CITATION: Aviva Insurance Company of Canada v. 8262900 Canada Inc. (CarePartners/Community Nursing Services Foundation), 2024 ONCA 258
DATE: 20240409
DOCKET: M54808 & M54818 (COA-23-CV-0578)

Pepall J.A. (Motions Judge)

BETWEEN

Aviva Insurance Company of Canada

Moving Party
(Respondent by way of Cross-Appeal)

and

8262900 Canada Inc. o/a CarePartners/Community Nursing Services Foundation

Respondent
(Appellant by way of Cross-Appeal)

Tim Gleason, for the moving party

Geoffrey D.E. Adair, K.C., for the respondent

Heard: February 13, 2024

ENDORSEMENT

[1] The moving party, Aviva Insurance Company of Canada (“Aviva”), brings a motion for an order setting aside its notice of abandonment of appeal, an order granting leave to file a new factum on appeal, and, in the alternative, an order extending the time for serving and filing a notice of appeal.

[2] The respondent/cross-appellant, 8262900 Canada Inc. (CarePartners), brings a motion for directions in respect of its cross-appeal against Aviva.

[3] The respondent suffered a cyberattack that resulted in the disclosure of confidential information and a class proceeding. The respondent tendered the class proceeding on Aviva seeking defence and indemnity coverage under its insurance policy. Aviva took the position that coverage was ousted by an exclusion provision in the policy. On a without prejudice basis, the parties entered into a funding agreement providing for the defence of the proceeding and interim funding on a 60/40 basis, with Aviva funding the majority share. Their agreement provided that either party was entitled to apply to the court for a declaration on the issue of coverage.

[4] The class proceeding settled and the settlement was approved on March 2, 2022.

[5] Aviva then commenced an application seeking a determination of its rights and obligations under the policy, a declaration that it did not have a duty to defend, and an order requiring repayment of any amounts paid by Aviva toward resolution of the class proceeding.

[6] On May 1, 2023, the application judge, Koehnen J., dismissed Aviva's application. He found that an exclusion endorsement relieved Aviva of the duty to defend and indemnify with respect to personal injury claims but did not relieve it of those duties with respect to claims for bodily injury. The application judge stated at para. 34 of his endorsement: "I note as well that Aviva has not asked me to

allocate defence or indemnity costs as between the personal injury claims and bodily injury claims in the underlying action."

[7] Aviva appealed from the order and perfected its appeal on June 30, 2023. The respondent cross-appealed but did not seek any relief or specify its grounds for the cross-appeal. The respondent did not file a responding factum as required by the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, nor did it perfect its cross-appeal. The appeal was scheduled for hearing on January 17, 2024.

[8] The appellant's counsel[1] was of the view that the application judge's bodily injury claim finding would not likely be overturned on appeal and the damages would not be substantial. He communicated with counsel for the respondent who agreed that Aviva could abandon its appeal without costs. However, the respondent would carry on with its cross-appeal and its counsel expressly stated that he made no promises or commitments as to what if any position the respondent would take.

[9] On December 11, 2023, Aviva abandoned its appeal by way of a Notice of Abandonment filed with this court.

[10] Around the same time, Aviva prepared a new application that was to be issued in December but, due to an administrative error, was ultimately issued in

[1] Not counsel on this motion.

January 2024. Aviva's new application sought a determination of Aviva's proportionate liability to indemnify the respondent for the portion of damages the application judge found to be covered.

[11] The respondent elected to proceed with its cross-appeal and on December 15, 2023, delivered a supplementary notice of cross-appeal which raised an issue to which Aviva had not adverted when it abandoned its appeal. In particular, the respondent claimed that issues raised in Aviva's new application were barred by *res judicata* and issue estoppel.

[12] Aviva's counsel had not turned his mind to the possibility that the respondent would take the position that the claims in the new application were *res judicata* or barred by issue estoppel due to the first application. He interpreted the application judge's reasons as simply concluding that the issue of apportionment was not before him.

[13] If Aviva is granted leave to withdraw its notice of abandonment, it will argue that the application judge did not foreclose the claims for apportionment and if he did, he erred because he decided there was no coverage for personal injury claims and therefore there had to be an apportionment.

[14] For its part, the respondent says that Aviva failed to seek allocation in its original application and cannot now assert that argument due to *res judicata* and

issue estoppel. The respondent claims that, having failed to pursue allocation[2] before the application judge, Aviva is now required to pay the respondent the 40 percent contribution made by the respondent under the interim funding agreement. The respondent says Aviva's decision to abandon its appeal was deliberate and not inadvertent. Furthermore, it asserts Aviva's appeal has no merit. In any event, Aviva will have to address *res judicata* and issue estoppel on the respondent's cross-appeal or the new application.

[15] Aviva is not now wishing to advance the argument that the application judge erred in finding that Aviva owed a duty to defend and indemnify in respect of the bodily injury claims. It only wishes to argue that the application judge erred if he foreclosed a claim for apportionment.

[16] Turning to the applicable law, r. 61.14(3) describes the effect of abandonment. Simply stated, "the appeal or cross-appeal is at an end". The rule is silent on withdrawing or setting aside a notice of abandonment.

[17] There is limited appellate case law in Ontario on the subject of setting aside or withdrawing a notice of abandonment in civil cases. In *Hermanns v. Ingle* (2002), 158 O.A.C. 21 (Ont. C.A.), at para. 11, this court granted an order setting aside a notice of abandonment, but without elaboration.

[2] The parties seemed to use apportionment and allocation interchangeably.

[18] In *Re Rogers*, [1955] O.J. No. 372, the Supreme Court of Ontario – Appellate Division held that it had inherent jurisdiction to exercise its discretion to order that an appellant be permitted to proceed with his appeal as though the notice of abandonment had not been served: at para. 10. Without engaging in a deep discussion of the facts of that case, suffice to say they were unusual. The application had not been finally disposed of through the abandonment as other interested parties were pursuing their appeals of the impugned judgment; the appeal was not frivolous; only three days had elapsed between the service of the notice of abandonment and service of a notice of motion countermanding it; some parties had not been served with the notice of abandonment; and none of the parties had altered their positions. The court described the case as exceptional.

[19] Recently, in *Sherwood v. Cinnabar Brown Holdings Ltd.*, 2021 BCCA 88, Fenlon J.A. of the B.C. Court of Appeal had occasion to consider a motion to set aside a notice of abandonment of an appeal in a multiparty proceeding. Drawing in part on *Philipos v. Canada (Attorney General)*, 2016 FCA 79, [2016] 4 F.C.R. 268, where Stratas J.A. was faced with a motion by an appellant to resurrect and continue a discontinued appeal, Fenlon J.A. considered the following factors: the presence of exceptional circumstances warranting a set aside order; prejudice should the notice of abandonment be set aside; the merits of the appeal sought to be revived; and the interests of justice. Examples of exceptional circumstances included: situations in which a party discontinues the wrong action or appeal; a

misapprehension of instructions by the lawyer; abandonment procured by fraud; lack of mental capacity in the party abandoning; and an abandonment filed as part of a settlement that was subsequently repudiated. At para. 12, Fenlon J.A. wrote:

> In short, there must be inadvertence, mistake, or misapprehension before this Court should exercise its discretion to set aside a notice of abandonment. Strategic decisions to abandon an appeal to save costs or because of the view held about the likelihood of success do not amount to exceptional circumstances—they are, to the contrary, the ordinary reasons appeals are abandoned. As Justice Esson concluded in *Adam and Adam v. Insurance Corporation of British Columbia et. al.* (1985), 1985 CanLII 584 (BC CA), 66 B.C.L.R. 164 at 171 (C.A.), after reviewing authorities to determine the basis upon which the discretionary power to set aside a notice of discontinuance of an action should be exercised:
>
> > ... it is my view that where, as here, the grounds are simply a change of heart, based on some greater consideration of the law or the facts as to the possibility of success, that is not enough.

[20] I am satisfied that I have jurisdiction to decide Aviva's motion. Indeed, no one suggested otherwise. I must then consider whether to exercise my discretion to grant the relief requested. For the following reasons, I have decided to dismiss Aviva's motion.

[21] As Stratas J.A. stated at para. 17 of *Philipos*, "Finality matters. … If expectations of finality engendered by discontinuance are not enforced strictly and discontinuances can be easily reversed, there will be no economy. …

Discontinuance would become nothing more than a form of suspending proceedings much akin to a stay."

[22] To grant the relief requested by Aviva runs the risk of establishing a problematic precedent and, in any event, I am not satisfied that it is merited.

[23] Although it is the case that this court has repeatedly stated that counsel's inadvertence should not prejudice a client's cause (see for example *Akagi v. Synergy Group (2000) Inc.*, 2014 ONCA 731, at para. 6), I am not persuaded that Aviva's notice of abandonment was filed based on inadvertence, mistake, or misapprehension. Both Aviva's counsel on the appeal and its claims analyst acknowledged in their cross-examinations that there was nothing accidental or inadvertent about the abandonment of the appeal. The appeal was abandoned because it was thought that the application judge's bodily injury claim finding would not likely be overturned on appeal and in any event, the recovery would not be substantial.

[24] The respondent's counsel candidly concedes that there is no prejudice to the respondent. Indeed, he argues that there is no prejudice to either party because the parties will have to address the issues of *res judicata* and issue estoppel as part of the respondent's cross-appeal and on Aviva's new application in any event.

[25] Importantly, I am hard pressed to see how Aviva could succeed on an appeal as it relates to the issue of apportionment. This is because the application judge expressly stated that Aviva had not asked him to allocate defence or indemnity costs between the personal injury claims and bodily injury claims in the underlying action. This is supported by Aviva's new notice of application where it states at para. 8: "The question of the apportionment of defence costs and indemnity between the Uncovered Claims and the Covered Claims was not before Justice Koehnen on the initial application." It is difficult to see how the application judge could be criticized for not addressing an issue that was admittedly not before him. No such request was made by either party. Moreover, Aviva does not wish to challenge the application judge's conclusion relating to the application judge's finding on bodily injury. That was the subject matter of its deliberate decision to abandon its appeal.

[26] Having said that, this endorsement should not be read as suggesting that the respondent will necessarily be successful on its cross-appeal or on its position on the new application. That remains to be addressed by others.

[27] I am mindful that the respondent never filed a responding factum to Aviva's appeal, nor did it perfect its cross-appeal in a timely manner. Only when it delivered a supplementary notice of cross-appeal did Aviva's counsel appreciate that *res judicata* and issue estoppel would be advanced to deny its claim for allocation. Aviva's counsel never turned his mind to this interpretation of the application

judge's order. He always thought the issue of the proportionate allocation would be addressed later. As mentioned, he is not precluded from pursuing that position.

[28] In conclusion, I am not persuaded that the interests of justice favour granting Aviva the relief requested. Aviva's motion is dismissed.

[29] As for the respondent's cross-motion for directions, the order requested is granted save and except for the time limits which will be established by the Appeal Scheduling Unit.

[30] As agreed by the parties, Aviva shall pay the respondent $3,000 in costs on account of Aviva's motion on a partial indemnity scale plus HST. There shall be no order for costs of the respondent's motion for directions.

"S.E. Pepall J.A."