COURT OF APPEAL FOR ONTARIO

CITATION: Aviva Insurance Company of Canada v. 8262900 Canada Inc. (CarePartners/Community Nursing Services Foundation), 2024 ONCA 513
DATE: 20240627
DOCKET: COA-23-CV-0578

MacPherson, Paciocco and Wilson JJ.A.

BETWEEN

Aviva Insurance Company of Canada

Applicant
(Respondent by way of cross-appeal)

and

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

Respondent
(Appellant by way of cross-appeal)

Geoffrey D.E. Adair, K.C., for the appellant by way of cross-appeal

Sean Dewart, for the respondent by way of cross-appeal

Heard: June 11, 2024

On appeal from the order of Justice Markus Koehnen of the Superior Court of Justice, dated May 1, 2023, with reasons reported at 2023 ONSC 2641.

REASONS FOR DECISION

[1] 8262900 Canada Inc. o/a CarePartners ("CarePartners") is in the health care business and, as part of its operations, it stores health care data and other private information concerning its patients and employees. In June 2018, CarePartners'

computer system was the victim of a cyberattack, and private data was removed from its servers and disclosed on the internet. A class proceeding was commenced in 2020, alleging that CarePartners was negligent in failing to properly secure and safeguard the private information stored on its computers. It was also alleged that CarePartners breached various statutory and contractual obligations. The plaintiffs sought damages, including for serious and prolonged mental distress. They also sought punitive and exemplary damages.

[2] Aviva Insurance Company of Canada ("Aviva") issued a professional and general liability policy of insurance to CarePartners for the relevant time period. CarePartners reported the class action to Aviva and by letter dated November 10, 2020, Aviva advised CarePartners of its position that the class action did not fall within the coverage afforded by the policy because of a Data Exclusion Endorsement.

[3] In approximately July 2021, Aviva and CarePartners entered into a without prejudice funding agreement for the defence of the action and the funding of any settlement on a 60/40 basis with Aviva funding 60% (the "Funding Agreement"). This Funding Agreement provided, *inter alia,* that the payments made were without prejudice to the rights of both parties under the policy and in respect of the coverage dispute and that following completion of the settlement, the coverage issues would be resolved by way of application before the Superior Court of Justice.

[4] Aviva issued an application in the Superior Court of Justice on November 22, 2021 seeking, *inter alia*, a determination of Aviva's rights and obligations under the policy and a declaration that Aviva did not have a duty to defend CarePartners in the class proceeding.

[5] The class action was settled for approximately $3.4 million, and the settlement was approved by the Superior Court in March 2022. Payments were made by the parties in accordance with the Funding Agreement. Aviva filed an amended version of its application in September 2022.

[6] In an endorsement released May 1, 2023, the application judge found that there was no duty to defend and/or indemnify CarePartners for any personal injury claims as they were excluded, but he found there was a duty to defend and potentially indemnify CarePartners for bodily injury claims. In his decision, the application judge noted that he was not asked to "allocate defence or indemnity costs as between the personal injury claims and bodily injury claims in the underlying action."

[7] Aviva served a notice of appeal of the decision of the application judge, and CarePartners served a notice of cross-appeal. On December 11, 2023, Aviva abandoned its appeal and, around the same time, delivered a draft notice of application, seeking a determination of Aviva's proportionate liability to indemnify CarePartners for the amount paid to resolve the class action and of allocation

pursuant to the policy. CarePartners filed a supplementary notice of cross-appeal, claiming among other things that certain issues raised in Aviva's new application were *res judicata*. Aviva then brought a motion seeking to set aside its notice of abandonment of appeal. In an endorsement released April 9, 2024, Pepall J.A. dismissed Aviva's motion.

[8] The cross-appeal of CarePartners on the initial application was argued and for reasons that follow, it is dismissed.

[9] The initial application sought "a determination of Aviva's rights and obligations under a contract of insurance", "a declaration that Aviva did not/does not have a duty to defend or indemnify CarePartners" for the class action, and an order requiring CarePartners to repay any monies Aviva had paid towards the resolution of the class action. The initial application also pleaded that the outcome would assist Aviva and CarePartners concerning their respective obligations with respect to the settlement and the defence of the class action.

[10] The application makes it clear that the funding of the settlement of the class action was without prejudice to the parties' respective rights under the policy and the issue of coverage for the loss, including both the duty to defend and the duty to indemnify, was to be determined by the application judge.

[11] We do not accept the position of CarePartners on the cross-appeal that, having lost the coverage application, Aviva was obligated to pay CarePartners the

40% of the settlement amounts pursuant to the Funding Agreement. Nor do we agree that the application was an “all or nothing” decision for Aviva such that if Aviva won, the 60% of the settlement funds they had paid would be returned to them by CarePartners and if they lost, Aviva would have to pay the remaining 40% of the settlement funds to CarePartners. The application judge was asked to determine whether the Data Exclusion Endorsement excluded coverage of the claims that otherwise would be insured claims under the policy, but he was not asked to determine allocation between Aviva and CarePartners.

[12] The reasons of the application judge make it clear that he was asked to determine coverage under the policy. He found that there was no duty to defend or duty to indemnify for the personal injury claims, but there was for claims for bodily injury, which the parties agreed the underlying claims involved. It is unclear on what basis the cross-appellant submits that the application judge was wrong. We see no error in the reasons of the application judge on the coverage issues.

[13] On the cross-appeal, counsel requests this court order Aviva to reimburse CarePartners the 40% of the settlement funds that were paid to the plaintiffs in the class action pursuant to the Funding Agreement. There is no basis for this court to make such an order. The Funding Agreement was not argued before the application judge, and he was not asked to deal with the apportionment issue. There is no evidentiary record before this court to enable it to deal with the Funding Agreement or apportionment and it would not be appropriate, given the application

judge did not determine that issue. An application to determine coverage is distinct from an application to determine apportionment of liability or quantum of indemnity payments, which requires evidence on the issues of liability and damages.

[14] While counsel for CarePartners submits that the second application is *res judicata,* we do not agree. There can be no argument of *res judicata* because the second application seeks to determine allocation, which was not before the application judge. Only the issues of the duty to defend and the duty to indemnify concerning personal injury and bodily injury claims were determined on the application. Neither party asked the application judge to determine allocation arising from the Funding Agreement.

[15] The cross-appeal is dismissed. CarePartners shall pay Aviva its costs of this appeal, at the agreed-upon amount of $7,500, inclusive of disbursements and HST.

"J.C. MacPherson J.A."
"David M. Paciocco J.A."
"D.A. Wilson J.A."