CITATION: Barkey v. Aviva, 2024 ONSC 2249
COURT FILE NO.: CV-21-86702
DATE: 2024/08/09

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Morgan Norma Barkey, Plaintiff (responding party)

AND

John Doe and Aviva Insurance Company of Canada (moving party), Defendants

BEFORE: The Honourable Justice C.T. Hackland

COUNSEL: Michael R. Switzer, counsel for the Plaintiff

Siobhan McClelland, for the Defendant Aviva Insurance Company of Canada (moving party)

HEARD: February 15, 2024 in Ottawa

ENDORSEMENT

OVERVIEW

[1] This is a motion for summary judgement brought by the Defendant, Aviva Insurance Company of Canada (hereinafter referred to as "Aviva"), which insured a motor vehicle being driven by the Plaintiff, Morgan Norma Barkey (hereinafter referred to as "the Plaintiff") when she was involved in a rear end collision which occurred on March 1, 2021 (hereinafter referred to as "the collision"). The driver of the vehicle which collided with the rear of the Plaintiff's vehicle as it was stopped in front of a Starbucks drive-thru window, has not been identified, notwithstanding that both drivers got out of their respective vehicles and had a brief conversation immediately following the collision.

[2] The Plaintiff claims against Aviva under the unidentified driver coverage of her insurance policy with Aviva. Aviva resists payment on the basis that:

a. The Plaintiff could have ascertained, through reasonable due diligence, the identity of the driver or of the owner of the vehicle that struck hers, and has therefore failed to comply with the unidentified motorist provisions of her auto policy; or

b. The Plaintiff could have reported the collision to the police within 24 hours or provided proper notice to her insurer, and has not complied with the notice provisions in legislation.

The Issue

[3] Is there "no genuine issue requiring a trial" given the plaintiff's alleged failure to perform the due diligence required of her by law to identify the driver and owner of the unidentified vehicle which struck her vehicle and given her failure to meet the notice requirements under the *Insurance Act*, R.S.O. 1990, c. I.8.

Facts and Discussion

[4] As noted, when the collision occurred, the Plaintiff's vehicle was stationary in a Starbucks drive-thru line and was outside the window through which the plaintiff was about to receive the beverage she had ordered. Her vehicle was bumped from behind by the next vehicle in line.

[5] Following the accident, according to the Plaintiff's discovery evidence, both the Plaintiff and the unidentified driver got out of their vehicles and the unidentified driver spoke with the Plaintiff and inquired if she had any injuries. The Plaintiff stated that she was okay. They further proceeded to inspect the Plaintiff's vehicle for damages. They did discuss the car damages, which were apparently very minor. Aviva accurately points out at no point in this conversation did the Plaintiff obtain the unidentified driver's personal or vehicle identifying information. Specifically, she did not obtain the name, driver's licence information, insurance information, or contact information from the driver of the vehicle that rear-ended hers. She did not record or otherwise take note of the licence plate of the other vehicle, though she did describe the vehicle as a BMW, grey or black in colour, and looked at it for damages. She did not take any photos at the scene.

[6] After the conclusion of the conversation with the driver of the vehicle that hit hers, according to the Plaintiff's discovery evidence, she proceeded to walk to the Starbucks window to collect her order. She had a conversation with the female barista who apparently witnessed the collision and the Plaintiff confirmed to the barista she was able to drive. The Plaintiff walked back to her vehicle (without obtaining the barista witness's identifying or contact information) and then drove her vehicle outside the drive-thru lane.

[7] The Plaintiff then parked her vehicle in the adjacent Starbucks' parking lot and called her mother from her cell phone and then drove home. Prior to departing, she told the barista (and subsequently her mother during the phone call) that she was "ok to drive".

[8] According to the Plaintiff's discovery evidence, she subsequently attended the same Starbucks location a month after the collision and interacted with or saw the same female barista who witnessed the collision but did not collect the barista's contact information.

[9] An application for accident benefits was submitted by the Plaintiff's present counsel on or around April 26, 2021 and a statement of claim was issued on June 9, 2021, both of which documents indicated an incorrect date of the accident as having occurred on February 25, 2021. The date of the accident was corrected to March 1, 2021 at the examinations for discovery, which took place some 11 months later.

[10] Aviva states that it attempted investigations into the accident in December 2021, based on the incorrect accident date of February 25, 2021 provided in the statement of claim and the application for accident benefits. The driver and vehicle involved in this rear end collision with the Plaintiff's vehicle has never been identified.

The Law

[11] Section 265(2) of the *Insurance Act* defines an "unidentified automobile" as "an automobile with respect to which the identity of either the owner or driver cannot be ascertained". Section 5.1.3 of the Ontario Automobile Policy ("O.A.P.") defines an "unidentified automobile" as "one whose owner or driver cannot be determined".

[12] I accept Aviva's submission that, in order for the Plaintiff to succeed in her claim for unidentified automobile coverage provided by her automobile insurance policy with Aviva, which is the claim being put forward in this proceeding, the Plaintiff must establish, on a balance of probabilities, that she could not have ascertained through reasonable due diligence the identity of the driver or owner of the vehicle that injured her.

[13] I accept that reasonable due diligence entails an objective and subjective consideration of the claimant's ability in the relevant circumstances to discover and record the appropriate identifying information. So, for example, a person suffering head trauma or otherwise significantly injured in a collision would not normally be expected to take immediate steps to identify the other driver at the time of a collision, see *Lamb v. Co-operators General Insurance,* 2020 ONSC 4955. The case law also places a burden on the Plaintiff to subsequently furnish any identifying information which might identify the other driver, such as identifying a witness to the collision, if she is or becomes aware of such person.

[14] In order to establish her injuries were sufficiently severe as to prevent her from collecting identifying information at the scene of the collision, the Plaintiff would normally be expected to provide sufficient documentation from relevant professionals, particularly medical information.

[15] Aviva relies on a case similar on the facts to the present case: *Shapiro v. John Doe,* 2016 ONSC 2956, in which the Plaintiff, a pedestrian, brought a claim against her insurer, alleging he was hit by an "unidentified automobile" as defined by s. 265 of the *Insurance Act.* The Plaintiff was crossing the street when he was hit by a car. The driver of the car got out of the vehicle, asked if the Plaintiff was okay, and offered him a ride if he needed one. The Plaintiff said he was okay and walked home. The Plaintiff did not ask the driver for his name or for any other information. The insurer brought a summary judgement motion to dismiss the Plaintiff's claim against it for insurance coverage on the basis the Plaintiff had not made all reasonable efforts to identify the car owner and driver.

[16] In *Shapiro,* a law clerk employed by the Plaintiff's law firm deposed that the Plaintiff was in a state of shock and not able to make proper decisions after he was hit by the car, basing this on statements in the Plaintiff's discovery evidence and medical records attached to the law clerk's

affidavit. The Plaintiff argued he was in shock, having hit his head, and therefore, the court should conclude his decision-making abilities were impaired. The court rejected this argument and held, on the evidence presented on the motion and in the absence of any direct medical evidence from the Plaintiff, there was sufficient evidence to establish there were no genuine issues requiring a trial because the Plaintiff had not met his burden of proving that he was injured by an "unidentified motorist" within s. 265 of the *Insurance Act*. The court stated (para. 18) "if the plaintiff proceeded to trial with the evidence he has relied on in this motion, he could not succeed".

The Plaintiff's Position

[17] In the present case, the Plaintiff's evidence from her discovery transcript and subsequent corrections is the following: (question 260) "after I obtained my beverage after the collision, I got back into my automobile, drove out of the drive through lane, and parked in the parking lot. I was in shock, disoriented, detached, and sobbing. I wasn't able to drive because of my disorientation. I sat quietly for a while and then called my mother. Eventually, I drove myself home". And (question 262): "the reason I did not obtain the other driver's information is because I was in shock, disoriented, and detached after my head injury in the collision. I was not thinking clearly and was sobbing. In hindsight, I ought to have requested medical assistance and ought to have had someone obtain the other driver's information for me". Both of the Plaintiff's parents filed affidavits similarly describing the Plaintiff's condition or demeanor upon her arrival at their home. The Plaintiff's evidence is also that she hit her head on the headrest or steering wheel when her vehicle was impacted from behind. She explained that she had previously suffered several concussions or head injuries in sports accidents, prior to this collision.

[18] The Plaintiff also filed on this motion a supplementary affidavit from her counsel's law clerk, Mr. Horan, deposing that in January 2023, the Plaintiff attended a neuropsychological and psychological assessment by Dr. Kenneth Reesor in connection with this motor vehicle collision. The law clerk appended to his affidavit a medical report prepared by Dr. Reesor, dated March 18, 2023. There is no affidavit from Dr. Reesor.

[19] The law clerk's affidavit is not admissible as it does not comply with Rule 39.01. Mr. Horan does not depose that he believes the medical report to be true (see Rule 39.01(4)). More

importantly, the medical report addresses contentious facts in this proceeding and can not be presented in this hearsay manner on this motion (see Rule 39.01(5)). This procedural issue was discussed with counsel at the opening of argument. The court considered that Dr. Reesor would, in all likelihood, have been prepared to swear a brief affidavit appending his report and confirming his belief that the report is true and continues to reflect his opinions on the Plaintiff's psychological condition. He should have been asked to do so. I could have granted the Plaintiff an adjournment to obtain such an affidavit, given the importance of this medical information. Importantly, Aviva's counsel was not looking to cross examine Dr. Reesor and was prepared to deal with the information and opinion he put forward in his report, as filed. In all the circumstances, and at the court's suggestion, counsel agreed to allow reference to Dr. Reesor's report as if it was properly before the court.

[20] The key factual issue on this motion is whether the evidence supports the conclusion that the Plaintiff's condition immediately after and resulting from the collision was such that she could not reasonably be expected to gather any information to identify the other driver. Dr. Reesor's opinion, as the only medical evidence available, is important in this respect.

[21] Counsel for Aviva submits that Dr. Reesor's report is in fact irrelevant on this issue because it does not offer an opinion as to the Plaintiff's capacity at the time of the collision. Aviva also submits that the Plaintiff's capacity is well illustrated by the fact that she carried on a conversation with the other driver, briefly inspected the two vehicles, then collected her order from the barista, told the barista and subsequently her mother on the phone that she was ok to drive home and then proceeded to do so.

[22] Dr. Reesor's report does not specifically address what the Plaintiff's capabilities were immediately following the collision. In fact, he was not asked to opine on that point. Dr. Reesor notes the Plaintiff had a complicated history of concussions (apparently 4 in total) in the 2016-2021 time period. These were sports injuries. The Plaintiff was a high school senior, having just turned 18 at the time of the present collision. She went on to experience further post concussive symptoms following this collision.

[23] In Dr. Reesor's comprehensive 39 page report, he makes some observations bearing on, or from which the court might infer, the Plaintiff's functionality at the scene of the collision. I take these excerpts from the "Executive Summary" portion of his report.

- She has a pre-history of multiple concussion events… ultimately, she was successful in maintaining school, social activities, work, and other personally meaningful activities.

- At the time of the accident, however, her symptoms and conditions were well-managed with medications, therapies, and her own efforts. Her symptoms and conditions did not appear to be particularly severe, as there was no report of impairment in academic, social, occupational, recreational leisure, or other important life activities.

- Post-impact, she had an immediate headache and neck pain. Other post-impact symptomatology included dysfunctional emotional reaction and a slight confusion. The collision aggravated pre-existing symptoms, which, up to that point, had been reasonably managed. She also had the onset of new symptoms including nausea, dizziness, and light and noise sensitivity. She denied a loss of consciousness or amnesia for the events. In all probability, she sustained a concussion in the motor vehicle accident. Concussion is a form of mild traumatic brain injury.

[24] Dr. Reesor obtained this history of the collision and the aftermath from the Plaintiff:

> She was stopped at the drive through window, with her head turned to the left. Suddenly, without warning, her vehicle was impacted from behind. She was pushed forward and backward. Her head hit the steering wheel, resulting in an instant headache, then impacted with the headrest. She described immediate pain to the left side of her neck and shoulder. Starbucks staff asked her, "are you okay?" She started crying. She felt "overwhelmed".
>
> There was no loss of consciousness or amnesia for the events. There was some indication of confusion or lack of clarity in her thought. She did not obtain any

> insurance information from the individual who hit her. There was minor damage to her car and no obvious damage to the vehicle that ran into her. The driver left the scene without exchanging information.
>
> After that, she recalled getting her order from Starbucks. She remained shaken and upset. She had a pounding headache. She was dizzy. She had minor problems with her vision. She noted that "I probably shouldn't have attempted to drive home". When she arrived home, her mother "helped talk me down".

[25] After anxious consideration of the record before the court on this motion, I am not prepared to say that the moving party Aviva has discharged its burden of showing that there is no genuine issue requiring a trial. In particular, a trial is required to determine whether the Plaintiff acted reasonably when she failed to obtain any identifying information about the other driver or his vehicle. She was shaken up in this fairly minor collision and interacted with the other driver but she seems to have suffered some head trauma, possibly a concussion, and she was being treated at the time for a whole series of sports related concussions which made her vulnerable to greater trauma from head injuries.

[26] The Plaintiff, an 18-year-old high school student at the time, deposed she was very emotional and upset following the collision, a circumstance corroborated by her parents. The other driver abruptly left the area following their brief conversation in the drive-thru line, without offering any identifying information. The Plaintiff may well have had a reasonable excuse for a lack of apparent diligence in obtaining the identification of the other driver or vehicle. This excuse, as an evidentiary matter, is partly a matter of credibility and is closely bound up with the medical issue of what head injuries or exacerbation of such injuries the Plaintiff actually suffered in the collision. I find an important triable issue exists to fairly resolve these issues and in the court's view, requires a trial.

Failure to Comply with Statutory Notice Requirements

[27] The other issue before the court is the Plaintiff did not report the collision to the police within 24 hours (or at all) and failed to provide an accident report to the insurer within 30 days,

both as required pursuant to O. Reg. 676 of O.A.P. Section 8(1) of O. Reg. 676 bars an action for amounts provided for under s. 265(1) of the insurance contract unless the requirements of the regulation have been complied with.

[28] However, section 129 of the *Insurance Act* provides that where there has been imperfect compliance by an insured with a statutory condition and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may grant relief against the forfeiture or avoidance on such terms as it considers just. The remedy of relief against forfeiture is equitable in nature and purely discretionary.

[29] The test to apply when considering whether an insured should be granted relief from forfeiture was stated in *Kozel v. Personal Insurance Co*., 2014 ONCA 130. The Plaintiff is required to demonstrate that her conduct was reasonable; that the breach of the condition was not grave; and, that there is a disparity between the value of the property forfeited and the damage caused by the breach.

[30] Whether or not there is evidence of prejudice to the defendant and whether or not there is evidence that the defendant would have done anything differently can be takin into account in making a finding that there is a genuine issue for trial in relation to the issue of whether a Plaintiff should be granted relief from forfeiture: *Manuel v. State Farm Mutual Insurance,* 2016 ONSC 7066 at para. 36.

[31] The court is of the view that there is a genuine issue for trial as to whether the Plaintiff should be granted relief from forfeiture. On the facts of this case, the relief from forfeiture issue also depends significantly on the nature and extent of the head injury suffered or exacerbated by the collision (i.e., the same issue as whether the Plaintiff acted reasonably in failing to collect the required identifying information at the scene of the collision). Further, the court would need to consider the Plaintiff's post collision level of disability within a reasonable period following the incident.

[32] In addition, consideration should be given to the fact that there may well be no prejudice to Aviva resulting from the resultant delays (if any) in their investigation of the collision. It is

speculative as to whether earlier access to a neighbouring video camera on a car wash building in the vicinity or an effort to find and interview the barista who may have seen and remembered the other driver would yield any identifying information. The possibility that filing a police report would result in an investigation in the circumstances of this case seems remote (minor rear end collision on private property, wherein the respective drivers spoke to each other and detected minimal or no visible property damage, and an obvious absence of any criminal conduct).

Disposition

[33] For the above reasons, the moving party Aviva's motion for summary judgement is dismissed. If the Plaintiff wishes to seek costs, she is to provide concise written submissions within 30 days of the release of this endorsement and the moving party (Aviva) may respond within 30 days of receiving the Plaintiff's submission.

Justice Charles T. Hackland

Date: August 9, 2024

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ENDORSEMENT

Justice Charles T. Hackland

Released: August 9, 2024