IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *MacPherson v. White*,
2016 BCSC 1151

Date: 20160622
Docket: Dawson Creek
Registry: 17908

Between:

Joseph Brent MacPherson

Plaintiff

And

Dallas Roy White

Defendant

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment
(In Chambers)

Counsel for the Plaintiff:	Barbara Webster-Evans
Counsel for the Applicant, Northbridge Insurance:	Simrat Harry
Counsel for the Defendant:	Fareeha Qaiser
Place and Date of Hearing:	Vancouver, B.C. June 15, 2016
Place and Date of Judgment:	Vancouver, B.C. June 22, 2016

INTRODUCTION

[1] In this action, the plaintiff, Joseph Brent MacPherson, claims damages for personal injuries arising out of a motor vehicle accident which occurred on February 27, 2006 on Highway 97, near Dawson Creek, British Columbia. The plaintiff suffered significant injuries when the vehicle he was driving was struck head-on by a vehicle driven by the defendant, Dallas Roy White.

[2] The applicant, Northbridge Insurance ("Northbridge"), is the liability insurer of the vehicle operated by the plaintiff at the time of the accident. Northbridge applies to be added as a defendant with full rights of participation as a party on contested issues of liability and damages.

[3] The Northbridge policy had a SEF 44 Family Protection Endorsement (the "SEF policy"), which provided first party underinsured liability coverage for the plaintiff.

[4] Northbridge has received notice the plaintiff intends to make a claim under the SEF policy in the event the defendant's insurance and assets are not sufficient to satisfy any judgment the plaintiff obtains in this action. The applicant contends it is just and convenient that all issues of liability and damages, both as between the plaintiff and the defendant, and between the plaintiff and Northbridge, be determined in this action.

[5] The plaintiff opposes the application. He says Northbridge has no statutory or contractual right to be added as a defendant. Further, the plaintiff argues that Northbridge is neither "a person who ought to have been joined as a party" nor a person whose participation is "necessary to ensure that all matters in the proceeding may be effectually adjudicated on", under Rule 6-2(7)(b) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. He also submits that it would not be just and convenient to determine in this action any issue that may arise between the plaintiff and Northbridge relating to liability or damages. As yet, the plaintiff has made no claim and Northbridge has made no payment under the SEF policy. Further, the plaintiff

says he would be prejudiced by the addition of the applicant as a party. The trial would be protracted. He would have to contend with two sets of opposing counsel. If he were unsuccessful at trial he might incur two sets of costs.

[6] The defendant takes no position on this application.

FACTS

[7] At the time of the accident, the plaintiff was driving a pick-up truck licensed in the province of Alberta, owned by his employer Corrpro Canada Inc., and insured by Northbridge.

[8] The defendant resides in the state of Alaska in the United States of America, and is insured by an American insurer.

[9] The Workers' Compensation Board has paid benefits to the plaintiff and is subrogated to his claim under s. 10(6) of the *Workers' Compensation Act*, R.S.B.C. 1996, c. 492.

[10] The plaintiff commenced this action by writ of summons and statement of claim filed on February 21, 2008.

[11] The defendant filed a response to civil claim on December 16, 2014. The materials filed on this application provide no explanation for the defendant's delayed response to the plaintiff's claim.

[12] On December 17, 2014, counsel for the plaintiff notified Northbridge they had been retained by the Workers' Compensation Board on behalf of the plaintiff. Counsel requested information concerning the SEF policy and the limits of underinsured motorist protection coverage under that policy.

[13] Northbridge anticipates that the defendant's third-party limits will be insufficient to satisfy a settlement or judgment in this action.

[14] On February 12, 2015, the plaintiff was examined for discovery, for one day, by counsel for the defendant.

[15] The parties have not set a trial date for this action.

[16] On December 21, 2015, plaintiff's counsel notified the applicant that Mr. MacPherson will be seeking payment from Northbridge under the SEF policy of the balance of any judgment that cannot be collected from the defendant.

[17] Northbridge has waived any contractual limitation defence it may have under the SEF policy regarding late notice of the accident and any claim of the plaintiff for underinsured motorist protection.

[18] As of April 9, 2015, the Workers' Compensation Board had made payments to or on behalf of the plaintiff totaling $458,884.74. Those payments included, in addition to pension and compensation for lost earnings, payments to the Medical Services Plan and to healthcare and vocational rehabilitation providers.

[19] There is a dispute between the plaintiff and Northbridge concerning whether Workers' Compensation benefits are deductible from any amounts payable to Mr. MacPherson under the SEF policy.

The SEF Policy

[20] The following provisions of the SEF policy are relevant to this application:

> 5. **Determination of the amount and eligible claimant is legally entitled to recover**
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> …
>
> f. No findings of a Court with respect to issues of quantum or liability are binding on the Insurer unless the Insurer was provided with a reasonable opportunity to participate in those proceedings as a party.
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> 9. **SUBROGATION**
>
> Where a claim is made under this endorsement, the Insurer is subrogated to the rights of the eligible claimant by whom a claim is made, and may maintain an action in the name of that person against the inadequately insured motorist and the persons referred to in paragraph 4.b.

> 10. **ASSIGNMENT OF RIGHTS OF ACTION**
>
> Where a payment is made under this endorsement, the Insurer is entitled to receive from the eligible claimant in consideration thereof an assignment of all rights of action, whether judgment is obtained or not, and the eligible claimant undertakes to cooperate with the Insurer, except in a pecuniary way, in the pursuit of any subrogated action or any right of action so assigned.

ISSUE

[21] Should the court exercise its discretion to add Northbridge as a defendant under Rule 6-2(7)(b) or (c) of the *Supreme Court Civil Rules*?

DISCUSSION AND ANALYSIS

Addition of Parties: Applicable Legal Principles

[22] Rule 6-2(7) which governs the addition of parties to a proceeding, provides in relevant part:

> At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
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> …
>
> (b) order that a person be added or substituted as a party if
>
> (i) that person ought to have been joined as a party, or
>
> (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
>
> (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
>
> (i) any relief claimed in the proceeding, or
>
> (ii) the subject matter of the proceeding
>
> that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[23] Rule 6-2(7)(b) is concerned with remedying defects in the proceedings as they stood before the application to add a party, and has a narrow application. The court must decide if the person ought to have been joined as a party, or the person's participation in the proceeding is necessary to ensure that all matters may be

effectually adjudicated. The court may only exercise its discretion to add a party under Rule 6-2(7)(b) if one of those conditions is met; otherwise the application under that subrule must be refused: *Alexis v. Duncan*, 2015 BCCA 135 at para. 15.

[24] Under Rule 6-2(7)(c), the court can order a person be added as a party if there exists, between the person sought to be added and any party to the proceeding, "a question or issue relating to or connected with the relief claimed in the proceeding or the subject matter of the proceeding" and "in the opinion of the court, it would be just and convenient to do so". The court has a discretion to add a party under Rule 6-2(7)(c) which must be exercised judicially. The chambers judge determines whether or not joinder of the new defendant is just and convenient in any particular case in accordance with the evidence adduced and guidelines provided by the authorities: *Alexis* at para. 17; *Letvad v. Fenwick*, 2000 BCCA 630 at para. 29. On the first branch of the test, the court must be satisfied that a real, rather than a frivolous issue exists between the plaintiff and the person sought to be added: *Strata Plan LMS 1816 v. Acastina Investments Ltd.*, 2004 BCCA 578 at para. 3. Factors which a chambers judge is required to take into account in the exercise of discretion under Rule 6-2(7)(c) include delay, prejudice to the respondents to the application, the extent of the connection, if any, between the existing claims and the proposed new cause of action, and the "overriding question" of what is just and convenient: *Teal Cedar Products (1977) Ltd. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 (C.A.).

Addition of Northbridge: Application of Legal Principles to Facts

Rule 6-2(7)(b)

[25] Here, Northbridge, as the plaintiff's motor vehicle liability insurer, is not a party that ought to have been added to Mr. MacPherson's action in negligence against the defendant. Nor is Northbridge's participation necessary to ensure that all matters in the existing action between the plaintiff and defendant are effectually adjudicated. The plaintiff and the defendant are each represented by counsel and have joined issue on both liability and quantum. Northbridge's participation is not

necessary for the effective determination of those issues as between the plaintiff and the defendant, or to remedy any defect in the proceedings.

Northridge has failed to establish either ground for its addition as a party under Rule 6-2(7)(b).

Rule 6-2(7)(c)

[26] I turn now to consider whether the applicant should be added as a party under Rule 6-2(7)(c).

[27] Northbridge seeks to be added as a defendant in the tort action to address issues of liability and damages. The insurer wishes to protect its contractual right of recovery from the defendant under paragraph 9 of the SEF policy. Northbridge says that if it is not given the opportunity to participate in this action and contest issues of quantum and liability with the plaintiff, then it may re-litigate those issues before it makes any payment to the plaintiff under its underinsured motorist coverage.

[28] The applicant relies on the decision of Mr. Justice Brooke in *Tichit v. Jones*, 2002 BCSC 1888. There, the court allowed the application of the plaintiffs' underinsured liability insurer to be added as a defendant under Rule 15(5)(a) of the former *Supreme Court Rules*, and to join issue on both liability and quantum. The insurer relied on an insurance contract identical to the SEF policy in the case at bar. *Tichit* is the only authority counsel were able to find where a judge of this court has granted leave to a plaintiff's liability insurer to be added as a defendant in order to participate in the underlying action.

[29] For his part, the plaintiff contends that there is no question or issue between him and Northbridge unless and until he obtains a judgment that the defendant White is unable to satisfy. The plaintiff emphasizes that his right to claim against Northbridge is contingent upon him first obtaining an unsatisfied judgment.

[30] The plaintiff argues that paragraph 5(f) of the SEF policy does not give Northbridge a contractual right to be added as a party. Rather, paragraph 5(f)

preserves the right of the applicant, as an underinsured motorist protection insurer, to argue that if it does not have the opportunity to participate in the underlying tort action, it is not bound by the findings of the court in that proceeding on issues of liability and quantum.

[31] In *Pope and Talbot Ltd. (Re)*, 2011 BCSC 548, Mr. Justice Walker, after an extensive review of the authorities, held at para. 18 that as a matter of general principle a liability insurer should not be permitted to participate in the defence of the underlying action as a party or through its coverage counsel. As Mr. Justice Walker explained, particularly where coverage is in issue, the insured party and the insurer have divergent interests. Participation in the underlying litigation could permit the insurer to "sculpt" the case so as to vitiate coverage.

[32] In *Pope*, the court stated the following principles at paras. 19-25:

> [19] The underlying action is not the forum to determine coverage issues. There is no provision in the *Rules of Court* that permit an insurer to add itself as a party or intervene in an underlying action.
>
> [20] Nor does a plaintiff in an underlying action have standing to participate in coverage litigation between an insured and insurer.
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> [21] There are a few exceptional instances where courts have permitted coverage issues to be determined in advance of the determination of the issues in the underlying action. It is rarely done and only when there is a complete absence of a factual controversy in the underlying litigation: [citations omitted]
>
> [22] The automobile insurance regime in British Columbia is an exception to this rule: *Insurance (Vehicle Act)*, R.S.B.C. 1996, c. 231. It permits automobile insurers to add themselves as third parties to an underlying action where there is an actual or alleged coverage breach because automobile insurers face an absolute liability to plaintiffs even where an insured is in breach of the policy: ss. (1), 76(6), 77(3). Even when an insurer adds itself as a third party, coverage issues are not to be determined in the underlying action. In *Bliefernich*, Southin J.A. made the following point at p. 8 when dealing in the context of that statutory regime:
>
> > But, it is not, under this rule, [Rule 22 of the previous *Rules of Civil Procedure*], or any other rule or statute, open to the insurer to have coverage issues determined in the victim's action.
>
> [23] The same view was taken in *AXA Pacific Insurance Co. v. Elwood*, 2000 BCSC 1248 at para. 35 and *East Kootenay Realty Ltd. v. Gestas Inc.* (1986), 21 C.C.L.I. 230 (S.C.).

> [24] Cases decided under the former *Rules of Court* did not interpret Rule 15-5, now Rule 6-2(7), to allow insurers to be added as parties to an underlying action in order to determine coverage issues.
>
> [25] According to *AXA Pacific* at para. 26, "[f]or a person to be joined as a party to a proceeding, that person must have a legal or equitable interest in the subject matter of the proceeding. A commercial interest is not sufficient". The same approach was taken in *British Columbia Development Corp. v. Spun Cast Industries Ltd.* (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.).

[33] Under s. 24(3) of the *Insurance (Vehicle) Act*, the Insurance Corporation of British Columbia has the statutory right to be added as a nominal defendant to defend to an action where it is alleged that bodily injury, death or property damage is caused or contributed to by an unidentified driver.

[34] Under s. 77(3), an automobile insurer who denies liability to an insured may add itself as a third party, and has the right to contest both the insured's liability to any party claiming against the insured and the quantum of damages.

[35] Neither s. 24 nor s. 77 of the *Insurance (Vehicle) Act* applies in the circumstances of this case. The applicant has no statutory right to be added as a party to this action.

[36] In *Pope*, a liability insurer providing coverage to its bankrupt insured on a reservation of rights basis sought unsuccessfully to participate in the underlying commercial litigation. Mr. Justice Walker distinguished *Tichit* on the basis that case fell within the automobile insurance exception to the general rule that a liability insurer will not be permitted to participate in the defence of the underlying litigation. The court stated at paras. 45 and 46:

> [45] XL also relies on *Tichit v. Jones*, 2002 BCSC 1888. There, the Court permitted an out-of-province automobile insurer, Guardian Insurance Company of Canada ("Guardian"), to be added as a party to an underlying automobile action in view of its residual interest to provide underinsured motorist benefits. In my opinion, that case is of no assistance to the facts of this case. The order was made in the context of a statutory regime that permitted, as it does now, automobile insurers to add themselves as parties: s. 161, *Insurance Act*, R.S.B.C. 1996, c. 226 (that section was subsequently repealed by 2003-94-56, effective June 1, 2007 (B.C. Reg. 166/2006)).
>
> [46] Further, Mr. Justice Brooke construed the policy wording (endorsement S.E.F. 44) to allow Guardian to be added as a party. He said at para. 7:

> Moreover, I note that under the language of the S.E.F. no. 44 endorsement upon which Guardian relies, it contemplates Guardian being added as a party and that would not have been its status simply as the insurer entitled to or perhaps obliged to appoint counsel in respect of the third party claim.

S.E.F. 44, entitled "Family Protection Endorsement", provided at para. 5(f):

> No findings of a Court with respect to issues of quantum or liability are binding on the Insurer unless the Insurer was provided with a reasonable opportunity to participate in those proceedings as a party.

[37] In *Pope*, the court also noted that Brooke J. took a broad view of whether prejudice would result from the addition of the insurer and concluded there was no prejudice to any of the parties. In *Tichit*, the court exercised its discretion to restrict the insurer's participation in order to ensure the trial date would not be lost as a result of the insurer's late entry in the proceedings.

[38] In *Tichit*, the Guardian Insurance Company of Canada ("Guardian") was the insurer of the plaintiff driver, Mr. Tichit, and of his wife and passenger, the plaintiff Carolyn Tichit, in respect of underinsured liability coverage.

[39] After the defendant Jones' truck collided with the vehicle operated by the defendant Simmons, Mr. Tichit's vehicle struck the Simmons vehicle. Mr. Simmons died later. The plaintiffs claimed against both Mr. Simmons and Mr. Jones, each of whom alleged that the other and Mr. Tichit were wholly or partly at fault. Both Mr. Jones and the estate of Mr. Simmons had delivered third party notices to Mr. Tichit claiming contribution and indemnity against him in respect of any liability they might have to Mrs. Tichit.

[40] Guardian claimed that a residual claim was being made against it, and that as a party whose interest was affected, it was entitled to join issue with its insured, Mr. Tichit, regarding liability and quantum.

[41] Regarding the third party claims against Mr. Tichit for contribution and indemnity for damages payable to Mrs. Tichit, Guardian, in its own right and on behalf of Mr. Tichit, had settled with Mrs. Tichit, on terms that any liability of the

defendants to Mrs. Tichit would be reduced in proportion to the degree of fault of Mr. Tichit.

[42] Guardian relied upon an SEF 44 Family Protection Endorsement identical to the SEF policy in the case at bar. The insurer argued that paragraph 5(f) afforded the insurer a contractual right to participate as a party in the action to contest issues of quantum and liability with Mr. Tichit.

[43] In *Tichit*, unlike the case at bar, the plaintiffs did not oppose the insurer's application. One of the defendants argued that under British Columbia law, tort and insurance issues could not be joined and decided in the same action. That defendant also argued that it was unnecessary to join Guardian because the insurer had appeared to the third party notice and could address issues of liability and quantum in that way. The defendant also contended that the addition of Guardian as a defendant would result in an unwarranted increase in the complexity, time and expense of the action.

[44] At para. 7, Brooke J., referring to paragraph 5(f), noted the SEF 44 endorsement contemplated the insurer being added as a party.

[45] While paragraph 5(f) of the SEF policy contemplates that an insurer may be added as a party, it does not confer a right to party status in the underlying litigation. As the plaintiff submits, paragraph 5(f) preserves the right of the insurer to argue it is not bound by the findings of a court on quantum or liability unless the insurer was provided with a reasonable opportunity to participate in those proceedings as a party.

[46] Northbridge, as a liability insurer seeking to be added as a defendant to a motor vehicle tort action must still satisfy the test under Rule 6-2(7)(c).

[47] In *Tichit*, at para. 9, the court held that while the *Insurance (Motor Vehicle) Act* precluded Guardian from setting up any defence to the plaintiffs' claim that could not be advanced by a British Columbia insurer, nothing in that *Act* prevented the addition of Guardian as a party defendant on the issues of quantum and liability.

[48] Here, the applicant and the plaintiff agree that s. 88(b) of the *Insurance (Vehicle) Act* prohibits Northbridge from setting up any defence to the plaintiff's claim that could not be set up by a British Columbia liability insurer.

[49] At paras. 10 and 11, Brooke J. held:

> [10] In addressing an application under Rule 15(5)(a), I must be satisfied that an issue or question relating to the relief claimed or the subject matter of the proceeding exists between the applicant and one or more of the parties. I am satisfied that the issues of quantum and liability in the main action are central to the obligation of Guardian under its contract of insurance. Next, it must be just and convenient to add Guardian as a party. First of all, I am satisfied that it is just to avoid a multiplicity of proceedings upon a common issue. I am satisfied that the discretion given the court under Rule 15(5)(a) should be generously exercised to enable effective adjudication upon all matters in dispute without the delay, inconvenience and expense of separate actions and trials. Here, I refer to the reasons of Madam Justice McLachlin (as she then was) in *Robson Bulldozing Ltd. v. Royal Bank of Canada et al.* (1985), 62 B.C.L.R. 267 (S.C.).
>
> [11] Affording Guardian an opportunity to contest issues and liability of quantum will avoid the prospect of a second trial on these issues and the risk of inconsistent or contradictory verdicts. I am not satisfied there is any prejudice to the defendant, the estate of Mr. Simmons, or to the other parties if Guardian is added as a party. However, in exercising a judicial discretion, the court may restrict Guardian's participation such that the trial date, now fixed for November of this year, will not be lost by reason of Guardian's late entry into this action as a defendant. I do so.

[50] In the case at bar, as in *Tichit*, the insurer does not allege any breach of coverage, and does not seek to raise issues of coverage in the underlying litigation.

[51] Because the insurer had settled with one of the parties covered by its underinsured motorist protection policy, *Tichit* is distinguishable on its facts from the case at bar.

[52] However, although Guardian had settled with Mrs. Tichit, it had not settled Mr. Tichit’s claim. Therefore, as the court held, issues of quantum and liability in the main action were central to Guardian's obligation under its contract of insurance with Mr. Tichit. Accordingly, the court was satisfied that an issue or question relating to the relief claimed or the subject matter of the proceeding existed between the insurer and one or more of the parties.

[53] I am similarly satisfied that a real issue exists between Northbridge and the plaintiff. In *Tichit*, the insurer's participation as a party was not contingent upon the settlement of both of its insured's claims for underinsured motorist protection. Here, the plaintiff has given notice of its intention to claim against the applicant under the SEF policy, although the plaintiff will not be able to bring an action to enforce that claim until it has obtained an unsatisfied judgment against the defendant. In my view, Northbridge has a direct interest in the determination of its obligations to the plaintiff under the SEP policy. That issue or question is connected with the relief claimed and the issues of liability and quantum raised between the plaintiff and the defendant. Northbridge has met the first branch of the test under Rule 6-2(7)(c).

[54] In *Tichit*, the court found that it was just and convenient to add the insurer as a defendant in order to avoid a multiplicity of proceedings and to ensure the effective adjudication of all matters in dispute without the delay, inconvenience and expense of a second trial and the risk of inconsistent or contradictory verdicts.

[55] Those considerations are equally applicable here.

[56] I also take into account the fact that there has already been significant delay in the prosecution of this action. On the limited evidence adduced on this application, I am unable to determine the causes of that delay, or attribute responsibility for the delay to either the plaintiff or the defendant. However, the interests of all parties, and particularly the plaintiff, will be served if all matters in dispute are resolved without further, unnecessary delay.

[57] The participation of Northbridge may extend the time required for the trial, but it need not result in any significant delay in getting to trial.

[58] I recognize the potential for the plaintiff to be prejudiced by incurring the additional time and expense of a proceeding where his claims are contested by two defendants. However, in my view, the potential prejudice to the plaintiff may be ameliorated by placing some limits on the applicant's participation in this litigation.

[59] Weighing all of these factors, I find that it is just and convenient to add Northbridge as a defendant in order to ensure that all issues of liability and damages, as between the plaintiff and the defendant White, and as between the applicant and the plaintiff, may be determined in this action.

CONCLUSION

[60] This Court orders that Northbridge be added as a party defendant on the following terms:

1. Northbridge will file and deliver a response to civil claim within 21 days of this order.
2. Northbridge may not examine the plaintiff for discovery, but may adopt and use the examination for discovery of any party adverse in interest.
3. Any independent medical examination of the plaintiff on behalf of Northbridge will be conducted near the residence of the plaintiff before December 31, 2016 and at a time and place convenient to the plaintiff and in consultation with the other defendant.

[61] The applicant will have the costs of this application as costs in the cause.

"PEARLMAN J."