

In the Court of Appeal of Alberta

Citation: D'Andrea v Economical Mutual Insurance Company, 2022 ABCA 337

Date: 20221018
Docket: 2101-0183AC
Registry: Calgary

Between:

Teresa D'Andrea

Respondent

- and -

Economical Mutual Insurance Company, operating under the trade name and style of “Economical Insurance Company”, and “Economical Insurance”

Appellant

The Court:

**The Honourable Justice Frans Slatter
The Honourable Justice Frederica Schutz
The Honourable Justice Jolaine Antonio**

Memorandum of Judgment

Appeal from the Decision by
The Honourable Justice R. Nation
Dated the 15th day of June, 2021
Filed on the 2nd day of July, 2021
(Docket: 1706 00540)

Memorandum of Judgment

The Court:

[1] The issue in this appeal is whether under the terms of the SEF 44 endorsement on her automobile insurance policy the respondent is entitled to coverage for injuries she suffered. The issue was resolved through a summary trial based on a Statement of Agreed Facts.

[2] The respondent was injured when she attempted to stop someone from stealing her car. When she realized what was happening, she ran towards the car and leaned into the open window. She was dragged by the moving vehicle for about 40 feet until she fell off. Since the vehicle was being used without her consent, the respondent's coverage depended on her being "struck" by the vehicle while not being an "occupant" of the vehicle. The trial judge found that the respondent was not an "occupant" of vehicle, but that she was "struck" by it, entitling her to coverage.

[3] The SEF 44 endorsement is a standard form regulated contract, and the standard of review for its interpretation is correctness: *Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para. 24, [2016] 2 SCR 23. The facts are set in the Statement of Agreed Facts. The inferences the trial judge drew from those facts will only be reversed on appeal if they disclose palpable and overriding error, even though the trial proceeded on a paper record: *Housen v Nikolaisen*, 2002 SCC 33 at paras. 19, 24-25, [2002] 2 SCR 235; *Pacer Construction Holdings Corporation v Pacer Promec Energy Corporation*, 2018 ABCA 113 at para. 91.

[4] The policy reads:

2. OCCUPANT DEFINED

In this Policy the word "occupant" means a person driving, being carried in or upon or entering or getting on to or alighting from an automobile.

3. CONSENT OF OWNER

No person shall be entitled to indemnity or payment under this Policy who is an occupant of any automobile which is being used without the consent of the owner thereof.

Read together, the effect of these two provisions is to deny coverage to anybody who is driving the vehicle without the consent of the owner and anybody who, with that person, is an occupant of the vehicle.

[5] The appellant argues that the respondent was an "occupant" because she was either getting into the automobile, or was being "carried" by it. The trial judge found as a fact that the respondent was merely attempting to get the attention of the thief to stop him from taking the car and did not

intend to “get into” the car while it was under the control of an unknown third person. This finding is entitled to deference on appeal.

[6] The trial judge continued:

In terms of the argument that the plaintiff was being carried upon the vehicle, I find that holding onto a vehicle when the driver swerves and accelerates, puts the plaintiff in an emergent situation. It would not on a plain reading of the policy, taking into account that this is a policy of insurance, interpret the words “being carried upon” to include being dragged beside a vehicle. “Being carried upon” would generally relate to someone being transported upon the car. There may be many circumstances where that may happen, where someone is upon the car, or sitting on the car, but this is not one of them.

This is a justifiable application of the policy wording to the facts. For example, if a pedestrian crossing the street was run over by a vehicle and dragged for some distance, one would not say that the pedestrian was being “carried upon” the vehicle. There is a boundary between being “dragged” and “being carried upon”.

[7] The trial judge also found that being dragged by the vehicle in this way amounted to being “struck” by the vehicle. An eligible claimant under the SEF 44 endorsement included the named insured when “not an occupant of an automobile who is struck by an automobile”. The Statement of Agreed Facts read:

13. The Plaintiff immediately turned around and sprinted towards the Vehicle. She yelled at Stokes [the thief] to “get out of the Vehicle” and leaned into the open window of the driver side door.

14. Stokes veered out into the street and accelerated the Vehicle. The Plaintiff held onto the driver’s side door and was dragged for approximately 40 feet until Stokes further accelerated, causing her to fall and land on her face and right leg.

The trial judge reasoned:

When I consider the word “struck”, looking at the facts, I find that a person who leans into the open window of a car, where the driver sets the car in motion, veering and accelerating is struck by that car in some fashion. To hold onto the car in those circumstances, and being dragged for a few seconds in that interaction does not mean that the plaintiff was not struck.

This is a meaning that the word “struck” can reasonably bear in this context.

[8] The trial judge interpreted para. 13 of the Statement of Agreed Facts to mean that the respondent was initially leaning into the stationary automobile, likely in some contact with the vehicle. However, the trial judge concluded from para. 14 of the Statement of Agreed Facts that the “striking” occurred when “Stokes veered out into the street and accelerated the Vehicle”. The trial judge concluded that when Stokes “set the car in motion, veering and accelerating [the respondent was] struck by that car in some fashion”. On this record it was open to the trial judge to find as a fact that the respondent was “struck” by her vehicle.

[9] The appeal is accordingly dismissed.

Appeal heard on October 12, 2022

Memorandum filed at Calgary, Alberta
this 18th day of October, 2022





Slatter J.A.



Schutz J.A.



Authorized to sign for: Antonio J.A.

Appearances:

B.J. Moen
for the Respondent

D.M. Pick
D.J. Wilson
for the Appellant