CITATION: Fleming v. Brown, 2017 ONSC 1430
COURT FILE NO.: 1220/15
DATE: January 9, 2017

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: James Fleming, Plaintiff

AND:

Pat and Cindy Brown, Defendants

BEFORE: Justice A. D. Grace

COUNSEL: T. Dhillon, for the plaintiff
A. Rachlin, for the defendants

HEARD: January 9, 2017

ENDORSEMENT

[1] Mr. Fleming alleges that he was injured after falling from a ladder while helping the defendant Pat Brown install Christmas decorations at the residence of Pat and Cindy Brown on November 23, 2014. Mr. Fleming seeks damages.

[2] Mr. Fleming was examined for discovery on May 11, 2016. He was asked whether he had adverse cost insurance. The question was refused. That position was softened in a September 27, 2016 letter sent by Mr. Fleming's solicitor to counsel for the defendants. At that time Mr. Fleming's lawyer wrote:

> We are agreeable to disclose the following in accordance with the principles in *Abu-Hmaid v. Napar*, 2016 ONSC 2894.
>
> The Plaintiff has opted for a Legal Protection Insurance Policy with DAS Justice Solutions. The limits of the Policy are $100,000.00.

[3] On October 5, 2016 counsel for the defendants advised that a motion would be brought seeking production of the policy. This motion followed. The policy has not been produced.

[4] Counsel for Mr. Fleming resists the motion on the basis that:

> (a) particulars of the adverse cost policy ('ACP') is all the law requires;
>
> (b) production "is of no probative value to any of the facts at issue". By that the plaintiff appears to mean the ACP is not relevant to the matters in dispute.

[5] No other reason for the plaintiff's position was set forth in the plaintiff's factum or in oral argument.

[6] The defendants' argument rests on rule 30.02(3). Appearing under the heading "Scope of Documentary Discovery" the subrule provides:

> A party shall disclose and, if requested, produce for inspection any insurance policy under which an insurer may be liable,
>
> (a) to satisfy all or part of a judgment in the action; or
>
> (b) to indemnify or reimburse a party for money paid in satisfaction of all or part of the judgment,
>
> but no information concerning the insurance policy is admissible in evidence unless it is relevant to an issue in the action.

[7] Counsel for Mr. Fleming acknowledged that, on its face, an ACP fits within rule 30.02(3)(b) because it would or could serve to provide Mr. Fleming with the money necessary to satisfy an adverse cost award subject, of course, to the limits of the ACP.

[8] I should add that rule 1.03 defines the word "judgment" to mean:

> …a decision that finally disposes of an application or action on its merits and includes a judgment entered in consequence of the default of a party.

[9] A judgment may, and usually does of course, include a provision concerning entitlement to and the quantum of costs.

[10] Mr. Fleming relies on four authorities. In *Abu-Hmaid v. Napar*, *supra*, Master Short outlined his understanding of the purpose of rule 30.02(3). At para. 22 he wrote in part:

> …the purpose of the rule in my understanding was to avoid plaintiffs incurring substantial costs in obtaining "practically worthless" judgments as they were in excess of any available insurance coverage. The coverage here [an ACP] is for an entirely different category of liability.

[11] Where that understanding came from was not stated.

[12] Shortly afterward Master Short concluded that "the existence" of an ACP "is relevant to the resolution of personal injury disputes and ought to be disclosed at the same stage as disclosure by the defendant is required under Rule 30.02": para. 25.

[13] However, the "specifics" (presumably the policy's attributes) of the policy did not have to be disclosed because they were not "of any probative value in this case": para. 26.

[14] A continuing obligation to disclose the existence of an ACP was imposed in a paragraph that referred to "proportionality", rule 1.04(2) (a subrule that directs the court to determine matters by analogy when the rules do not provide for them) and the permission granted by rule 1.05 to impose terms and to give directions when making an order.

[15] Master Short's decision was applied by Gunsolus J. in *Paulin v. Singh* (unreported, Peterborough court file no. 13-15). In schedule 'A' to a September 16, 2016 order, my colleague agreed the plaintiff was not obligated to do more than disclose the existence of an ACP. He said:

> While Rule 30.02 does not distinguish between types of insurance policies that must be disclosed, that Rule, as drafted, does not contemplate this type of insurance. As Mr. Lanctot for the Plaintiff suggested, it is analogous to an insurance companies [sic] "reserve" in a case of this nature.

[16] I pause here because I concede difficulty with both decisions. On what basis did Master Short order disclosure of the existence of an ACP? If under rule 30.02(3), then production for inspection of the policy was also expressly required upon request by the adverse party.

[17] If not under that subrule, then what was the basis? Proportionality is not one. It is to feature in the application of the rules: rule 1.04(1.1). Was Master Short's reference to rule 1.04(2) intended to suggest that the production of an ACP is not covered by or provided for in the rules? If so, why especially given para. 21 of his endorsement. I am puzzled.

[18] My colleague Gunsolus J. did not explain why an ACP was not contemplated by rule 30.02(3) unless the reference to a "reserve" was the intended reason. I do not understand the analogy. A policy of insurance provides coverage. An ACP provides a particular kind of benefit to the insured. It, like many other policies, is subject to a monetary limit. An insurer may, from time to time, estimate its exposure under a policy and establish a "reserve": Black's Law Dictionary, 9th ed. Is that what Gunsolus J. means? I'm not sure. In any event, production of the policy does not disclose the existence, let alone amount, of a reserve. Rule 30.02(3) applies whether a reserve has been created or not because the subrule deals with the policy itself.

[19] The plaintiff also relies on *Cobb v. Long Estate*, 2015 ONSC 7373 (S.C.J.). In that case the defendant sought information relating to an ACP following a jury verdict. While rule 30.02(3) was referenced in the summary of the plaintiffs' response to the request, the decision of the trial judge on the point consisted of one paragraph that read simply, at para. 10:

> In addition, the request by the defence for disclosure of insurance particulars I find is premature and as well, perhaps unnecessary, following what may be either the parties' agreement or my eventual decision on costs.

[20] With respect, that decision dealt with the issues facing the trial judge in a pragmatic way. It is of no assistance to me on this motion because no analysis of rule 30.02(3) was undertaken.

[21] Finally, Mr. Fleming's counsel relies on *Hayes v. Saint John (City) et al.*, 2016 NBQB 051. In that case Grant J. declined to order production of a

third party funding agreement because it "would impact the process by giving an unfair advantage to the defendants" based on a reading of the agreement and a finding the agreement was necessary to provide access to justice in that case: para. 6.

[22] Grant J. did not refer to any procedural rule. He did observe that the plaintiff asserted a claim of litigation privilege in the motion he heard. Privilege was not claimed by or on behalf of Mr. Fleming here: in any event see *Blank v. Canada*, 2006 SCC 39 at para. 68.

[23] To this point I feel rather unassisted by the authorities cited. I turn to some of those referred to by the defendants.

[24] Rule 30.02(3) came into effect on January 1, 1985. It did not take long for a motion to be brought seeking disclosure and production of a liability policy held by the defendant. In *Sabatino v. Gunning*, 1985 CanLII 2013 (Ont. C.A.), Thorson J.A. dealt with such a motion in the context of a pending appeal. He concluded:

> (a) that each rule and subrule must be looked at in terms of its own particular function or purpose;
>
> (b) that rule 30.02(3)'s purpose is to assist the making of informed and sensible decisions by parties involved in litigation where recourse to any available insurance monies may play a role in how the litigation is conducted and through the stages it should be pursued.

[25] Those conclusions are important. Generally speaking, obligations with respect to documentary discovery are determined by whether the document is "relevant to any matter in issue": see rule 30.02(1) and (2). If that test is met, the document in question is to be disclosed (rule 30.02(1)) and subject to a claim to privilege, produced for inspection: rule 30.02(2).

[26] Rule 30.02(3) serves to expand the obligation. All parties are required to disclose and if requested, to produce for inspection policies of insurance that fall into the categories established by subrules (a) or (b). To this point rule 30.02(3) does not import the words "relevant to an issue in the action". Those words appear at the very end of rule 30.02(3) in the context of the use that can be made of a disclosed and produced insurance policy. Although a policy of insurance captured by subrule (a) (one which obligates the insurer

to pay all or part of a judgment) or subrule (b) (one which indemnifies or reimburses a party who satisfies a judgment in whole or part) must be disclosed and produced for inspection, no information concerning same is admissible in evidence "unless it is relevant to an issue in the action".

[27] As can be seen, rule 30.02(3) applies to policies of insurance even if irrelevant to an issue in the action. Relevance limits the use that can be usable of the disclosure and policy itself: *Pye Bros. Fuels Ltd. v. Imperial Oil Ltd.* (2012), 20 C.P.C. (7th) 1 (Ont. C.A.), leave to appeal to the S.C.C. refused 2012 Carswell Ont. 11635 ("*Pye Bros.*"). The plaintiff's position ignores that important difference between the subrule in issue and rules 30.02(1) and (2).

[28] I should add that *Pye Bros.*, *supra* at para. 9, agreed with Thorson J.A.'s articulation of the purpose of rule 30.02(3). In fairness to Master Short, he recognized that purpose too in *Abu-Hmaid v. Napar, supra*. at para. 25.

[29] In this case, Mr. Fleming has obtained an ACP for the purpose of allowing him to participate in and to pursue this action. It is conceded to be a policy captured, on its face, by rule 30.02(3)(b). The subrule applies to "a party". It is not confined to defendants. It is not restricted to a particular kind of policy but dependant on the obligation that exists in connection to a judgment if obtained.

[30] The policy's existence and terms may well play a role, even if only strategically, in how this action is conducted. In my view, that is enough to trigger the obligation to produce: *DGW Electronics Corp. v. Crystal Craft Industries Inc.*, [1986] O.J. No. 1380 (H.C.J.); *Sharma v. Timminco Ltd.*, [2010] O.J. No. 469 (S.C.J.) at paras. 19 and 31; *Barr & Ors v. Biffa Waste Services Ltd.*, [2010] Lloyd's Rep. IR 428 (Q.B.) at paras. 56-60 but see; *Arroyo & Ors v. BP Exploration Company (Columbia) Ltd.*, [2010] EWHC 1643 (Q.B.) at paras. 59 and 60.

[31] In *Pye Bros.*, *supra* the motion judge refused to order production of an insurance policy in the possession of Imperial Oil under rule 30.02(3) because the moving party sought same for a collateral purpose. The Court of Appeal affirmed that decision. However, that case does not assist the plaintiff.

[32] The evidence filed on this motion was very limited. There is nothing in the record which causes me to believe that there is any, let alone principled, basis for refusing to allow the defendants to exercise the right to inspection rule 30.02(3) confers. A policy has been identified to which rule 30.02(3)(b) applies. The defendants are entitled to inspect the policy issued by DAS Justice Solutions in favour of Mr. Fleming in respect of this action. Production is ordered. Same is to take place within fifteen days.

[33] As agreed by the parties costs in the all-inclusive amount of $4,000 are payable. Given the defendants' success, same is to be paid by Mr. Fleming to them within thirty (30) days.

"Grace J."
Justice A. D. Grace

Date: Handwritten endorsement released and transcribed January 10, 2017.