

Younis v. State Farm Mutual Automobile Insurance Company;
Insurance Bureau of Canada et al., Intervenors

[Indexed as: Younis v. State Farm Mutual Automobile
Insurance Co.]

113 O.R. (3d) 344

2012 ONCA 836

Court of Appeal for Ontario,
Simmons, Juriansz and Epstein JJ.A.
November 29, 2012

Insurance -- Automobile insurance -- Statutory accident benefits -- Actions against insurer -- Insured commencing action against insurer for statutory accident benefits after applying for mediation but before mediation was held -- Action barred by s. 281(2) of Insurance Act -- Insured not allowed to bring action until mediation has failed -- Insurance Act, R.S.O. 1990, c. I.8, s. 281(2).

The plaintiff filed a claim with the defendant insurer for statutory accident benefits. The defendant denied certain benefits. The plaintiff applied for mediation and a few days later commenced a civil action against the defendant. The defendant's motion to stay or dismiss the civil action was dismissed. The defendant appealed.

Held, the appeal should be allowed.

Under s. 281(2) of the Insurance Act, no person may bring a

proceeding against an insurer until mediation has failed. The plaintiff jumped the gun and brought the action before that had occurred. The commencement of the action was statute-barred.

Cases referred to

Cornie v. Security National Insurance Co. (2012), 113 O.R. (3d) 331, [2012] O.J. No. 5602, 2012 ONCA 837 (C.A.), affg (2012), 109 O.R. (3d) 780, [2012] O.J. No. 704, 2012 ONSC 905, 7 C.C.L.I. (5th) 106, 33 M.V.R. (6th) 155, 212 A.C.W.S. (3d) 535 (S.C.J.)

Statutes referred to

Insurance Act, R.S.O. 1990, c. I.8, ss. 280 [as am.], 281 [as am.], (2) [as am.], 282 [as am.], 283 [as am.] [page345]

Rules and regulations referred to

Statutory Accident Benefits Schedule -- Effective September 1, 2010, O. Reg. 34/10 [as am.]

APPEAL from the order of DiTomaso J., [2012] O.J. No. 3585 (S.C.J.) dismissing a motion to stay or dismiss an action.

Eric K. Grossman, for appellant State Farm Mutual Automobile Ins. Co.

Roman Baber, for respondent Nebal Younis.

John Craig and Vivian Bercovici, for intervenor Insurance Bureau of Canada.

M. Steven Rastin and Stanley Pasternak, for intervenor Ontario Trial Lawyers Association.

The judgment of the court was delivered by

[1] JURIAN SZ J.A.: -- This appeal was heard with four other appeals, which were released concurrently with this decision [(2012), 113 O.R. (3d) 331, [2012] O.J. No. 5602 (C.A.) ("Cornie appeal")]. Like the other appeals, this appeal raised the question of when, in light of s. 281(2) of the Insurance Act, R.S.O. 1990, c. I.8 (the "Act"), insured persons

can commence court actions against their own insurers to claim benefits under the Statutory Accident Benefits Schedule -- Effective September 1, 2010, O. Reg. 34/10 ("SABS").

[2] Section 281(2) provides:

281(2) No person may bring a proceeding in any court, refer the issues in dispute to an arbitrator under section 282 or agree to submit an issue for arbitration in accordance with the Arbitration Act, 1991 unless mediation was sought, mediation failed and, if the issues in dispute were referred for an evaluation under section 280.1, the report of the person who performed the evaluation has been given to the parties.

[3] As can be seen, s. 281(2) prevents insured persons from commencing court actions or proceeding to arbitration unless they have first sought mediation and mediation has failed.

[4] The Financial Services Commission of Ontario ("FSCO") is the administrative agency responsible for administering Ontario's statutory scheme regulating auto insurance. FSCO has developed a significant backlog of mediations. The insured person in this case, like the insured persons in the other cases, commenced court proceedings before their cases were mediated by FSCO. In all the appeals, the insurers applied to stay or dismiss the court proceedings as being barred by s. 281(2). The motion judges in all cases dismissed the insurers' motions. The insurers appealed to this court. [page346]

[5] The four other appeals involve similar facts and circumstances and the court issued one set of reasons that applied to all of them. The court concluded that the legislative scheme for the resolution of disputes set out in ss. 280 to 283 of the Act, the SABS and FSCO's Dispute Resolution Practice Code requires that the mediation process be completed within 60 days from the filing of an application for mediation with FSCO, unless the parties agree to an extension of time. Once the 60-day time limit has expired, the parties may commence a court action or proceed to arbitration. Subsection 281(2) postpones the right of insured persons to

commence civil actions against their insurer in order to allow the mediation process to be completed within the time prescribed, but leaves them free to commence actions once that period has expired.

[6] On this reasoning, the insurers' appeals in the other four cases were dismissed, as the respondents commenced their court proceedings after the 60-day time period for mediation had expired.

[7] The facts of this case differ from the four other appeals. This difference in facts leads to a different result. I would allow the appeal.

[8] In this case, the respondent was injured in a motor vehicle accident on June 28, 2010. He filed a claim with the appellant for statutory accident benefits. The appellant denied certain benefits and a dispute arose. On July 14, 2011, the respondent made an application to FSCO for mediation. A few days later, on July 22, 2011, he commenced the civil action that is the subject of this appeal. The appellant, relying on s. 281(2) of the Act, brought a motion to stay the civil action pending the holding of an actual mediation of all the issues in dispute by FSCO.

[9] The motion was heard on February 21, 2012, well after the 60 days prescribed for the completion of mediation. The motion judge followed the reasoning of Sloan J. in *Cornie v. Security National Insurance Co.* (2012), 109 O.R. (3d) 780, [2012] O.J. No. 704, 2012 ONSC 905 (S.C.J.) and concluded, as did this court in the *Cornie* appeal, that s. 281(2) of the Act allows an insured person to bring a civil proceeding if mediation was sought and mediation has not been completed within 60 days of the "filing" of an application for mediation. An application is "filed" when it is delivered to FSCO.

[10] The motion judge found that the respondent "had satisfied the requirement of s. 281(2)", as mediation did not take place within 60 days of the respondent filing his application with FSCO. The motion judge concluded that the "balance of prejudice as between the plaintiff and State

Farm favours the continuation of the action". [page347]

[11] On this reasoning, the motion judge declined to stay the action.

[12] I would allow the insurer's appeal. The motion judge evidently approached the motion as one that called upon the court to exercise its inherent jurisdiction to stay an action. However, the insurer's motion called upon the court to apply a statutory bar to the commencement of an action. The terms of s. 281(2) of the Act are clear. No person may bring a proceeding until mediation has failed. The respondent jumped the gun and brought this proceeding before that had occurred.

[13] I appreciate that by the time the motion to stay came before the court, the 60-day time period had expired. From the practical perspective adopted by the motion judge, there would seem to be no reason to require the respondent to start again. However, the respondent commenced his action in contravention of the statute and the statute must be applied. Insured persons cannot commence civil actions until mediation has failed. To conclude otherwise would allow all insured persons to immediately commence civil actions knowing that the insurers' motions to stay are not likely to be heard until after the expiration of the 60-day time period. The statute does not permit this stratagem.

[14] The appeal is allowed. As the commencement of the action was statute-barred, it is quashed.

[15] The appellant did not seek costs. There will be no order as to costs.

Appeal allowed.