

COURT OF APPEAL FOR ONTARIO

CITATION: C.S. v. TD Home and Auto Insurance Company, 2015 ONCA 424

DATE: 20150611

DOCKET: C59887

MacPherson, Cronk and Gillese JJ.A.

BETWEEN

C.S., J.G. and M.G. (by her litigation guardian J.G.)

Applicants (Respondents)

and

TD Home and Auto Insurance Company

Respondent (Appellant)

Marc D. Isaacs and Cameron A. Grant, for the appellant

Esmail Mehrabi, for the respondents

Heard: May 21, 2015

On appeal from the order of Justice Kevin W.V. Whitaker of the Superior Court of Justice, dated December 9, 2014.

MacPherson J.A.:

[1] This is a companion appeal to *Unifund Assurance Company v. D.E. and L.E.*, with reasons released today. The principal parties in the two cases (parents), the underlying action relating to alleged bullying and harassment by their minor daughters, and the relevant insurance policies are identical.

[2] In a decision released on December 18, 2014, Whitaker J., the application judge, expressly adopted the reasons of Stinson J. in *Unifund* and declared that the appellant insurance company had a duty to defend and indemnify the respondent parents C.S. and J.G. in the underlying action.

[3] For the reasons in *Unifund*, I conclude that the application judge erred in his interpretation of exclusion clause 7(b) of the insurance policy. The appellant does not have a duty to defend and indemnify the respondent parents in the underlying action.

[4] Two separate issues remain to be addressed in this appeal.

[5] The first issue is the position of M.G., the minor daughter of C.S. and J.G. The style of cause in this proceeding, both in the Superior Court and in this court, includes M.G. as a party. The minor daughter in *Unifund* was not a party.

[6] The application judge gave no separate consideration to M.G.'s position. However, his formal Order provides that the appellant "has a duty to defend the Applicants" which would include M.G. What happens to M.G. now that the appellant has no duty to defend and indemnify her parents?

[7] I agree with the appellant that the answer to this question is found in this court's decision in *Meadows v. Meloche Monnex Insurance Brokers Inc.*, 2010 ONCA 394. In *Meadows*, the exclusion clause was identical to exclusion clause 6(a) in the insurance policies in this case and in *Unifund*. The underlying action in

Meadows involved an alleged assault. After reviewing the pleadings, Rouleau J.A. concluded, at para. 28:

In conclusion, therefore, I am of the view that on a reasonable reading of the claim it is apparent that it is strictly one for the intentional torts of assault and battery. When the terms of the policy are considered, it is clear that there is no possibility that the obligation to indemnify will be triggered by such a claim and therefore there is no duty to defend.

[8] In the underlying action in this case, the claims against the three minor defendants are that they “verbally threatened and physically assaulted” K.S. at a school, “verbally threatened and physically assaulted” K.S. in the community, and “verbally threatened” K.S. via telecommunications. By parity of reasoning, exclusion clause 6(a) applies in this case just as it did in *Meadows*.

[9] The second separate issue relates to costs. The application judge awarded the respondents costs of \$13,000 “on consent”. The parties jointly state that the amount they agreed on was \$11,300 to the successful party.

[10] I would allow the appeal, set aside the order of the application judge, and declare that TD Home and Auto Insurance Company does not have a duty to defend or indemnify C.S., J.G. and M.G. in the underlying action.

[11] I would allow the appeal with respect to costs and fix the amount of costs below at \$11,300, now payable to the appellant.

[12] The appellant is entitled to its costs of the appeal fixed, on consent, at \$10,500, inclusive of disbursements and applicable taxes.

Released: June 11, 2015 ("J.C.M.")

"J.C. MacPherson J.A."

"I agree. E.A. Cronk J.A."

"I agree. E.E. Gillese J.A."