CITATION: *Natario v. RBC et al.*, 2025 ONSC 6921
COURT FILE NO.: CV 22-667
DATE: 20251210

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MARIA NATARIO, Plaintiff

and

RBC INSURANCE COMPANY OF CANADA, AVIVA INSURANCE COMPANY OF CANADA, KEVIN DAVID SHERKIN and JOHN DOE(S) Defendants

BEFORE: C.M. Smith J.

COUNSEL: Michael Rotondo, Counsel for the Plaintiff

Alexander Reyes, Counsel for the Defendant, Aviva Insurance Company of Canada

HEARD: September 10, 2025

OMNIBUS ENDORSEMENT ON THE DEFENDANT'S MOTIONS[1]

[1] The defendants bring motions for leave to deliver an amended amended statement of defence, for an order compelling the plaintiff to answer two questions refused during discovery, and for an order requiring the plaintiff to post security for the costs of this action.

[2] The plaintiff requests the motions be dismissed in their entirety with costs on a substantial indemnity basis.

BACKGROUND

[3] This is a coverage action brought by the plaintiff which arises from an underlying tort claim she brought as a result of injuries she suffered in 2012 while visiting the home of Manuel Rodrigues and Lucia Goncalves ("the insureds"). The home was being renovated by the insureds at the time and the plaintiff fell through a hole in the attic floor. As a result of the fall, the plaintiff was rendered paraplegic.

[4] The plaintiff commenced a tort action against the insureds on September 18, 2012. In her statement of claim the plaintiff claimed to have suffered her injury when she tripped and fell on some construction debris while she walking down the stairs. The plaintiff delivered an amended

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[1] I wish to thank Mr. Tyler Rogerson, Judicial Law Clerk for the Ontario Superior Court of Justice, Oshawa, for his eager and effective assistance in the preparation of this endorsement.

statement of claim on January 29, 2015, in which she asserted she incurred her injuries after falling through an opening in the floor or an unstable floorboard while in the attic of the home.[2]

[5] The insureds also initially asserted the plaintiff had slipped on debris while descending a staircase in the home. They persisted in that position through examinations for discovery in February 2014. In April 2019, some seven years after the commencement of the action, the insureds admitted their evidence at discovery was false and they had deliberately fabricated their account of the incident. As I understand the evidence, the insureds fabricated their story because they were doing the renovations themselves without first obtaining a building permit and were fearful of the legal consequences.

[6] On July 11, 2019, Aviva advised the insureds their misrepresentations constituted a substantial and material breach of the home insurance policy ("the policy"). Consequently, Aviva declined to indemnify the insureds. Aviva did, however, continue to provide the insureds with a defence, ostensibly in order to minimize any judgment, on the condition the insureds cooperated fully with the process.

[7] On October 13, 2021, the underlying tort action was dismissed on consent with no order as to costs. The amended consent order also provided as follows:

> 2. THIS COURT ORDERS that the Plaintiff shall sign a Full and Final Release in favour of the Defendants, which is subject to approval by the Plaintiff's lawyer, and shall state, *inter alia*, that in consideration for the dismissal of the Action the Plaintiff shall be entitled to commence an action or application against Aviva pursuant to s.132 of the *Insurance Act* or any other party that the Plaintiff may determine in the future to be responsible for the coverage position taken by Aviva ("Proceeding") for damages claimed by the Plaintiff in the Action.
>
> …
>
> 4. <u>THIS COURT ORDERS that the Plaintiff shall be entitled to bring the Proceeding, and that the Plaintiff shall be in the same position in the Proceeding as she would have been had she obtained a judgment at trial.</u>
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> 5. THIS COURT ORDERS that the amount sought by the Plaintiff in the Proceeding shall be agreed upon to be $2,000,000 in damages and pre-judgment interest, and that subject to paragraph 6 below,[3] the Plaintiff will not be required to prove damages for the agreed upon sum of $2,000,000. In addition, if the Plaintiff is successful in the Proceeding, costs and disbursements of the Action and the Proceeding are to be agreed upon or fixed by the Court. [emphasis in original.]

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[2] This miscue appears to have been the result of the plaintiff's inability to communicate in English. The original records stated the plaintiff had fallen down the stairs, a notion which may have been based on information gleaned from the insureds at the scene. The ambulance and hospital records were subsequently amended accordingly.

[3] Paragraph 6 deals with the rights of the plaintiff's estate in the event she should pass away before this action is resolved.

[8] The plaintiff then commenced this action pursuant to the provisions of s. 132(1) of the *Insurance Act*, R.R.O. 1990, c. I.8. She seeks to recover the $2,000,000 policy limits under the home insurance policy originally issued by the defendant, RBC, which is now owned by the defendant, Aviva.

[9] The action is currently scheduled for the January 2026 trial sittings for an eight-day judge alone trial.

1. **<u>Section 132(1) of the *Insurance Act*</u>**

[10] The provisions of s. 132(1) play a significant role in the analysis of each of the three motions brought by Aviva. Section 132(1) reads as follows:

> **Right of claimant against insurer where execution against insured returned unsatisfied**
>
> **132** (1) Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against the person in respect of the person's liability, and an execution against the person in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.

[11] As one might expect, this section has been the subject of considerable judicial scrutiny, particularly the phrase "subject to the same equities as the insurer would have if the judgment had been satisfied."

[12] The plaintiff submits the jurisprudence confirms "the only defences available under s. 132 are those that flow directly from the policy." In support of that position, the plaintiff has directed me to a number of authorities, including the following, all of which conclude a judgment creditor in a coverage action stands in the position of the insured and that the insurer can advance defences against the insured arising from the policy.

- *Horsefield v. Economical Mutual Insurance Company*, 2017 ONSC 2080, where the court held at para. 29 of the decision "[t]he 'equities' that may be raised by an insurer include defences such as: (1) the policy is void *ab initio* by reason of a misrepresentation in the application; (2) the policy does not insure the individual against whom the judgment was obtained; (3) the insured breached a condition of the policy: (4) there was no coverage, or that the coverage alleged was excluded under the terms of the policy." All the enumerated equities/defences appear to arise from the wording of the policy. The court also mentioned, at para. 29, the oft cited proposition "a judgment creditor stands in no better position than the insured." However, the court did make a point of noting, at para. 26, that in a coverage action "it is not open to an insurer to contest the findings of liability or damages upon which the judgment in question is based."

- While briefly considering the wording of s. 132(1) in *Sovereign General Insurance Company v. Walker*, 2011 ONCA 597, 107 O.R. (3d) 225, the Court of Appeal for Ontario made passing mention of the same oft cited proposition and then suggested any defence available to an insurer against its insured would also be available against the judgment creditor in a coverage action: see *Sovereign*, at para. 13. Here, again, the defence in question was, in fact, a breach by the insured of a statutory condition of the policy.

- In *C.H. Robinson Worldwide Inc. v. Northbridge Commercial Insurance Corp.*, 2016 ONCA 364, 132 O.R. (3d) 73, the court held that a material misrepresentation made by an insured in its application for coverage could void the policy which would give the insurer a defence to a claim under s. 132(1). This decision, again, concerned an issue arising from the policy's terms.

- In *Tai Foong International Ltd. v. Lombard Canada Ltd.* (2001), 53 O.R. (3d) 595 (S.C.J.), aff'd (2002), 35 C.C.L.I. (Ont. C.A.), leave to appeal dismissed, (2002), S.C.C. File No. 29176, S.C.C. Bulletin, 2002, at p. 1483, the court found that a limitation period defence available to the insurer under the terms of its policy with the insured was also available to the insurer in a s. 132(1) action, it being one of the "equities" referred to in the section. The court was of the view that the word "equities" should not be read as restricting the insurer from advancing a defence based on a provision contained in the policy.

- In *Perry et al. v. General Security Insurance Co. of Canada et al.* (1983), 42 O.R. (2d) 514 (H.C.J.), the court held that while the effect of s. 132(1) is to put the plaintiff in the shoes of the insured, the plaintiff is entitled to no better or different rights under the terms of the policy than the insured would have: see *Perry*, at p. 12.

[13] This issue was addressed thoroughly by the Court of Appeal for Ontario in *Stoyka v. General Accident Assurance Co. of Canada* (2000), 47 O.R. (3d) 407 (C.A.), a case also involving a coverage action and the operation of s. 132(1). Mr. Stoyka was badly burned in an accident at his residence and claimed the insured was liable for damages. He was successful in his action against the insured, but he could not recover. Mr. Stoyka then brought a coverage action against the defendant insurer. The insurer advanced a number of defences including an assertion that Mr. Stoyka and the insured fraudulently colluded together such that there had not been the "actual trial" as required by the policy. In his reasons for decision, Goudge J.A. held as follows, at paras. 20–26:

> [20] In Cannon v. Constitution Insurance Co. of Canada,[4] supra, Wilkins J. undertook a comprehensive review of the jurisprudence. He concluded that, since Finlay,[5] it is not open to an insurer who had notice of and the opportunity to participate in the earlier proceedings, to contest afresh the findings of liability or

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[4] (1995), 26 O.R. (3d) 500 (Gen. Div.).
[5] *Global General Insurance Co. v. Finlay and Laying*, [1961] S.C.R. 539

damages made therein in an action brought under s. 132(1) of the Act. I agree with this conclusion.

[21] My reading of s. 132(1) of the Act supports this conclusion. It accords a statutory cause of action to a person injured due to the fault of another who is insured for that liability. On proof of a final judgment for damages against the insured and an unsatisfied execution in respect of it, "the person entitled to the damages may recover by action against the insurer an amount of the judgment up to the face value of the policy ..." subject only to the same equities as the insurer would have against its insured.

[22] There is nothing in the language of this section that suggests that the insurer in defending such an action can effectively re-open the judgment to contest the findings of liability and damages. Indeed, the clear inference is to the opposite effect. The statutory cause of action allows the injured person to recover the amount of the judgment. It does not suggest that the injured person must prove the quantum of his loss.

[23] Moreover, s. 132(1) specifies the defences available to the insurer. It defines those defences as the equities which the insurer would be able to raise against its insured. The findings of liability and damages in the original action between the injured party and the insured cannot be said to be matters of equity between the insured and his insurer. Equally, while the alleged fraud of the injured party itself in obtaining the original judgment might be a basis for setting aside that judgment, it does not constitute an equity as between the insured and the insurer.

[24] There are sound policy reasons to support this conclusion. Where the insurer has had notice of the original proceedings and has chosen not to provide its insured with a defence at trial or to seek to be added as an intervener (as it could have done here under rule 13.01), it is simply unfair to the injured party to require that it again prove the insured's liability and the resulting damages. The injured party has done so once with success and is entitled to regard that judgment as final. In addition, it is clearly in the interest of the sound administration of justice to discourage the unnecessary re-litigation of the same issues.

[25] I therefore conclude that the decision of McGarry J. was correct. In the circumstances of this case, once the respondents prove the final judgment against the insured, the reasons for it, the failed execution, and the governing insurance policy, the insurer can raise in defence only those equities which it would have against its insured.

[26] However, it is not open to the insurer to contest the findings of liability and damages in the original judgment or to allege that that judgment is vitiated by the respondents' own fraud. These matters are not defences within the contemplation of s. 132(1) of the Act.

[14] I find the reasoning of Goudge J.A. to be both persuasive and binding. The jurisprudence on the issue of what constitutes the "equities" referred to in s. 132(1) appears to leave an insurer defending a coverage action with no leeway in terms of resorting to defences other than those it can raise directly against its own insured, those being defences arising from the policy. The insurer in a coverage action is not entitled to re-litigate the issues of liability and damages.

2. Motion re: Leave to Deliver an Amended Amended Statement of Defence

[15] Aviva delivered an amended statement of defence in the coverage action on August 11, 2022. Aviva has pled the insureds' deliberate misrepresentations of the incident constituted a substantial and material breach of the duty to cooperate set out in the policy and of the duty of good faith.

[16] Aviva now seeks to further amend their statement of defence to plead the deliberate misrepresentations also constitute civil fraud.

[17] Rule 26.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, requires a court to grant leave to amend pleadings at any stage of an action on such terms as are just unless:

i. the responding party would suffer non compensable prejudice;
ii. the amending pleading is scandalous, frivolous, vexatious or an abuse of the courts process; or
iii. the pleading discloses no reasonable cause of action.[6]

[18] The Court of Appeal for Ontario has found amendments must be permitted, even on the eve of trial, as r. 26 makes amendments mandatory unless the responding party demonstrates non-compensable prejudice.[7]

[19] The party resisting the amendment, in this case the plaintiff, has the burden of establishing the proposed amendment would cause such prejudice.[8]

[20] The plaintiff argues civil fraud is an affirmative defence and must be pleaded from the outset, citing the provisions of r. 25.07(4). The plaintiff further submits the equities of the situation, as envisioned in s. 132 of the *Insurance Act*, "confirm the amendment is unavailable". In my view, the plaintiff is correct on both points.

[21] Rule 25.07(4) reads as follows:

> ***Affirmative Defences***
> (4) In a defence, a party shall plead any matter on which the party intends to rely to defeat the claim of the opposite party and which, if not specifically pleaded, might take the opposite party by surprise or raise an issue that has not been raised in the opposite party's pleading.

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[6] *Rooplal v. Fodor*, 2018 ONSC 399, at para. 41.
[7] *Kings Gate Developments v. Colangelo* (1994), 17 O.R. (3d) 841, at p. 5.
[8] *Barker v. Furlotte*, (1985), 12 O.A.C. 76 (Div. Ct.).

[22] This rule was considered by the Court of Appeal for Ontario in *Midland Resources Holding Ltd. v. Shtaif,* 2017 ONCA 320, 135 O.R. (3d) 481. At para. 110 of *Midland*, the court held as follows:

> The reason for this pleading rule is quite simple. The just determination of a civil proceeding on its merits requires a fair adjudicative process. Trial by ambush is not fair.

[23] This action is approaching its four year anniversary. Aviva first had knowledge of the misrepresentations of the insureds in 2018, which is now some seven years ago. That being so, I do not understand why this issue is only now arising, after the matter was scheduled for trial. The civil fraud claim should have been pled at the outset in 2022.

[24] The amendment sought carries with it palpable, non-compensable prejudice to the plaintiff, which I enumerate here in no particular order:

- It is the eve of trial. Such an amendment would likely result in yet another lengthy adjournment of this long-standing matter given the need for reply pleadings. The plaintiff has been waiting for her day in court for thirteen years. The plaintiff is a paraplegic who in her words, and at Aviva's urging, "relinquished her trial rights in exchange for the promise that agreed damages would be paid if she succeeded under s. 132." Her access to justice is now on life support.

- The insureds now enjoy the protection of a complete and final release and will be "absent parties" at the trial.

- The essential element of civil fraud, intent, is not something the plaintiff can answer on behalf of the absent insureds.

- The plaintiff is essentially a judgment creditor who is figuratively standing in the shoes of the insureds. At no time were the insureds ever sued by Aviva for civil fraud. This motion is the first occasion the concept has even been raised.

- By seeking to amend its pleadings to include civil fraud, Aviva is attempting to reopen the issues of liability and damages, which is contrary to the provisions of s. 132(1) and to the findings of the Court of Appeal in *Stoyka*. It is also contrary to para. 4 of the order of Edwards R.S.J., which I note was made at the urging of Aviva, and with the express consent of Aviva.

[25] Aviva has supplied no authorities in support of its assertion that civil fraud is one of the equities between the parties envisioned by s. 132(1).

[26] Irrelevant pleadings are considered to be improper: see *Schindler Elevator Corp. v. 1147335 Ontario Inc.*, 2009 CarswellOnt 8876, at para. 22.

[27] In my view, given the history of this matter and the circumstances described above, including the non-compensable prejudice to the plaintiff, to allow what amounts to an irrelevant amendment on the eve of trial would amount to an injustice to the plaintiff.

[28] For these reasons I decline to order the relief sought. The plaintiff's coverage claim should be tried on the merits as required by s. 132(1).

3. <u>Motion re: the Refusals</u>

[29] Examinations for discovery were held in the coverage action on July 16, 2024. In the course of her examination, the plaintiff was asked two questions which her counsel stopped her from answering on grounds of relevance, those being:

1. "…can you tell me in your own words what happened?[9]

2. "Did you agree with Lucia and Manuel to help them by going along with the lie?"[10]

[30] Counsel for the plaintiff takes the position the only possible defences in the coverage action are those grounded in the insurers contractual rights under the policy, including breaches of its terms or statutory conditions. Further, the issue of liability was the subject of the underlying tort action. That being the case, the conduct of the plaintiff is no longer relevant and as such the questions were improper.

[31] Counsel for Aviva takes the position the questions are relevant in that they go to the question of whether the insureds' deliberately false statements constituted a material and substantial breach of the policy and whether the insureds are entitled to relief from forfeiture.

[32] This issue was addressed thoroughly by the Court of Appeal in *Stoyko*. Goudge J.A. specifically found, at para. 20, "it is not open to an insurer who had notice of and the opportunity to participate in the earlier proceedings, to contest afresh the findings of liability or damages made therein in an action brought under s. 132(1) of the Act."

[33] Clause 4 of the consent order of Edwards R.S.J. puts the plaintiff in the "same position in the Proceeding as she would have been in had she obtained a judgment at trial." In my view, that fact, when taken together with the findings of Goudge J.A., renders the answers to the two questions refused by the plaintiff irrelevant.

[34] I therefore decline to make the order requested.

4. <u>Motion re: Security for Costs</u>

[35] Aviva seeks an order for security for costs in the amount of $50,000 which Aviva submits is a fair and just amount in the circumstances of this case.

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[9] Transcription of Examination for Discovery of Maria Natario on July 26, 2024, at p. 11 line 8.
[10] *Ibid*, at p. 32, line 3.

[36] The plaintiff submits she is impecunious and that Aviva brings this motion not to secure fairness but rather "to shut down a paraplegic plaintiff's trial rights and to forever foreclose her ability to access justice."

(a) **<u>Relevant legal principles</u>**

[37] To obtain an order for security for costs, a defendant must first show it "appears" there is good reason to believe the plaintiff falls within a category enumerated in r. 56.01(1).

[38] The first enumerated category in r. 56.01 is whether "the plaintiff…is ordinarily resident outside Ontario." There is no dispute about the fact that the plaintiff has been living in Portugal since the death of her husband, Arlindo, in 2018. Notwithstanding his own medical challenges, Arlindo was the plaintiff's primary caregiver from the date of her fall in 2012 until his death in 2018. Following Arlindo's death, the plaintiff was compelled to re-locate to Portugal as she was without means to pay for care for herself, and her two adult children in Portugal were prepared to take on the caregiving role.

[39] Given the plaintiff resides in Portugal, the onus shifts to the plaintiff to show why security for costs should not be ordered. Aviva agrees this step requires a discretionary, contextual analysis.

[40] The court in *Coastline Corporation Ltd. et al. v. Canaccord Capital Corporation et al.*, 2009 CanLII 21758 (Ont. S.C.J.), at para. 7, held that plaintiffs can meet the onus in one of the following three ways:

> (a) by proving they have sufficient assets in Ontario to satisfy a costs award;
>
> (b) by establishing they are impecunious, in which case they must show their case *is not plainly devoid of merit*; or
>
> (c) if impecuniosity cannot be established by showing they are suffering financial hardship, they must show their case *has a good chance of success*. [emphasis added.]

[41] These principles were echoed by the Court of Appeal for Ontario in *Yaiguaje v. Chevron Corporation*, 2017 ONCA 741, 137 O.R. (3d) 729. At paras. 25–26 the court held that a court hearing a motion for security for costs has a broad discretion to make such order as is just in the context of the particular case.

[42] The correct approach is for the court to consider the justness of the order holistically, examining all of the circumstances of the case. The court must be guided by the overriding interests of justice to determine whether it is just that the security for costs order be made.

[43] Courts hearing motions such as this one must also be vigilant in ensuring an order that is designed to be protective in nature is not used as a litigation tactic: see *Split Vision Eyewear Inc. v. The Economical Insurance Group*, 2010 BCSC 396, 83 C.C.L.I. (4th) 188. At para. 85 of *Split Vision*, the court noted the inherent unfairness of first creating financial hardship through an

insurer's denial of coverage and then seeking to effectively preclude the plaintiff from asserting a claim in a coverage action by way of a security for costs motion.

(b) The plaintiff's financial disclosure and the issue of impecuniosity

[44] The jurisprudence requires plaintiffs who are resisting a security for costs order to provide full and fair financial disclosure supported by appropriate documentation to back up their claimed financial status, which is to include a description of all assets including their value, a list of liabilities and other significant expenses, some indication of the extent of their ability to borrow funds, as well as details of any assets disposed of or encumbered since the cause of action arose: see *Coastline*, at para. 7.

[45] There are a number of components to the plaintiff's financial disclosure in response to this motion, including her own affidavit sworn February 18, 2020, and the affidavit of her son Carlos Fernandes, sworn August 28, 2025. There is also some independent evidence provided by both the plaintiff and Aviva about the nature and extent of the plaintiff's real estate holdings in Portugal.

(i) Affidavit of the plaintiff sworn February 18, 2020

[46] The affidavit of the plaintiff was prepared in contemplation of an earlier motion for security for costs brought by Aviva in 2020. That matter was heard by Associate Judge Muir who concluded the plaintiff was impecunious.[11]

[47] The affidavit reveals the plaintiff is now 70 years of age. She was born and raised in Portugal. She has a grade 4 education and only has "a very limited ability to understand English or speak or read English."

[48] She married her husband, Arlindo, in 1980 in Portugal. They had two children together, being Sandra, currently age 44, and Carlos, currently age 40. At the time of the marriage Arlindo's parents gifted the couple a plot of vacant land in Pombal, Portugal. The two built a home on the land and resided there until they moved to Canada in the early nineties. After being injured, and after Arlindo's death, the plaintiff returned to that home and now lives there with Carlos, his wife and their child. A small one-storey home was later built on the property which is now Sandra's home. Carlos, his wife, and Sandra share daily ongoing caregiving responsibilities for the plaintiff.

[49] The property in Pombal is now owned and shared equally by the plaintiff, Carlos and Sandra. In 2020, the plaintiff estimated it was worth €200,000, at the time approximately $290,000 CAD. The plaintiff advised in her affidavit that neither she nor her children would agree to sell the property as they all need housing. In the plaintiff's words "I need the family home as a place to live and to be cared for due to my severe and extreme disabilities."

[50] The plaintiff also advises that her bank told her she would need the consent of her children to mortgage the property but, even with that consent, she would not qualify for a

[11] *Natario v Rodrigues*, 2020 ONSC 1045, at para. 13.

mortgage due to her age and uninsurability. A letter from the bank confirming that information was filed in this proceeding.

[51] The plaintiff advised her income consists of a small government pension, part of which is survivor's benefits paid since the death of her husband, all of which totals approximately $870 CAD per month in 2020. Her enumerated monthly expenses at the time totaled approximately $950 CAD, for a monthly shortfall of approximately $80 CAD.

[52] The plaintiff's other assets consisted of two Canadian bank accounts at the Bank of Montreal ("BMO"), which in 2020 held deposits totaling $21,292.47 CAD, a Portuguese bank account at Banco Montepio, which she uses for her everyday banking which then contained $580 CAD, and some modest home furnishings.

(ii) Affidavit of Carlos Fernandes sworn August 28, 2025

[53] Mr. Fernandes currently manages his mother's daily needs and manages her financial affairs. He confirms his mother returned to Portugal at the time of her husband's death because she could not afford the cost of care in Toronto.

[54] He advises that as of June 25, 2025, there was a balance of $5,000 CAD in the two BMO accounts, the plaintiff having utilized those funds for her own care during the intervening years after swearing her 2020 affidavit for the first motion for security for costs.

[55] He attached title documents to his affidavit confirming the three-way equal ownership of the home in Pombal.

[56] The plaintiff's monthly Banco Montepio bank statements for January through July 2025 were also attached to Mr. Fernandes's affidavit. They show monthly deposits of €730.71 and €199.07, being the plaintiff's monthly Portuguese government pension payments. They also show regular modest withdrawals for living expenses which effectively reduce the funds on deposit to a near zero balance each month.

[57] Mr. Fernandes also provided a detailed up-to-date outline of the plaintiff's monthly budget which shows total expenses of €1,075.07 and a total income of €1,057.01. These figures result in a monthly shortfall of €18, which he and Sandra cover from their own funds.

[58] The plaintiff's government pension statements and her 2024 Portuguese tax return confirming the foregoing were also attached to Carlos's affidavit. He also included a recent letter from Banco Montepio confirming the plaintiff's ineligibility for mortgage financing due to her age and the uncertain title of her property.

[59] Mr. Fernandes estimates the family home in Pombal is now worth approximately $354,574 CAD. He suggests it remains a non-realizable asset given the ongoing shelter requirements of the family and the plaintiff's ever worsening financial position.

(iii) The independent evidence about the nature and extent of the plaintiff's real estate holdings

[60] Aviva retained the services of Mr. Francisco Luis Dias, a Lisbon real estate lawyer, to provide "a comprehensive overview of real estate assets currently owned or potentially owned" by the plaintiff in Portugal.

[61] Mr. Dias's report lists six properties which the plaintiff "currently owns, or is entitled to acquire" through either the Portuguese community property regime or her status as heir to Arlindo's estate, details of which were provided as follows:

- Plot 74 and Plot 75: jointly registered in Arlindo and the plaintiff's names since 2004, with the plaintiff already owning a 50 per cent share and "she *may* inherit an additional share of the remaining 50 per cent of Arlindo's estate. [emphasis added.]

- Urban Property I – Barco: This parcel is said to "lack any land registry inscription" which apparently "prevents confirmation of title." While "the head" of Arlindo's estate is the registered owner according to the tax certificate, Mr. Dias concluded "the ownership is unclear."

- Urban Property II – Casal do Barco: Arlindo is the registered owner, however, "the lack of visibility of title underlying the acquisition of the property makes it uncertain to determine its ownership (sole ownership or jointly with [the plaintiff]". Again, the ownership is said to be "unclear".

- Rural properties I and II – Casal do Barco: this property is said to be owned by six individuals, one of whom is Arlindo. Comments similar to those above were also made by Mr. Dias about the title issues of this property.

[62] Tax values for these properties range from a low of $4,019.12 CAD to a high of $387,829.15 CAD, the high apparently being for the Pombal property. No other values are given.

[63] Mr. Dias concludes his report as follows:

> Based on the reviewed information, Arlindo Natário and Maria Durvalina Natário had two descendants, meaning there are three heirs in total (Maria Durvalina Natário and the two descendants). However, the document issued by the Tax Authorities regarding the payment of stamp duty ("*Portugal Property Transfer.pdf*") does not allow us to determine the full extent of Arlindo Natário's estate, whether any partition has already occurred, whether the properties listed therein comprised the entirety of Arlindo Natário's Estate, or whether the descendants mentioned in the document constitute all the heirs.
>
> Consequently, we cannot ascertain whether any partition of the estate has already taken place (unregistered), nor can we determine the current ownership of the assets. Maria Durvalina Natário may be entitled to an undetermined universality of assets. The ultimate distribution of the estate will be contingent upon the

completion of the partition process and the identification of all errors and assets, the details of which remain confidential, as outlined above.

[64] The plaintiff asked Dr. Jorge Marques, a lawyer in Pombal, Portugal, to review the report of Mr. Dias. Dr. Marques concluded that while Plots 74 and 75 are registered in the name of the plaintiff and Arlindo, succession proceedings have not been completed. Therefore, the plaintiff "cannot realize her 50 per cent independently." Moreover, "[a] single co-heir is precluded from mortgaging or otherwise encumbering the property that belongs to a heritance unilaterally."

[65] As for the Pombal properties, Dr. Marques concludes ownership of the two properties "cannot be determined" as a result of which the plaintiff "would not be able to obtain a loan or mortgage on either property."

[66] I have been given no information or explanation, by either side, about why the succession proceedings regarding Arlindo's estate have not been started, much less completed. I suspect the explanation is the plaintiff's lack of financial resources to pay for the legal assistance associated with such a proceeding. Were it otherwise, the plaintiff would surely have attended to that process by now. In his affidavit, Mr. Fernandes included photographs that depict a woman, who I presume to be Sandra, assisting the plaintiff in moving from her bed to her wheelchair. These photographs are eye-opening. They show the wheelchair in which the plaintiff is obliged to spend each day to be careworn and decrepit. It is patched with tape in spots. It is most assuredly not the type of state of the art equipment we are accustomed to seeing in use in Canada. If the plaintiff, or her family members, had the ability to extract any monetary value from the impugned Portuguese properties, I am sure the plaintiff would have managed to obtain a higher quality, more comfortable wheelchair by now.

[67] Furthermore, the plaintiff's financial disclosure, and the comments of her son, show her to be in dire straits, unable to afford many amenities which would make her life, and the lives of her caregivers, much less onerous. Clearly, had the plaintiff the ability and resources to acquire title to the properties in which she *may* have an interest, and to realize on those properties, she would have done so. That said, her inability to qualify for mortgage financing must also be borne in mind.

[68] Be that as it may, I am of the view the plaintiff has provided the appropriate and requisite full and frank level of financial disclosure. She has provided detailed information about her income and expenses, which includes bank statements, pension statements, and her most recent tax return. She and her son have each provided sworn evidence of her monthly expenses and have quantified her monthly shortfall. The realities of her situation have been fully explained, including the fact her primary asset, being the Pombal home, is not hers to deal with on her own, and is otherwise an unrealizable asset given the inescapable fact she and her caregivers need a place to live.

[69] Certainly, the other potential real estate interests ought to have been disclosed to Associate Judge Muir. However, in the absence of any further evidence on this point, I am not prepared to draw an adverse inference against the plaintiff regarding that particular shortcoming.

[70] The plaintiff subsists on what can only be described as a paltry monthly income. She suffers a shortfall each month which falls on the shoulders of her family members upon whom she is obliged to rely for her day-to-day care due to her paraplegia. I note those family members are providing that care without charge or complaint.

[71] The Concise Oxford English Dictionary definition of "impecunious" is certainly concise. The word is defined as "having little or no money". There can be no doubt those words accurately describe the plaintiff's financial circumstances.

[72] I find the plaintiff is impecunious.

(c) <u>The merits of the plaintiff's case</u>

[73] Having been found to be impecunious the plaintiff must now demonstrate her case is "not devoid of merit": see *Coastline*, at para. 7. That is most certainly a very low bar.

[74] The plaintiff starts from a position of strength given the wording of the consent order of Edwards R.S.J. to the effect that the plaintiff is in the same position she would be in had she obtained a judgment at trial.

[75] The plaintiff's trial strategy is made fairly clear in her factum responding to this motion. She will argue that, by continuing to defend its insureds for more than a year after receiving the 911 tapes, which provided the basis for the denial of coverage, Aviva has implicitly waived compliance with the policy conditions, per s. 131(1) of the *Insurance Act.*

[76] The plaintiff will argue Aviva is estopped from denying coverage because they continued to defend the insureds for over two years after learning of the facts they are now relying upon to deny coverage. That included paying a costs award, continuing its trial preparation work, and otherwise advancing the matter to the consent order of Edwards R.S.J. The plaintiff argues that, by doing so, Aviva "effectively redeemed the policy for her benefit."

[77] There is also an allegation Aviva placed itself in a conflict of interest by continuing to defend while knowing it was denying coverage which usually requires the appointment of independent counsel. The plaintiff asserts that decision could amount to an affirmation of coverage.

[78] Finally, the plaintiff will also advance an argument in support of relief from forfeiture. While the insureds may have misrepresented the manner in which the plaintiff suffered her injuries, there is no question that the plaintiff suffered grievous permanent injuries while she was a guest in the insureds' home. There is therefore some question about whether the misrepresentation of the insureds constitutes a substantial and material breach of the terms of the policy and the insureds' duty of good faith, and what prejudice, if any, was suffered by Aviva. Under the terms of the policy, did it matter whether the plaintiff fell through the attic roof or down the stairs? In short, was Aviva's decision to deny coverage justified?

[79] In my view, given the history and circumstances of this case, none of those arguments can be said to be devoid of merit.

(d) Conclusion

[80] I have found the plaintiff's financial disclosure meets the benchmark of full and frank disclosure as set out in the jurisprudence.

[81] Based on that disclosure I have found the plaintiff to be impecunious.

[82] I have also found the plaintiff's case is not devoid of merit.

[83] The motion for security for costs brought by Aviva is therefore dismissed.

COSTS

[84] The plaintiff was the successful party on each of Aviva's three motions. She is therefore presumptively entitled to indemnity for her costs incurred in defending these motions per the provisions of r. 57.01.

[85] The plaintiff's bill of costs shows her counsel expended 33 hours at a full indemnity hourly rate of $365.00. Counsel's legal assistant expended 7 hours at an hourly rate of $150.00. The amount of time billed is fully commensurate with motions of this complexity in a proceeding of the utmost importance to the parties. The hourly rates are also reasonable.

[86] The disbursements billed total $8,616.74, being an unusually high amount due to the fees charged by the plaintiff's Lisbon real estate solicitor for his opinion on the title issues.

[87] The plaintiff seeks her substantial indemnity costs in the amount of $23,498.59, or in the alternative her partial indemnity costs in the amount of $18,560.49, both amounts being inclusive of disbursements and HST.

[88] The plaintiff submits an increased costs award is justified as the defendant delivered reply evidence, being the Dias affidavit, which ought to have been included in the defendant's main record, as well as a lengthy reply factum, both of which drove up costs. In my view that is a legitimate point although I do not see it as justifying costs on a substantial indemnity scale.

[89] The plaintiff's costs are easily within the defendant's reasonable expectations. The defendant is a sophisticated and highly experienced litigant whose own bill of costs for these motions significantly exceeds the plaintiff's, even allowing for the fact that bill of costs also includes fees incurred in defending the plaintiff's own motion.[12]

[90] In the circumstances, I am of the view the fair and reasonable costs award is a somewhat elevated award in the amount of $20,000.00.

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[12] I have addressed that issue more directly in my endorsement on the plaintiff's refusals motion.

[91] I therefore order the defendant, Aviva, to pay the plaintiff her costs of defending the three motions in the amount of $20,000.00 within 30 days.

C.M. Smith J.

Date: December 10, 2025