

# Pinder v. Farmers' Mutual Insurance Co. (Lindsay), [2018] O.J. No. 2470

Ontario Judgments

Ontario Superior Court of Justice

M.E. Vallee J.

Heard: March 27, 2018.

Judgment: May 9, 2018.

Peterborough Court File Nos.: 40/05 and 374/06

[2018] O.J. No. 2470 | 2018 ONSC 2910

Between Cindy Pinder and Joyce Pinder, Plaintiffs, and Farmers' Mutual Insurance Company (Lindsay), Defendant  
And between Farmers' Mutual Insurance Company (Lindsay), Plaintiff, and Cindy Pinder and Joyce Pinder,  
Defendants

(31 paras.)

## Case Summary

---

**Insurance law — Actions — By insured against insurer — Property coverage — Practice and procedure — Judgments and orders — Relief against forfeiture — Cross-motions for judgment following jury trial allowed in favour of defendant insurer — Plaintiffs sought coverage for losses related to destruction of home by fire — There was no basis for interference with jury's verdict finding electric heaters rather than wood stove were primary source of heat after gas was cut off, and that plaintiffs made false statements in proof of loss — Inferences drawn by jury were available on evidence — No intent to deceive was required given evidence of reckless disregard for truth, precluding relief from forfeiture — Judgment entered in favour of defendant.**

Cross-motions by the parties for judgment and related relief following a jury trial. The plaintiffs sued the defendant insurer after they were denied coverage for the loss of their home following a fire. The jury verdict included an affirmative response to the question of whether the plaintiffs used portable electric heaters as their primary source of heat after the gas was cut off, and found that the plaintiffs made wilfully false statements on their proof of loss in respect of 39 of the 68 items listed. Judgment was not entered post-verdict. The defendant moved for judgment with return of funds paid to the mortgagee. The plaintiffs brought a cross-motion seeking an order that judgment not be entered in accordance with the jury's verdict, relief from forfeiture, and judgment on the basis of the property appraisal and proof of loss.

HELD: Defendant's motion allowed and plaintiffs' motion dismissed.

There was no basis for interference with the jury's finding that electric heaters rather than a wood stove were the home's primary source of heat. The evidence supported the inference that the heaters were used to heat approximately half of the residence. There was no basis for interference with the jury's finding that the plaintiff made wilfully false statements on her proof of loss in respect of personal property. It was open to the jury that the plaintiff's statements were made recklessly without regard for the truth. No intent to deceive was required to support the jury's conclusion. This was not a case of imperfect compliance that justified relief from forfeiture. Judgment was entered for the defendant in accordance with the jury's verdict.

## **Statutes, Regulations and Rules Cited:**

---

Courts of Justice Act, R.S.O. 1990 c. C.43, s. 98

Insurance Act, R.S.O. 1990, c. I.8, s. 129

## **Counsel**

---

Alfred M. Kwinter, for the Plaintiffs.

Martin P. Forget, for the Defendant.

Martin P. Forget, for the Plaintiff.

Alfred M. Kwinter, for the Defendants.

---

### **REASONS FOR DECISION**

**M.E. VALLEE J.**

#### **BACKGROUND**

1 This matter proceeded to a jury trial in December 2017. It concerned a fire that destroyed a home which Joyce Pinder owned and in which her daughter, Cindy Pinder, resided. The insurer denied coverage.

2 The first question for the jury was, "Did the plaintiffs use portable electric heaters as their primary source of heat after July 2003 when the gas supply to the property, 49 Rideout Street, Lindsay, was cut off?" Questions two through four related to the answer to the first question.

3 The fifth question for the jury was, "Did the plaintiffs make a wilfully false statement in the Proof of Loss form and the schedules?" The defendant alleged that the plaintiffs had made wilfully false statements regarding a number of items set out on Exhibit 1, which was attached to the jury questions.

4 The jury delivered its verdict on December 22, 2017. The answer to question one was "yes". The jury's answer to the fifth question was "yes" regarding 39 of the 68 items listed on the Exhibit.

5 After the verdict was delivered and the jury was excused, plaintiff's counsel stated that he intended to bring a motion for an order that the jury's verdict was perverse. Therefore, judgment in accordance with the jury's verdict was not entered at that time.

#### **MOTIONS**

6 The defendant brings a motion for judgment and return of the funds that it paid to the mortgagee.

7 The plaintiff brings a cross motion requesting an order for the following:

- (i) judgment shall not be entered in accordance with the jury's verdict;
- (ii) the plaintiffs shall be relieved from forfeiture;
- (iii) if the plaintiffs succeed on (a) and (b), the plaintiffs shall be granted judgment in accordance with the property appraisal and proof of loss; and,
- (iv) the defendant's motion for judgment shall be dismissed.

## **ISSUES TO BE DETERMINED**

8 The following issues are before the court:

- (a) Was there any evidence at trial to support the jury's answer to question 1?
- (b) Is relief from forfeiture available in these circumstances?
- (c) Who should have judgment -- the plaintiff or the defendant?

### **(a) Was There Any Evidence at Trial to Support the Jury's Answer to Question 1?**

#### **Applicable Legal Principles**

9 A trial judge may refuse to accept the verdict of a jury only when she or he considers that there is no evidence to support the findings of the jury or where the jury gives an answer to a question which cannot in law provide a foundation for a judgment. Intervention is limited to verdicts bad in law or devoid of evidentiary support. (see *Teskey v. Toronto Transit Commission*, 2003 CarswellOnt 4452 par 6)

10 A trial judge has less power to deal with a perverse verdict than does an appeal court. (see *Cameron v. Excelsior Life Ins. Co.*, [1981] 1 S.C.R. 138)

#### **The Plaintiffs' Position**

11 Cindy Pinder testified that she used her wood stove as the primary source of heat and portable electric heaters as a supplementary source on very cold days. She was not cross-examined on this point. There was no contradictory evidence. Furthermore, Luc Coutu, the adjuster testified near the end of the trial. In cross-examination, he was asked, "Did you hear one witness in this entire trial say that the Pinders were using ceramic or electric heaters as their primary source of heat?" He answered "no".

12 The plaintiffs state that the jury's answer "yes" to question one is perverse. It lacks evidentiary support. This was not a credibility issue. The trial judge is obligated to correct a serious error and substitute "no" as the answer to the question.

#### **Analysis**

13 Cindy Pinder's evidence was that she left home at approximately 5:30 p.m. on Sunday February 1, 2004 and returned at approximately 3:30 a.m. on Monday February 2, 2004 to find the house on fire. According to a statement that she gave to the insurer on Monday February 2, 2004 at 3:30 p.m. right after the fire, Cindy Pinder said that on the night of the fire, there was one stick of wood in the wood stove. It was "one of the bought wood." She agreed that it was a "fire log". Three space heaters were turned "half on". Her trial testimony was consistent with this.

**14** The fact that a witness, Mr. Coutu, testified that he had not heard any evidence at trial that the plaintiffs were using ceramic or electric heaters as their primary source of heat does not determine this matter. The question was for the jury to decide.

**15** There is no dispute that defendant did not challenge Cindy Pinder on this evidence. Nevertheless, it was open to the jury to believe some, none or all of her evidence. In his closing submissions, defence counsel reminded the jury of the rooms in the house where the portable electric heaters were located (kitchen, bathroom and bedroom) and the fact that there was only one log in the wood stove at 5:30 p.m. when Ms. Pinder left. He suggested that the three portable electric heaters were used to heat approximately half of the space in the residence. He asked the jury to draw an inference that Cindy Pinder was using the portable heaters as her primary source of heat. It was open to the jury to draw that inference. Plaintiffs' counsel did not object to the defendant's closing address.

**16** This is not a case where there is no evidence to support the jury's finding. Accordingly, I decline to interfere with the jury's answer to Question One.

### **(b) Is Relief From Forfeiture Available in these Circumstances?**

#### **Applicable Legal Principles**

**17** Section 129 of the *Insurance Act*, R.S.O. 1990, c. I.8 states,

Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss and a consequent forfeiture or avoidance of the insurance in whole or in part and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just.

**18** Section 98 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43 states, "A court may grant relief against penalties and forfeitures on such terms as to compensation or otherwise are considered just."

**19** Relief from forfeiture for imperfect compliance has been granted where a notice to arbitrate<sup>1</sup> was not filed within the required time (see *Rolls-Royce Industries (Canada) Inc. v. Commercial Union Assurance Co. of Canada*, 1996 CarswellOnt 2797), and where a proof of loss did not set out adequate particulars but there was no significant prejudice to the insurer (see *Creative Touch Millworks Inc. v. Royal Insurance Co. of Canada*, [1991] I.L.R. 1-2736 and *Jean-Louis v. Prescott Farmers' Mutual Fire Insurance Co.*, 1981 CarswellOnt 3080).

**20** Where an exaggerated claim was made but the claimant was engaging in only puffery or attempting to establish a negotiating position, fraud was not imputed and the coverage was not avoided. (see *Brandiferri v. Wawanesa Mutual Insurance Co.*, 2012 ONSC 2206)

**21** The jury was instructed that a wilfully false statement is one that a person makes:

- (a) Knowing it to be false,
- (b) Without belief in its truth, or
- (c) Recklessly without caring whether it is true or not.

**22** The jury was further instructed that a statement will not be a wilfully false statement if the person who made the statement had an honest belief in its truth. The honest belief in its truth must be grounded in a reasonable foundation. A person making a statement cannot shut his or her eyes to the facts or purposefully refrain from inquiring into them.

**23** A wilfully false statement is something much more than "imperfect compliance with a proof of loss". The court has no power to relieve against any forfeiture which may result. (see *Swan Hills Emporium and Lumber Co. v. Royal General Insurance Co. of Canada*, [1977] A.J. No. 503, par 38)

### **The Plaintiff's Position**

**24** The defendant pleaded that Cindy Pinder made wilfully false statements on her proof of loss regarding the personal property in the house. This constituted a breach of statutory condition 7 that states, "FRAUD -- Any fraud or wilfully false statement in a statutory declaration in relation to any of the above particulars vitiates the claim of the person making the declaration."

**25** The plaintiff states that fraud requires intention to deceive. The defendant did not plead fraud and was adamant about this at trial. Instead, it pleaded that Cindy Pinder made only wilfully false statements. Therefore, the concept of "intention" is neutralized. Without fraud, if a claimant makes an error in describing an item, the policy should not be vitiated. The allegation of a wilfully false statement is founded in fraud. It is an element of a wilfully false statement. Fraud and wilfully false statements are essentially the same. The court cannot find fraud where there is an honest belief in the truth. The defence could not say that in listing certain items on the proof of loss, Cindy Pinder committed a fraud and intentionally misled the insurer. Any errors made in the absence of fraud are as a result of inadvertence and or carelessness. Accordingly, the court can grant relief against forfeiture.

### **Analysis**

**26** During the pre-charge conference, counsel made submissions regarding the test for a wilfully false statement and whether the defendant had to prove intention to deceive in order for a statement to be wilfully false. I made a ruling on this issue and determined that there was a distinction between fraud and a wilfully false statement. Nevertheless, in closing submissions, the plaintiff stated that, "This case comes down to whether Cindy Pinder and Joyce Pinder are honest people. Either they're honest, people or they're not." (Transcript of Plaintiffs' Closing Submissions dated December 20, 2017, pg 2) "Willfully false statements basically means they were dishonest and wanted to or attempted to deceive the insurance company in some way." (Transcript pg 6) Cindy Pinder made some adjustments to the amounts that she claimed for items on the proof of loss. In closing submissions, the plaintiff further stated:

Remember, she's doing this [listing the values of items on the proof of loss] to get paid. One item has gone from two twenty-nine [\$229] to ninety-nine dollars [\$99]. You have to wonder how many proofs of loss insurance companies see like this where items have gone, so many items have done down in price. I ask you to look at that very carefully when you are considering whether or not you're dealing with an honest person. (Transcript p 18)

**27** Cindy Pinder's evidence at trial was that she believed that all of the items that she described on the proof of loss, and to which she attributed a value, were lost in the fire, properly described and given an accurate value. She was extensively cross-examined on the various items. She admitted that some of them were duplications and some were incorrectly described. Some of the values were incorrect. Luc Coutu testified that there was no evidence in the house of the existence of some of the items claimed. Cindy Pinder admitted that she did not attempt to verify that she owned some of these items and their proper value when she could easily have done so. She could have gone to local stores where she purchased the items and could have obtained duplicate receipts. She provided no reason as to why she did not do this when she knew that the insurer was questioning the items. One example of such an item is a fur coat that Cindy Pinder stated was in the front closet. According to the defendant, there was no fur coat in that closet, not even remnants. The defendant requested proof of ownership and value. The following are portions of the defendant's closing submissions regarding the fur coat:

So she goes to Cahill [where she stated she bought the coat], provides a note, but the note doesn't say they purchased the coat there. The note just provides a replacement cost if you had the coat. So you'd

think that if she actually purchased the coat from Cahill, then she goes and speaks to the merchant, the merchant would be able to confirm that in fact she did purchase it, and this is an expensive item, and this is an item that was on the list of items over five hundred dollars obviously, that the insurer was looking for. In addition to that, the timing of the purchase of the coat, she indicates in her letter that it's purchased in 2001. We know from the income tax returns she simply does not have the funds to purchase a coat in 2001. We know she's using her RRSPs. We know she's on social assistance...We have the fact that she was asked specifically to obtain proof of ownership. She did not do that, and the mere fact that she's going to the retailer, there's an absence of that to strongly suggest that the statement is false. It's false in its existence in the fire. It's false in its origin. It's false in its location. (Transcript of Defendant's Closing Submissions dated December 20, 2017, p. 35 - 36)

**28** It was open to the jury to believe some, none or all of Cindy Pinder's evidence. It was open to the jury to find that Cindy Pinder shut her eyes to the facts or purposefully refrained from inquiring into them. It was open to the jury to find that she made statements recklessly without caring whether they were true or not. The jury did not have to find that Cindy Pinder intended to deceive the insurer in order to come to its conclusion. The jury found that she made wilfully false statements regarding 39 of the items on Exhibit 1 and that she did not make wilfully false statements regarding the other 29 items.

**29** Relief from forfeiture may be granted in situations where there is imperfect compliance with a requirement. I reject the plaintiff's submission that in the absence of fraud, errors on the proof of loss were made only inadvertently or carelessly, that they constitute only imperfect compliance and, therefore, the court can grant relief from forfeiture. Imperfect compliance relates to the type of issues set out in para 19 above. This was not a case of imperfect compliance.

**(c) Who Should Have Judgment -- the Plaintiffs or the Defendant?**

**30** The plaintiffs have been unsuccessful on this motion. Accordingly, judgment shall be entered for the defendant in accordance with the jury's verdict. The defendant shall provide to my assistant, Jennifer Beattie, a draft judgment approved as to form and content by the plaintiff.

**TRIAL COSTS**

**31** The parties shall contact the Barrie Trial Co-Ordinator to arrange a date to attend before me to make submissions on costs. The parties are expected to agree on a schedule for serving and filing materials.

M.E. VALLEE J.

---

**1** An arbitration was required to determine the value of lost property and goods.