**CITATION:** Tadeson v. Unifund Assurance Company, 2020 ONSC 7726
**COURT FILE NO.:** 58294/18 (St. Catharines)
**DATE:** 20201216

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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| **BETWEEN:** | |
| DEREK TADESON<br>Plaintiff | Dionne Chambers, for the Plaintiff (moving party) |
| **– and –** | |
| UNIFUND ASSURANCE COMPANY<br>Defendant | Angelo G. Sciacca, for the Defendant (responding party) |
| | **HEARD:** November 24, 2020, by video conference |

**R. A. LOCOCO J.**

**REASONS FOR DECISION**

## I. Introduction

[1] The Plaintiff Derek Tadeson was the registered owner of a sports utility vehicle destroyed by fire. The Defendant Unifund Assurance Company, his insurer, denied coverage. Mr. Tadeson sued by simplified procedure. He now brings a motion for summary judgment to recover the amount claimed, being $62,264.74. For the following reasons, I am dismissing Mr. Tadeson's summary judgment motion.

### *A. Background facts*

[2] On April 24, 2017, Derek Tadeson purchased a new 2017 Buick Enclave sports utility vehicle for over $60,000. The purchase price included an extended warranty, covering 71 months or 120,000 kilometres. Mr. Tadeson paid the car dealer in cash, mostly in $100 bills. At that time, Mr. Tadeson was employed as a security guard, earning in the neighbourhood of $30,000 a year. Mr. Tadeson says that he contributed $20,000 toward

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the vehicle's purchase price and his father provided the balance as a gift. Mr. Tadeson's father was also employed as a security guard.

[3] A few days later, Mr. Tadeson completed the purchase of a residence, paying $280,000, financed by a $258,000 mortgage. Mr. Tadeson says his mother assisted him with the down payment for the residence.

[4] In July 2017, after initially insuring the SUV with another insurer, Mr. Tadeson insured it under a vehicle insurance policy with Unifund. The policy included a waiver of depreciation, providing full replacement value coverage.

[5] Mr. Tadeson's evidence on the motion was that on the evening of November 17, 2017, he parked his SUV at an isolated location near one of the businesses he was responsible for patrolling as a security guard. Before beginning his shift, he met his father (who was working in the same vicinity that evening) for dinner at a fast food restaurant (Wendy's). At approximately 12:30 a.m. on November 18, 2017, while on his patrols (using a company vehicle), Mr. Tadeson discovered that his SUV was on fire. He called 911 to summons the fire department. The police investigated the circumstances of the fire, later indicating that they suspected arson. However, no charges were laid.

[6] The day following the fire, Mr. Tadeson reported the fire to Unifund and subsequently submitted an affidavit of vehicle fire and proof of loss, claiming the SUV's full purchase price plus towing and other incidental expenses. Unifund's investigation of Mr. Tadeson's claim included his (unsworn) statements to Unifund adjusters/investigators, his examination under oath (as permitted in the insurance policy), and the production of various financial and other documents.

[7] By letter dated June 15, 2018, Unifund advised Mr. Tadeson that it was denying his claim. In that letter, Unifund stated that Mr. Tadeson submitted contradictory information that suggests that he wilfully provided false information with respect to his claim, in contravention of s. 233(1) of the *Insurance Act*, R.S.O. 1990, c. I-8. The letter also expresses concerns with the conflicting evidence it received regarding the source of the funds used to purchase the vehicle.

[8] In an affidavit submitted in response to Mr. Tadeson's summary judgment motion, Unifund's Regional Claims Investigator states that based on the information obtained during the investigation, he formed the opinion that the fire was caused by arson and, while he could not say who set the fire, he believed Mr. Tadeson had some role in it. He also provides the opinion that Mr. Tadeson was engaged in money laundering by purchasing the vehicle with cash from a source he could not or refused to identify, and that the purpose of the arson was to turn the cash into legitimate funds in the form of an insurance payment. He indicates that his opinions were based on his (27) years of experience as an RCMP officer (until his retirement in 2007) and his subsequent experience as an insurance investigator.

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[9] Mr. Tadeson subsequently commenced an action by way of the simplified procedure under r. 76 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. In its responding pleadings, Unifund alleged that Mr. Tadeson made wilfully false statements relating to (among other things) the SUV's purchase and the circumstances of the loss. The pleadings also allege that Mr. Tadeson was engaged in a scheme to launder money in order to hide from authorities money generated through criminal activity, and that he used the proceeds of crime to purchase the vehicle.

### *B. Parties' positions and matters to be determined*

[10] Mr. Tadeson now seeks summary judgment against Unifund. His counsel argues there is no genuine issue requiring a trial relating to either Mr. Tadeson's proof of loss or the defences Unifund has raised. The plaintiff says that on the evidence, he has met the onus of proving his loss, including the amount of the loss and his insurable interest in the vehicle. He also says that Unifund's money laundering allegations lack the factual foundation necessary to justify denial of insurance coverage. He further argues that Unifund has failed to establish the falsity or materiality of the statements Unifund says were wilfully false. In these circumstances, the plaintiff says that it is just and fair to determine this action in his favour by way of summary judgment. If the court decides that summary judgment should not issue, the plaintiff argues in the alternative that a mini-trial should be ordered to make the factual findings that would be required to determine the limited matters in issue.

[11] In response, the defence argues that given the inconsistencies and gaps in the evidence relating to the circumstances of the fire and the source of funds for the vehicle's purchase, the plaintiff has not met his onus of establishing that there is no genuine issue requiring a trial relating to his proof of loss. In particular, the defence says that the plaintiff has not met his obligation to establish that (i) the plaintiff had an insurable interest in the vehicle, and (ii) the fire that caused the loss was accidental. The defence also argues that it would be unfair to grant summary judgment in this case, given the evidentiary inconsistencies and gaps. The defence says that in the context of a simplified procedure action, Unifund is at a procedural disadvantage on a summary judgment motion, given its inability to (i) cross-examine the plaintiff on his affidavit, or (ii) compel evidence from others involved, including the plaintiff's father regarding the circumstances of the fire and the vehicle's purchase (see r. 76.04; see also *Manthadi v. ASCO Manufacturing*, 2020 ONCA 485, 63 C.C.E.L. (4th) 163, at paras. 32-41.) In order to address that unfairness, the defence says that the court should either (i) dismiss the plaintiff's summary judgment motion and order a summary trial, or (ii) order a mini-trial to permit the defence to examine the plaintiff, his father and others relating to the matters in issue. The defence also says that if the court decides it is appropriate to grant summary judgment, it should be in Unifund's favour on the basis that the evidence establishes that the plaintiff made wilfully false statements to Unifund, voiding the insurance policy. Therefore, Unifund was justified in denying coverage for the plaintiff's loss.

[12] Given the foregoing, the matters to be determined are as follows:

a. Proof of loss: Are there triable issues relating to the plaintiff's proof of loss?

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b. Wilfully false statements: Are there triable issues relating to Unifund's denial of coverage based on wilfully false statements about to the circumstances of the fire or the purchase of the vehicle?

[13] In the balance of these Reasons, I will first summarize in general terms the requirements applicable to summary judgment motions. I will then address in turn the matters set out above.

## II. Legal principles – summary judgment

[14] Summary judgment will be granted if the court is satisfied that there is no genuine issue requiring a trial: see r. 20.04(2)(a). In *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at paras. 49-51, the Supreme Court of Canada interpreted this test as follows:

> 49. There will be no genuine issue requiring trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
>
> 50. These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication.…
>
> 51. Often, concerns about credibility or clarification of the evidence can be addressed by calling oral evidence on the motion itself. However, there may be cases where, given the nature of the issues and the evidence required, the judge cannot make the necessary findings of fact, or apply the legal principles to reach a just and fair determination.

[15] In determining whether the test for summary judgment has been met, the motion judge has enhanced fact-finding powers that entitle the judge to weigh the evidence, evaluate credibility of a deponent and draw any reasonable inference from the evidence, unless it is in the interest of justice for such powers to be exercised only at a trial: see r. 20.04(2.1). These enhanced powers are therefore discretionary and presumptively available: *Hryniak*, at para. 45. Using these powers will not be against the interest of justice if using them will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole: *Hryniak*, at para. 66. For the purpose of exercising these enhanced powers, the motion judge is authorized to hear oral evidence, referred to as a "mini-trial": see r. 20.04(2.2).

[16] In *Hryniak*, at para. 66, the court also suggested a roadmap or approach to a summary judgment motion. The motion judge should first determine whether there is a genuine issue requiring a trial based only on the evidence before the court on the motion, without using the enhanced fact-finding powers. If there appears to be a genuine issue requiring a trial, the motion judge should then determine if a trial can be avoided by using those fact-finding powers. The court, at para. 78, also suggested that where a motion judge dismisses a

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summary judgment motion, the motion judge should seize herself of the matter as the trial judge in the absence of compelling reasons to the contrary.

[17] The onus of establishing that there is no genuine issue requiring a trial is on the moving party, in this case, Mr. Tadeson. However, both sides are required to "put their best foot forward" with respect to the existence or non-existence of material issues to be tried: see *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R 372, at para. 11, quoting *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434. This requirement is consistent with r. 20.02(2), which requires the responding party to place before the motion judge evidence of specific facts showing that there is a genuine issue requiring a trial. The motion judge is entitled to presume that evidentiary record is complete and there will be no further evidence if the issue were to go to trial: *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at p. 17; *Broadgrain Commodities Inc. v. Continental Casualty Co. (CNA Canada)*, 2018 ONCA 438, 80 C.C.L.I. (5th) 23, at para. 7.

[18] With that background, I will now address the issues that arise on this motion.

## III. Proof of loss

[19] Are there triable issues relating to the plaintiff's proof of loss?

### *A. Parties positions*

[20] The plaintiff argues there is no genuine issue requiring a trial relating to his proof of loss. The plaintiff says that on the evidence, he has met the onus of proving his loss, including the amount of the loss and his insurable interest in the vehicle.

[21] It is not in dispute that (i) Mr. Tadeson was the registered owner of the SUV, (ii) Unifund agreed to insure the SUV under a policy the included waiver of depreciation, providing full replacement value coverage, (iii) the vehicle was destroyed by fire, resulting in a total loss of the vehicle. Mr. Tadeson provided unchallenged evidence that (i) the purchase price of the vehicle earlier in the year of the loss was $60,537.10, (ii) the claim deductible was $500, and (iii) Mr. Tadeson incurred additional expenses (including towing, storage and vehicle rental) totaling $2,227.64 that would be covered under the terms of the policy.

[22] On the evidence before me, without taking into account the issues Unifund has raised (as outlined further below), I am satisfied that the plaintiff incurred a recoverable loss of $62,264.74 as a result of the vehicle fire. Unifund's evidence on the motion included an Autosource valuation, indicating that the SUV had a market value of $38,165 at the time of the loss. I do not see the relevance of that valuation given the terms of the policy.

[23] In order to establish his entitlement under the policy, the plaintiff must also establish that he had an insurable interest in the vehicle: see *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2. The plaintiff says that the evidence supports his position that he had an insurable interest. He was the vehicle's registered owner. He purchased the vehicle with $20,000 of his own funds, which the balance being a gift from his father. The

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purchase price included an extended warranty. He drove the vehicle regularly. He paid for the vehicle's maintenance, including rustproofing. He installed a trailer hitch for towing a utility trailer. According to the plaintiff, there is no cogent contrary evidence to support the defence's position that he did not have an insurable interest in the vehicle.

[24] In response, the defence argues that given the inconsistencies and gaps in the evidence relating to the circumstances of the fire and the source of funds for the vehicle's purchase, the plaintiff has not met his onus of establishing that there is no genuine issue requiring a trial relating to his proof of loss. The defence says that in order to prove his loss, in addition to establishing that he had an insurable interest in the vehicle, the plaintiff also has the onus of establishing that the fire was accidental. In that regard, the defence notes that under the policy terms, Unifund was liable for "accidental" loss or damage caused by covered perils, including fire.

[25] To support its position, the defence notes various inconsistencies and gaps when comparing the versions of events that Mr. Tadeson provided in his unsworn statements to Unifund personnel, his examination under oath under the policy (including documents he undertook to provide during the examination), and his affidavit in support of the motion. Those inconsistencies and gaps included the following.

a. Mr. Tadeson provided inconsistent statements about where he got the $20,000 in cash he provided to purchase the vehicle (together with the funds his father provided), that is, whether the funds were part of a "stash" he kept at home or whether they were withdrawn from one or two banks. The financial records he provided were of no assistance in resolving those inconsistencies.

b. Mr. Tadeson provided inconsistent statements about the events the evening prior to discovery of the fire, including the time he parked his SUV, whether he normally parked his vehicle at that location, whether he picked up his patrol vehicle before or after having dinner with his father, whether they took two cars or one to the restaurant, and when he last saw his SUV before discovering it on fire.

c. Mr. Tadeson's father (who was working in the vicinity at the time of the fire) would be in a position to provide relevant information regarding both the events preceding the discovery of the fire and the source of funds for the SUV's purchase. He has not done so. He did not cooperate with Unifund personnel during the claim investigation. The plaintiff did not provide an affidavit from his father in support of the summary judgment motion. Because the plaintiff's action is by simplified procedure, Unifund was not permitted to compel evidence from his father on this motion by way of examination under r. 39.03 (see r. 76.04).

d. Other persons would be in a position to provide relevant information relating to the matters in issue. For example, Mr. Tadeson's mother would able to provide information regarding the source of funds for the down payment for Mr. Tadeson's residence purchase, which occurred shortly after the SUV purchase. Because the

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plaintiff's action is by simplified procedure, Unifund was not permitted to compel evidence from others on this motion.

[26] The defence says that the foregoing evidentiary gaps and inconsistencies, relating to the source of funds for the SUV's purchase justify the conclusion that the plaintiff has not established the absence of a triable issue as to whether the plaintiff had an insurable interest in the SUV. The defence also says that the suspicious circumstances of the fire, exacerbated by the foregoing evidentiary gaps and inconsistencies, justify the conclusion that the plaintiff has not established the absence of a triable issue as to whether the fire was accidental.

[27] In support of its position that the onus was on the plaintiff to establish that the fire was not accidental, the defence relies on Ontario Court of Appeal decision in *Shakur v. Pilot Insurance Co.* (1990), 74 O.R. (2d) 673 (C.A.). In that case, the insured sued to recover the value of jewellery she said was stolen from her after she was pushed down in the street. The insurer denied the claim, alleging no theft had occurred. The trial judge found for the insured, noting that the evidence did not establish that the insured made a fraudulent claim. In doing so, the trial judge stated that he was not asked to decide whether it was more likely than not the robbery happened. On appeal, a new trial was ordered. The Court of Appeal held that (i) the burden of proof was on the insured to establish her right to recover under the policy, which included the burden of proving that a theft of the jewellery had occurred, and (ii) the insurer's allegation that the claim was fraudulent did not shift that burden: see *Shakur*, at p. 681.

[28] The defence also notes that similar reasoning was used in *Sokolik v. Wawanesa Mutual Insurance Company* (1956), 17 W.W.R. 443 (Man. C.A), in which the court upheld an insurer's denial of coverage for a fire loss claim. In that case, the court found that the insured did not meet his onus of establishing that the fire was accidental and not set by the insured: see *Sokolik*, at p. 445.

[29] In response, the plaintiff says that when an insurer alleges arson to defeat a fire insurance claim, in the absence of direct evidence that the insurer set the fire or caused it to be set, the insurer has the burden providing clear and cogent evidence pointing to the insured's involvement in causing the fire in order to defeat the insured's claim. The plaintiff relies on the principles summarized in *Sayeau v. Prudential of America General Insurance Co. (Canada)*, [2000] O.J. No. 4479 (S.C.), at para. 14, as follows:

> When an insurer seeks to defeat a claim on grounds of arson, it must establish in the absence of direct evidence, that the fire was of incendiary origin, that the plaintiff or her principals had the opportunity to set or cause the fire to be set, and that the plaintiff or her principals had sufficient motive for setting the fire. See: *Bernardi v. Guardian Royal Exchange Assurance Co.*, [1979] I.L.R. 1-1143 (Ont. C.A.); *Rizzo v Hanover Insurance Co.* (1993), 14 O.R. (3d) 98 (Ont. C.A.); and *612705 Ontario Ltd. v. Continental Insurance Co. of Canada* (1995), 29 C.C.L.I. (2d) 146 (S.C.J.) [Ont. Gen. Div.]. I view these principles as applicable to the case at bar in that it is not

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> a case of the plaintiff having been observed directly in setting a fire intended to destroy the premises.

[30] In *Sayeau*, at para. 16, the court goes on to state that in order to determine whether the insurer has proven arson, fraud or other serious misconduct, the burden that applies is proof "to a high probability, supported by clear and cogent evidence, and eliminating all reasonably probable innocent, fortuitous or accidental explanations for what happened that may be supported by the evidence" (see also *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164, referred to further below under "Wilfully false statements").

### *B. Analysis and conclusion*

[31] I consider the parties' analysis of competing cases relating to burden of proof to be somewhat tangential when considering the issue of proof of loss. Both at trial and on this motion, the legal burden is on the plaintiff/moving party to make his case, that is, to establish the validity of his claim (at trial) or to establish there is no genuine issue requiring a trial to determine that issue (on the summary judgment motion). In my view, when considering the issue of proof of loss, the reasoning in *Sayeau* should be read as indicating the *evidentiary* burden on the insurer when it seeks to justify denial of a claim based on arson or other serious misconduct by the insured. The nature of the evidence required to meet that evidentiary burden (within the context of the usual civil onus of balance of probabilities) would be a relevant consideration in determining the outcome, but the legal burden of proof remains on the plaintiff/moving party.

[32] On the evidence before me on this motion, I have concluded that the plaintiff has not met his onus of establishing that there is no genuine issue requiring a trial with respect to the plaintiff's proof of loss. In order to prove his loss at trial, the elements that the plaintiff would need to establish would include the amount of the loss, the plaintiff's insurable interest in the vehicle, and the fact that the loss was caused accidently by reason of an insured peril. As already indicated, I am satisfied on the evidence that the plaintiff has established the amount of the loss, being $62,264.74. However, I am not satisfied there are no triable issues relating to the other two elements.

[33] Dealing first with insurable interest, I agree with the defence that the evidentiary inconsistencies and gaps relating to the source of funds for the SUV's purchase calls into question whether the plaintiff had an insurable interest in the vehicle. Those inconsistencies and gaps include the plaintiff's inconsistent statements (and lack of supporting documentation) relating to the source of the cash he used to purchase the vehicle (that is, his "stash" at home or one or more banks) and his father's reported contribution to the cash purchase price. The plaintiff's modest reported income and the fact that he purchased a residence around the same time (with the down payment assistance he says he received from his mother) also calls into question the nature of his interest in the vehicle.

[34] If the plaintiff's action were by ordinary procedure, it would have been open to the defence on this motion to cross-examine the plaintiff on his affidavit as well as compel evidence from others by way of examination under r. 39.03. In these circumstances, unlike in

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*Dawson*, it would not be appropriate in this case to presume that I have on this motion all the evidence that would be available at trial.

[35] In addition, although not directly relevant to the issue of source of funds, the evidentiary inconsistencies with respect to the events relating to the discovery of the fire (referred to further below) call into question the credibility and reliability of the plaintiff's evidence generally, providing further support for the conclusion that the plaintiff has not met his burden on this motion. I am not saying that the plaintiff's evidence is not credible or reliable but rather that the evidence on this motion placed his evidence's credibility and reliability in issue.

[36] As well, I am not satisfied there is no genuine issue requiring a trial with respect to whether the loss was caused accidently. There is no issue that (i) fire is a peril covered under the policy and (ii) the loss was caused by fire. In addition, it is clear from the case law that the defence would face a significant evidentiary burden at trial to avoid paying the plaintiff's claim based on the plaintiff's involvement in setting the fire. I agree with the plaintiff that the evidence before me on this motion would not be sufficient to establish his involvement.

[37] That being said, I agree with the defence that the evidentiary inconsistencies and gaps with respect to the events prior to the discovery of the fire calls into question whether the fire was caused accidently without the plaintiff's involvement. Those inconsistencies and gaps include the plaintiff's inconsistent statements relating to the events of that evening (as outlined previously), his father's involvement and presence in the vicinity, the absence of evidence from his father, and the defence's lack of opportunity to compel his father's testimony by way of examination. Given those inconsistencies and gaps, when considered in the context of the suspicious circumstances surrounding the SUV's cash purchase, I have concluded that there are triable issues relating to whether the fire occurred accidently without the plaintiff's involvement.

[38] In order to address the evidentiary gaps and inconsistencies, both parties have suggested (as a primary or alternative submission) that the court consider whether it is in the interest of justice to order a "mini-trial" (see rr. 20.04(2.1) and (2.2); *Hryniak*, at para. 66). The evidence at the mini-trial would include oral evidence from the plaintiff and others, including his parents.

[39] From the standpoint of proportionality, expedience and expense I do not see any significant advantage in this case to ordering a mini-trial. Since this action is proceeding by simplified procedure, a summary trial is available to the parties, as set out in r. 76.12. In this case, the evidentiary gaps and inconsistencies would be as (or more) effectively addressed in a summary trial as in a mini-trial under s. 20.02(2.2).

[40] I also see no sufficient reason to seize myself of the trial (see *Hryniak*, at para. 78). Among other things, the evidence is not document-intensive, providing me with little if any advantage in conducting the trial judge as opposed to another judge without previous involvement. As well, seizing myself of the trial may well be more likely to result in further delay in the current environment.

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## IV. Wilfully false statements

[41] Are there triable issues relating to Unifund's denial of coverage based on wilfully false statements about to the circumstances of the fire or the purchase of the vehicle?

[42] Section 233(1) of the *Insurance Act* provides that an insured's claim is invalid and the right to recover under the policy is forfeited if the insured (a) when applying for insurance, gives false particulars of the vehicle to the insurer's prejudice or knowingly misrepresents any fact required to be stated, (b) contravenes a policy term or commits a fraud, or (c) wilfully makes a false statement in respect of a claim.

[43] The defence argues that if the court decides it is appropriate to grant summary judgment in this case, judgment should be granted in Unifund's favour on the basis that the evidence establishes, on the balance of probabilities, that the plaintiff made wilfully false statements to Unifund amounting to fraud, both at the time he applied for the policy and when he made his claim for fire loss, thereby voiding to policy. Therefore, Unifund's denial of coverage was justified under s. 233(1) of the *Insurance Act*, according to the defence.

[44] On a motion for summary judgment, it is open to the court in an appropriate case to grant summary judgment to the responding party, even though the responding party did not itself bring a motion for summary judgment: see *King Lofts Toronto I Ltd. v. Emmons*, 2014 ONCA 215, 40 R.P.R. (5th) 26, at para 14; *Kassburg v. Sun Life Assurance Company of Canada*, 2014 ONCA 922, 124 O.R. (3d) 171, at paras. 50-52; *Meridian Credit Union Ltd. v. Baig*, 2016 ONCA 150, 394 D.L.R. (4th) 601, at para 17; and *Singh v. Trump*, 2016 ONCA 747, 408 D.L.R. (4th) 235, at para 147. For the reasons below, I do not consider it appropriate to grant summary judgment to Unifund in this case.

[45] In order to establish that the plaintiff's insurance coverage was void under s. 233(1) by reason of wilfully false statements or fraud, there is no dispute that (i) the onus of proof is on Unifund, and (ii) the applicable standard is the civil standard of balance of probabilities. In *Continental Insurance Co. v. Dalton Cartage Co.* (a decision the defence relies on), the Supreme Court of Canada indicates that the usual civil burden of proof still applies (rather than the higher standard of proof beyond a reasonable doubt that applies in criminal cases) where there is an allegation in civil litigation of "conduct that is morally blameworthy or that could have a criminal or penal aspect."

[46] In *Continental*, the Supreme Court also goes on to find no reversible error in the trial judge's statement that the plaintiff's onus of proof was "upon a balance of probabilities and by a degree of proof commensurate with the gravity of the allegation that requires proof, namely that the loss was occasioned by a fraudulent or dishonest act" (emphasis added): *Continental*, at p. 169. In doing so, the court notes as follows (at p. 170):

> There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered.

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[47] The defence says that Unifund has met the required burden of establishing that the plaintiff made wilfully false statements when he applied for insurance and when made his claim, voiding his insurance. In support of that position, the defence relies inconsistencies and gaps in the evidence referred to previously. The defence also notes the inconsistency between the plaintiff's statement that the SUV was used for pleasure purposes only (in the insurance application), as compared to later statements that he regularly drove the vehicle to work.

[48] Earlier in these Reasons under "Proof of loss", when considering whether the plaintiff met his burden of establishing the absence of triable issues, I found that those evidentiary inconsistencies and gaps justified the conclusion that the plaintiff did not meet his burden of establishing there was no genuine issue requiring a trial relating to his proof of loss. Consistent with that conclusion, I have no difficulty finding that the evidence before me raises triable issues with respect to Unifund's allegations of wilfully false statements by the plaintiff. However, taking into account the "gravity of the allegation that requires proof", I agree with plaintiff's counsel that the evidence does not meet the standard of proof, on the balance of probabilities, that would be required to grant Unifund's request for summary dismissal of the action. I also agree that there are issues relating to the "materiality to the claim" of certain statements that Uniform says were wilfully false, including the degree of any prejudice to Unifund: see *Sagl v. Cosburn, Griffiths & Brandham Insurance Brokers Ltd.*, 2009 ONCA 388, 249 O.A.C. 234, at para. 107.

[49] The matters to be determined relating to proof of loss and wilfully false statements are intertwined. Their determination depends, among other things, on the credibility and reliability of the plaintiff's evidence and the extent to which it may be supported by the evidence of others not available on this motion except through the plaintiff (who did not provide it). In these circumstances, it is appropriate that these matters be determined at a summary trial, rather than on a summary judgment motion.

## V. Conclusion

[50] Accordingly, an order will issue as follows:

a. The plaintiff's motion for summary judgment is dismissed.

b. The defendant's costs on a partial indemnity basis are fixed at $7,500 including disbursements and tax, payable by the plaintiff within 30 days.

[51] I am grateful to counsel for their helpful submissions as well as for the parties' prior agreement on the scale and amount of costs to be awarded to the successful party.

R. A. Lococo J.

**Released:** December 16, 2020

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**B E T W E E N:**

DEREK TADESON

Plaintiff

**- and –**

UNIFUND ASSURANCE COMPANY

Defendant

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**REASONS FOR DECISION**

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**R. A. LOCOCO J.**

**Released:** December 16, 2020