**CITATION:** Aviva v. Intact, 2018 ONSC 6527
**COURT FILE NO.:** CV-18-00595339-0000
**DATE:** 20181004

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Aviva Insurance Company of Canada

**AND:**

Intact Insurance Company

**BEFORE:** Mr. Justice Peter Bawden

**COUNSEL:** *Mr Keenan Sprague*, for the Applicant

*Mr. Jason Mangano* for the Respondent

**HEARD:** October 3rd, 2018

## ENDORSEMENT

1. The applicant, Aviva Insurance, seeks a declaration that the respondent, Intact Insurance, is obliged to defend Deejah Braithwaite and Lynda Williams against an action brought by a woman who was injured in a motor vehicle accident.

2. Lynda and John Williams insured their vehicles with Intact. Their daughter, Deejah, caused two accidents while driving under their insurance policy and it was decided that she would no longer be covered as an occasional driver under the policy. On March 28, 2011, Deejah, Lynda and John signed an OPCF 28A which clearly stated that she was an excluded driver on her parents' policy with Intact. In the portion of the form that lists the vehicles covered by the excluded driver endorsement, the form read "see your certificate of automobile insurance for which automobile(s) this change applies to". At the time that the form was signed, Lynda and John owned a 2006 GMC truck and a 2003 Honda CRV.

3. Deejah bought her own car in October, 2013. It was a 2013 Honda Fit which she insured herself. In January, 2014, Deejah moved to Australia for 18 months. Prior to leaving, she transferred the ownership of the Fit to her mother.

4. On February 11, 2014, Lynda deleted the 2003 Honda CRV from the policy and added the Fit. Intact mailed a document entitled "Policy Change Advice" to Lynda and John on February 10, 2014. On the third page of that document, the letter lists a series of benefits

and limitations to the policy. One of the listed endorsements reads "28A Excluded Driver Endorsement - Braithwaite, Deejah - B 7219-15969-35611".[1]

5. On August 14, 2014, Lynda removed the 2006 GMC truck from the policy and added a 2010 Mazda 3. The policy was changed and Intact confirmed the change to the policy in a letter dated August 13, 2014 which once again referred to the Excluded Driver Endorsement (EDE) which applied on the policy to Deejah. In her email of August 12, 2014 requesting the change in policy, Lynda made no mention of Deejah driving either the Fit or the Mazda.

6. Lynda and John also had a son named Nicholas Braithwaite. Nicholas was evidently also a poor driver and on March 21, 2015, he signed an EDE acknowledging that he would not be insured by Intact to drive his parents' cars. The EDE that Nicholas signed had a different description of the subject vehicles then the EDE which Deejah had signed in March, 2011. The 28A signed by Nicholas read "all vehicles insured by this policy".

7. On March 20, 2015, Lynda sent an email to her insurance broker advising her that Deejah was expected back from Australia in June and asking the following questions:

    a. "Can we add her to our policy?

    b. "Or if we transferred the Honda Fit to her would she be able to afford insurance on her own?"

    c. Can you possibly give us quotes for her?

8. The broker responded on the same day with a quotation of $2508 to ensure Deejah under the existing policy with Intact.

9. On March 24, 2015, Lynda replied to her broker "Deejah will be home in late June and I think in July once she is settled we will transfer the Honda to her and have her on her own insurance. We will contact you at that time."

10. Deejah did return from Australia in May, 2015. On July 7, 2015, Intact mailed a "Certificate of Insurance" to John and Lynda signifying that the insurance on the 2013 Fit and the 2010 Mazda had been renewed. The policy named only John and Lynda as drivers and included the same reference to the Excluded Driver Endorsement for Deejah

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[1] Mr. Sprague refers in his factum to a letter received by Lynda Williams from Intact on February 11th, 2014 confirming that coverage would be granted for the 2013 Honda Fit. That letter does not make reference to the OPCF 28A for Deejah and indicates that a policy endorsement would be sent to her. The formal "Policy Change Advice" document which was mailed to Lynda and is dated February 10th, 2014 *does* include the 28A for Deejah as does every formal acknowledgment of the policy that was ever sent by Intact. I do not draw anything from the absence of a reference to the EDE for Deejah in the letter of February 11th.

which had been printed on every confirmation of insurance mailed by Intact to Lynda and John since the EDE had been signed in March, 2011.

11. On July 16, 2015, Deejah was involved in an accident while driving the Honda Fit. Shari Darling was injured in that accident and seeks damages against Lynda and Deejah. Intact Insurance takes the position that it is not obliged to defend since Deejah was an excluded driver on the policy.

12. In an affidavit filed for this application, Lynda Williams states that "it did not occur to me that Deejah was an excluded driver on the Intact policy when she returned from Australia in 2015." She goes on to say that Intact did not remind her or bring to her attention the existence of the OPCF 28A since it had been signed in 2011. She observes that when the 28A was signed, she and her husband owned completely different vehicles. In her discovery evidence, Lynda testified that when the policy confirmation documents arrived in the mail, she would remove the pink insurance slip and discard the balance of the document without reviewing it. It was the discarded portion of the document which included the reference to the 28A Endorsement.

13. I have considerable sympathy for the situation that Lynda Williams finds herself in today but I simply do not accept her evidence that she had no idea that Deejah remained an excluded driver in 2015. Her email of March 24, 2015 makes it abundantly clear that she was aware that it would be difficult for Deejah to get automobile insurance, knew that Deejah was not then covered by the Intact policy, knew that it would cost a great deal more to put Deejah back on the policy and recognized that Deejah would have to get her own policy once she arrived back in the country. Lynda had only just finished signing an EDE for her son Nicholas so it can hardly be said that the excluded driver provisions for her two children were far removed from her mind. Perhaps most significantly, she must have been aware from her July 7, 2015 policy renewal statement that her rate had not gone up in any substantial way. As a result of her March, 2015 email exchange with her insurance broker, Lynda knew that covering Deejah would significantly increase the costs of her policy.

14. Based on all of the evidence, it is obvious that Lynda knew of the EDE regarding Deejah, was aware of the absence of coverage when Deejah drove the car and nevertheless allowed her to drive it. These factual findings do not necessarily decide this application but it can certainly be said that there is nothing in the evidence to support the proposition that there had not been a meeting of the minds between Intact and Lynda Williams regarding the terms of the insurance contract.

15. Mr. Sprague urges me to apply the reasoning of the Supreme Court of Canada in *Ledcor* [2016] 2 S.C.R. 23 and scrutinize the standard form contract used by Intact to determine if there is any ambiguity which can be resolved in favour of his clients. I will address his arguments in the order in which they appear in his factum.

*The EDE signed by Deejah and Lynda in March 2011 did not comply with the FSCO approved OPCF 28A Excluded Driver Endorsement form*

16. The 28A which Deejah signed did not list the vehicles which were covered by her parents' insurance contract. It rather said "See your Certificate of Automobile Insurance for which automobile(s) this change applies to". At the time that she signed the 28A, the only vehicles that the policy covered were the 2006 GMC Truck and the 2003 CRV. Mr. Sprague argues that each time a new vehicle was added to the policy, Intact was obliged to obtain Deejah's signature on a new 28A in order to apply the Excluded Driver Endorsement to the newly added vehicle.

17. Mr. Sprague relies on the case of *Paine et al. v. Intact* (2016) 133 O.R. (3d) 781. The facts in *Paine* are somewhat similar to the case at bar. The applicant signed an excluded driver endorsement which listed the three vehicles which were covered at the time that the EDE was signed. A further vehicle was added to the policy but the insurer did not obtain a newly signed EDE to cover the additional vehicle. The EDE signed by the driver referred only to the three listed vehicle and did not include any "catch-all" phrase which would have extended the EDE to any future vehicles insured under the policy.

18. The court in *Paine* cited the decision in *Tompros* 2015 ONSC 3998 (S.C.J.) for the proposition that anyone who signs an EDE should be able to tell from reading that document the identity of the vehicles that are excluded from coverage. The court distinguished the case of *Hunter* (2004), 75 O.R. (3d) 124 on the basis that there was a catch-all phrase in the EDE used in Hunter which permitted the addition of new vehicles on policy without a requirement to obtain a newly signed EDE.

19. Mr. Sprague argues here that the phrase "See your Certificate of Automobile Insurance for which automobile(s) this change applies to" in combination with the inclusion of the EDE for Deejah on every renewal or confirmation of the insurance policy was not a sufficient "catch-all" phrase to include the Honda Fit.

20. The Court of Appeal considered Intact's use of the very same 28A form in the case of *Royal & Sun Alliance v. Intact Insurance* 2017 ONCA 381. In that case, the plaintiff argued that the phrase impermissibly deviated from the form which had been preapproved by the Superintendent and was therefore void because it infringed section 227(1) of the Insurance Act. The court dismissed the appeal finding that even if the phrase did not comply with the terms of the statute, it remained a valid contract between the parties and was in forcible. Although Mr. Sprague seeks to distinguish *R.S.A.* on other grounds, the case indisputably establishes that the EDE which Deejah signed was at least capable of forming a valid contract.

21. Mr. Sprague fairly argues that the EDE would be more effective if it included the phrase "or any future vehicles" as the EDE in *Hunter* did. The fact that a different phrasing might be more specific does not preclude a finding that the wording here is sufficient. The phrase which was used on Deejah's 28A form in combination with the continual references to the 28A on every policy renewal and confirmation received by Lynda made it abundantly clear that the EDE applied to any vehicle insured under the policy. Any other interpretation would have the effect of imposing an obligation on all insurers to

obtain new EDE's on every occasion when an additional vehicle is entered onto a policy, an unnecessary obligation which would be cumbersome and onerous for the insured and the insurer alike.

22. Mr. Sprague seeks to distinguish *R.S.A.* on the basis that the EDE signed in that case pertained to the same vehicle which was involved in the accident whereas in this case, Deejah was driving a car which had not even been built at the time that the EDE was signed.

23. This distinction is immaterial based on my factual findings. In *R.S.A.*, the trial judge found that the plaintiff knew that she was not covered by the policy and the Court of Appeal found that the record fully justified that finding. I have made the same finding here. The only material distinction that could exist between *R.S.A.* and this case is if there was an ambiguity in the 28A or the certificate of insurance which gave rise to uncertainty about what Lynda and Deejah knew about the limitations on the policy. I have found in this case, as in *R.S.A*, that there was not.

*Intact was required under Section 232(5) of the Insurance Act to include a copy of the signed EDE with any subsequent Certificate of Automobile Insurance sent to the policy holders*

24. Mr. Sprague relies here on the decision of Justice Sharpe in *GMAC vs. Lombard Insurance* 87 O.R. (3d) 513. The GMAC decision considered section 232(3) of the *Insurance Act* which states:

> (3) Subject to subsection (5), the insurer shall deliver or mail to the insured named in the policy, or to the agent for delivery or mailing to the insured, the policy or a true copy thereof in every endorsement or other amendment to the contract.

25. The court confirmed that this provision is mandatory and that a notation on the Certificate of Insurance was not sufficient notice that the endorsement had been issued. In the *GMAC* case, the excluded drivers on the policy could not be gleaned from reading the Certificate of Insurance.

26. The evidence in this case is that Lynda and Deejah received the 28A form from their insurance broker. They signed the document and then sent a copy back to the broker. Lynda retained the original. Lynda also received an annual notice of the renewal of the policy which explicitly stated that Deejah was an excluded driver. All of the renewal and confirmation notices sent by Intact conformed to section 232(5) of the Act.

27. Section 232 does not impose an obligation upon the insurer to provide a copy of every signed endorsement on the policy whenever the insurer confirms or renews the policy. The evidence here is that Intact itself only received a copy of the signed EDE and the plaintiff retained the original. Unlike the case in *GMAC*, there is no basis for uncertainty as to whether an EDE had been signed or who was an excluded driver.

28. If I am wrong in that conclusion, I would nevertheless find that the failure to abide by the mandatory terms of the statute does not vitiate the contract between the parties. As the Court of Appeal observed in *R.S.A.*, section 126(2) of the Act provides that a contract is not "void or voidable as against an insured, or a beneficiary or other person to whom insurance money is payable under the contract, by reason of the failure of the insurer to comply with a provision of this Act."

29. Although the breach of the statute is a factor to consider in deciding if the contract is enforceable, it is not determinative. In this case the failure to provide a copy of the EDE in compliance with section 232(3) had no material bearing on the understanding of the parties and I find that it would not affect the validity of the contract.

## Conclusion

30. I find that the 2011 EDE signed by Lynda and Deejah did apply to the 2013 Honda Fit at the time of the accident. I further find that Intact Insurance did substantially comply with the provisions of section 232(3) of the Insurance Act. If I am wrong in that regard, any failure to comply with the statute does not vitiate the contract between Intact Insurance and the plaintiffs.

31. Accordingly, I find that Intact Insurance is not obliged to defend the action brought by Shari Darling arising from the accident which occurred on July 16th, 2015.

32. In keeping with an agreement between the parties, costs in the amount of $20,000 are awarded to the Respondent Intact.

Peter Bawden

Justice Peter Bawden

**Date:** October 4th, 2018