COURT FILE NO.: 03-BN-12612
DATE: 20070410

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Steven Williams v. Phillip Condon, Kingspoint Property Inc., carrying on business as Kingspoint Plaza and State Farm Mutual Automobile Insurance Co.

BEFORE: van Rensburg J.

COUNSEL: Diana Edmonds, for the Plaintiff

Michael P. Taylor, for the Defendant, Phillip Condon

REASONS FOR JUDGMENT

[1] The plaintiff Steven Williams was walking across the parking lot at Kingspoint Plaza in Brampton when he was struck by a vehicle operated by the defendant driver. The plaintiff claims general and special damages in relation to his injuries.

[2] The plaintiff did not own a vehicle and was not insured at the time of the accident. The defendant driver's insurer State Farm Mutual Automobile Insurance Company ("State Farm") accordingly responded for accident benefits ("AB") as well as for the bodily injury ("BI") or tort claim.

[3] This matter proceeded before me as the trial of an issue; that is whether a release of the tort claim that was signed by the plaintiff is binding and enforceable. In his Amended Statement of Claim, the plaintiff seeks rescission of

the release and a declaration that the release is void *ab Initio* or in the alternative voidable and of no force and effect. If the matter of the release is resolved in favour of the defendant, the plaintiff's claim will be dismissed. If the plaintiff succeeds at this stage, the action will continue toward trial by jury of the plaintiff's damages claim.

[4] It is alleged that the plaintiff was intoxicated after consuming alcohol and prescription drugs when he signed the release and that he lacked capacity to give his consent. Alternatively, the plaintiff claims that the settlement should be set aside as unconscionable.

[5] The accident occurred on October 30, 2002 when the defendant's vehicle struck the plaintiff in his right knee. He was taken by ambulance to the William Osler Health Centre where his leg was put in a soft cast, and he was prescribed Tylenol 3 for pain. He was referred for physiotherapy. The disability certificate signed by a physician on November 5, 2002 noted, "right knee sprain MCL and/or ACL". ("MCL" refers to the medial cruciate ligament and "ACL" refers to the anterior cruciate ligament.) A treatment plan was prepared by the Sports Medicine Specialists noting "right knee grade I, II MCL and ACL tears; minor lower back pain", and recommending six to eight weeks of physiotherapy sessions three times per week. The certificate and treatment plan were received by State Farm on November 6th.

[6] At the time of the accident the plaintiff was working as a high-rise window cleaner earning approximately $1,000 per week as a sub-contractor. The plaintiff claims that he became depressed when he was unable to work, and he started to drink heavily, consuming 10 to 12 "king" cans of beer per day starting at 6 a.m. and continuing throughout the day. At times he combined his drinking with prescription drugs, the Tylenol 3 prescribed at the hospital, and his room-mate's painkillers. The plaintiff claims that this numbed his pain and that he was intoxicated a good deal of the time.

[7] The plaintiff's primary concern during this period appears to have been the replacement of his income as he had no source of financial support other than his job. He received $400 per week from State Farm as income replacement benefits under the AB coverage. The AB claim was originally assigned to claim representative Natalie Farro. Ms Farro spoke to the plaintiff by telephone on October 31st. She explained that State Farm would put two people on the case - one to look after his interests and one to look after State Farm. She explained that she would be handling the AB claim and she explained that this coverage would pay a maximum of $400 per week. State Farm, through another claim representative, John Barukcic, would make up the plaintiff's pre-accident earnings of up to 80% of his net earnings per week. Ms Farro sent out a letter to

Mr. Williams on October 31st requiring the completion of a disability certificate and treatment plan.

[8] By letter dated November 5th, the plaintiff was advised that Chris Metson had taken over the file. Mr. Metson sent the plaintiff an "Explanation of Benefits Payable by Insurance Company" dated November 8, 2002 that confirmed that he was eligible for weekly income replacement benefits of $400, and explained how this amount was calculated. The plaintiff was also put in contact with Mr. Barukcic, and they discussed the top-up of the AB income replacement. According to the plaintiff, they did not discuss any other types of claims the plaintiff might be able to make. On November 6th Mr. Barukcic sent out a consent form, authorizing his review of the AB file, which the plaintiff signed and returned.

[9] Mr. Metson arranged for a home assessment by Independent Rehabilitation Services Inc. ("IRSI"), which was conducted on November 28, 2002 with the plaintiff's written consent.

[10] By letter dated December 9, 2002, the plaintiff was notified by claim representative Tajinder Singh, that an appointment had been arranged with an orthopaedic specialist for January 2, 2003. On December 10th, Ms Singh sent out an Explanation of Benefits Payable by Insurance Company and under "Income replacement benefits" she did not check off whether or not the plaintiff

was eligible or provide any further detail. She simply noted, "please provide a phone number so that we may contact you to discuss your claim". She also enclosed a copy of the IRSI report which summarized the plaintiff's present abilities as "client has sustained an impairment that limits his/her ability to perform pre-accident Activities of Normal Living. Minimal assistance is currently reasonable and necessary". The report also indicated that a work site analysis was to be completed by IRSI.

[11] The plaintiff testified that when he received this notice he contacted Ms Singh by telephone. The call took place on December 16th. He did not have a home telephone number and his cell phone had been disconnected for non-payment. He was to return to work in mid-January but was concerned about his ability to work. According to the plaintiff, Ms Singh wanted to settle the AB part of his claim. She proposed paying an additional eight weeks of income replacement beyond January 15th or 12 weeks in total, plus the cost of a gym membership. The plaintiff asked what would happen to the "top-up". Ms Singh indicated that she was not responsible for that portion and with the plaintiff's agreement she would speak to John Barukcic. The following day the plaintiff claims Ms Singh called him and confirmed that Mr. Barukcic had agreed to pay the top-up for the 12 week period. On that basis he agreed to the settlement and they arranged a time and place to meet.

[12] Mr. Williams testified that he attended at State Farm's office at around 11:00 a.m. on December 18th. He claimed that he had already consumed five or six king cans of beer and a couple of painkillers. He was given a drive to the appointment by his ex-girlfriend's daughter Kerri-Anne Renshaw, who yelled at him when he opened the car door because he was drunk. Ms Renshaw confirmed this in her evidence, claiming that Mr. Williams was noticeably intoxicated, that he was slurring his speech and his eyes were red.

[13] Mr. Williams indicated that he attended at State Farm's office, where Ms Singh met him in reception and took him to a room. He was left there for five or ten minutes with a form of release and according to Mr. Williams, a cheque for $2,400. He indicated that he just stared at the cheque and did not attempt to read the papers. When Ms Singh returned he signed two releases – the first was a seven page document that released his AB claim for $5,300, and which included a Settlement Disclosure Notice, a Description of Benefits and an explanation of what it means to settle the AB claim. Mr. Williams had two days to change his mind and accordingly he was not given a cheque for the settlement of his AB claim until two days later. The other form of release was a standard form general release, one half page long which released Philip Condon for all claims in respect of the October 30th accident for the consideration of $2,400. According to Mr. Williams there was no detailed discussion of the documents and

Ms Singh simply witnessed his signature. On the way out of the office he ran into John Barukcic who asked him how his knee was, and he replied that it was about 85%.

[14] Ms Singh's account of how the settlement was arrived at with Mr. Williams differs from the plaintiff's evidence in a number of respects. She testified that she had no intention of discussing settlement when she took over the plaintiff's file and sent him a notice asking him to contact her to discuss his claim. She simply needed a telephone number at which to reach him. According to Ms Singh it was Mr. Williams who broached the issue of settlement. She explained to him that any settlement would be full and final, and she made sure he knew what that meant. He asked whether the BI claim could be settled at the same time, and she indicated that she could speak to John Barukcic about this. Ms Singh indicated that she spoke to Mr. Barukcic, and got authority to offer an additional 12 weeks of top-up. She offered this and the plaintiff accepted; there were no negotiations. Under cross-examination Ms Singh insisted that it was the plaintiff who offered to settle for 12 weeks. She indicated that she was surprised that the plaintiff called her to settle, and that at the time she believed that he had suffered only a knee sprain or strain.

[15] Ms Singh recalled her meeting with the plaintiff on December 18th. She left the plaintiff in the room with the AB release, and possibly the tort release

which had been prepared by Mr. Barukcic. Mr. Barukcic was on the telephone when she passed by his office to pick up the release, informing him that the plaintiff was there. After 10 or 15 minutes she returned to the room and explained to Mr. Williams each and every point in the release documentation. She testified that she was with the plaintiff for about 30 minutes. Mr. Williams did not have any difficulty communicating. She did not smell alcohol on his breath, and she could not recall whether his eyes were bloodshot. In any event she had no impression that he was impaired. She asked Mr. Williams repeatedly if he had any questions and if he understood the documents and he assured her that he had no questions.

[16] Mr. Barukcic testified that he had spoken with the plaintiff to take his statement on November 8th and that at that time, although he could not recall the specifics, he would have gone over what AB and BI adjusters do. He spoke with the plaintiff on December 5th at which time he claimed that he was doing well and 70% recovered. There were intervening calls when the plaintiff was looking for his top-up cheques. On December 17th Mr. Barukcic received a telephone call from Ms Singh about a settlement of the tort claim. He did not know whether it was the plaintiff or Ms Singh who raised the issue of settlement. He had reviewed the AB file but recalled only that the plaintiff had a knee strain or sprain. On this basis he felt that it would be reasonable to settle the tort claim by paying

an amount equivalent to a top-up of the wage loss for the proposed 12 week period.

[17] Mr. Barukcic was on the telephone when Mr. Williams arrived for the meeting on December 18th. Ms Singh came by and picked up the release he had prepared and a few minutes later he met the two in the hallway. According to Mr. Barukcic he asked the plaintiff how he was doing and he replied that his physiotherapist thought he was crazy to be settling. From this Mr. Barukcic concluded that the plaintiff understood that he was making a full settlement of all claims.

[18] At the time of the settlement the plaintiff had not yet finished the prescribed course of physiotherapy and he had not returned to work. State Farm cancelled his last two physiotherapy appointments as well as the orthopaedic assessment. Mr. Williams returned to work in the second or third week of January 2003. His knee slowed him down considerably. It became unstable and was popping out of joint, sometimes in mid-air. He took much longer to complete his work for which he was paid per building and his earnings were down 25 to 30%. The plaintiff had a lot of pain and was wearing his brace regularly. Ultimately he consulted with Dr. Bob Karabatsos, an orthopaedic surgeon. An MRI confirmed an ACL tear. He had reconstructive surgery in February 2004 and took three or four months off work for rehabilitation. He continues to suffer pain

in his knee and has not been able to continue full time work as a high-rise window-cleaner. There is a prospect of further surgery.

[19] The plaintiff testified that, in February 2003 when he was having difficulty with his work and continuing knee pain, he contacted State Farm to ask about additional benefits. He was informed that there were no further benefits as he had settled all claims. He wrote several letters to State Farm personnel, claiming that he had believed he had two years to settle all claims, that he had not intended to settle, that he was in extreme financial hardship and that he was taking painkillers and drinking beer when he signed the settlement documents. State Farm advised that the settlement was final.

[20] The plaintiff is only seeking to set aside the release in respect of the BI or tort claim. As noted above, the grounds are lack of capacity due to the plaintiff's intoxication at the time of the settlement and unconscionability.

Lack of Capacity

[21] The authorities are clear that the contract of an intoxicated person may be set aside for lack of consent if the person was so intoxicated that he or she was incapable of understanding what he or she was doing, and if the other contracting party was aware of the intoxication (*Bawlf Grain Co.* v. *Ross* (1917), 55 S.C.R. 232; *Murray* v. *Smith* (1980), 32 Nfld. & P.E.I.R. 191; affd. 35 Nfld. & P.E.I.R. 382). The contract must be rescinded promptly upon the person

becoming aware of the circumstances entitling him or her to disavow the contract.

[22] In the present case, I am not persuaded on the evidence that the plaintiff lacked capacity to settle even if he had consumed alcohol and taken pills the day he signed the releases. According to the plaintiff his consumption was no different than what had occurred on a daily basis since his accident, and yet in that state he had engaged in telephone conversations with the insurer on each of the two days preceding the meeting at State Farm, which he recalled clearly while testifying at trial. While I accept that Ms Renshaw smelled alcohol on the plaintiff's breath when she picked him up and she criticized him for drinking so early in the morning, she nevertheless transported him to a meeting at State Farm, and after the meeting went out for lunch with him. Mr. Williams admitted that he had chewed gum to mask the alcohol on his breath and that Ms Singh may not have noticed that he was impaired. There is insufficient evidence to establish that the plaintiff was intoxicated to the point of incapacity on the day that he signed the release.

Should the Settlement be Set Aside as Unconscionable?

[23] The relevant legal test for setting aside an unconscionable bargain is set out in *Morrison* v. *Coast Finance Ltd. et al.* (1965), 55 D.L.R. 710 (B.C.C.A.). Davey, J.A. stated:

> A plea of undue influence attacks the sufficiency of consent; a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair.

In *Black* v. *Wilcox* (1976), 70 D.L.R. (3d) 192, the Ontario Court of Appeal set aside the sale of property at a grossly undervalued price when the plaintiff, known by the purchaser to be a chronic alcoholic, had not received independent advice. The Court set out the test for unconscionability as follows:

> In order to set aside the transaction between the parties, the Court must find that the inadequacy of the consideration is so gross or that the relative positions of the parties is so out of balance in the sense that there is a gross inequality of bargaining power or that the age or disability of one of the contracting parties places him at such a decided disadvantage that equity must intervene to protect the party of whom undue advantage has been taken.

The Court noted that, where there is a pronounced inequality of bargaining power and the contract is grossly improvident, so that it appears that the stronger party has overreached to obtain a bargain which is highly beneficial to him, a presumption arises that the stronger party has made an unconscientious use of the power arising out of the circumstances and conditions. The defendant then

has the obligation to rebut the presumption, by persuading the Court that the transaction is fair.

[24] The foundation of unconscionability is inequality of bargaining power, better described as a *marked discrepancy* in bargaining power between the parties. Proof is also required that the bargain reached is improvident or substantially disadvantageous to the weaker party. The authorities stress that a bargain is not unconscionable merely because it is more favourable to one of the parties. In the case of *Mundinger* v. *Mundinger*, [1969] 1 O.R. 606 (C.A.), affd., [1970] S.C.R. vi a case dealing with the enforceability of a separation agreement that deprived the wife of substantially all of her property interests, the Court held:

> If the bargain is fair the fact that the parties were not equally vigilant of their interest is immaterial. Likewise, if one was not preyed upon by the other, an improvident or even grossly inadequate consideration is no ground upon which to set aside a contract freely entered into. It is the combination of inequality and improvidence which alone may invoke this jurisdiction. Then the onus is placed upon the party seeking to uphold the contract to show that his conduct throughout was scrupulously considerate of the other's interests.

[25] In *Smyth* v. *Szep*, [1992] B.C.J. No. 37, the B.C. Court of Appeal upheld a decision on summary judgment setting aside a settlement of a personal injury claim. The plaintiff was a university student who had settled her claim with an experienced insurance adjuster. After finding that there was an obvious disparity of bargaining position, the Court noted that there was also obvious unfairness in the bargain:

> ...the plaintiff was persuaded to give up her claims at a time when the adjuster knew she had been receiving treatment for some 8½ months, and had no reason to believe she had recovered, when he had no current or relevant medical report, and when neither he nor she had any means of assessing for how much longer it was reasonable to expect that she might suffer pain or disability, and require treatment. Having in mind both what was known with respect to the plaintiff's history and what was not known - and, in the absence of investigation, would therefore have to be valued on the basis of a wide range of possibilities with respect to the future - a fair final settlement, if it had to be reached at that stage, would clearly have to be in an amount several times that of the settlement offered by the adjuster in this case.
>
> The issue is not, in my view, whether a lawyer would have recommended a settlement in that amount...the question is whether an adjuster could reasonably consider the offer made here to be fair when he had no basis on which to assess the plaintiff's present condition or future prognosis.

[26] It is not in every case of a settlement between an insurance adjuster and an unrepresented claimant that inequality of bargaining power will be found. It will depend on the circumstances of the particular case. In *Keewaticappo* v. *Clearsky* (1992), 79 Man. R. (2d) 311, a judge of the Manitoba Court of Queen's Bench found that an experienced insurance adjuster did not deal on equal terms with an unemployed claimant with a grade eight education and no business or commercial experience. In *Pridmore* v. *Calvert et al.* (1975), 54 D.L.R. (3d) 33, Toy J. of the B.C. Supreme Court held that an experienced claims adjuster was in a dominant position to the claimant, a trained practical nurse of modest means who was still recuperating from her injuries. In the present case, I find that there was in fact an inequality of bargaining power between the parties. The State Farm claim representatives involved in the settlement had many years of experience evaluating and handling claims. They had considerably more knowledge and understanding in relation to the assessment of damages and the

appropriate time for settling claims, and their position gave them the power to make decisions about the plaintiff's entitlement, and to withhold payment if they believed he did not qualify for benefits. While the plaintiff was not uneducated (he had a high school education and had worked for some years as a real estate agent) he clearly was in precarious financial circumstances, and entirely dependent on the cheques he was receiving from State Farm. The plaintiff's financial need was apparent to the State Farm representatives. They knew that he did not have a telephone or cell phone. Mr. Barukcic testified that the plaintiff told him that he had to sell his big screen TV to buy cigarettes. He also acknowledged that the plaintiff called frequently when his cheques were late. Accordingly there was a marked inequality of bargaining power between the plaintiff and the State Farm representatives.

[27] With respect to the second part of the test for unconscionability, it is clear that the bargain that was struck between the parties was improvident. As in the *Smyth* case, a great deal was unknown about the plaintiff's condition. There was no reason to believe that the plaintiff had recovered from his injuries. He had not yet completed his course of physiotherapy and had not yet attended the scheduled appointment with the orthopaedic specialist. He was still experiencing pain and using a brace. The plaintiff expressed his concern about the ability to return to work. A work site analysis had been recommended but

had not yet taken place. Most significantly, both Ms Singh and Mr. Barukcic proceeded on the mistaken assumption that the plaintiff had suffered a knee sprain or strain, notwithstanding that the diagnosis of a tear (which both admitted was a more serious injury) was apparent in the AB file they both had reviewed. Mr. Barukcic candidly admitted that, had he been aware of the actual diagnosis, he is not sure that he would have settled the tort claim at that time, and he would have valued the claim at higher than $2,400. Settlement of the tort claim for an amount equivalent to 12 weeks of top-up of the AB income loss was clearly unfair to the plaintiff, and highly favourable to the insurer, based on what was known and still undetermined at the time:

[28] Having determined that there was inequality of bargaining power and an improvident settlement, I must now consider whether State Farm's "conduct throughout was scrupulously considerate of the [plaintiff's] interests". On the evidence I am satisfied that the insurer acted precipitously in settling the tort claim. The settlement came about only after Ms Singh became involved and identified an opportunity to settle the AB claim. She clearly viewed the plaintiff's injuries as minor, although she had scheduled an orthopaedic assessment which had not taken place. It should have been recognized that there was insufficient information to properly assess the injury, which had not fully resolved. The need for further therapy or treatment had not been evaluated, and the plaintiff had not

yet returned to his employment, which was physically demanding. Neither Ms Singh nor Mr. Barukcic fairly assessed the plaintiff's condition and whether and when he would be in a position to return to work.

[29] I am not satisfied that the plaintiff's rights and what he was giving up by settling the IB claim were adequately communicated to him. It does not appear that the plaintiff initiated any discussion about general damages; in fact he contends that he was not aware of his tort rights at that time. It was reasonable that he would ask about the top-up when discussing settlement of his AB claim with Ms Singh however the way the settlement was handled would not have alerted the plaintiff to the fact that he was releasing all claims for pain and suffering and future wage loss for no additional consideration. When the AB adjuster undertook to resolve both claims in circumstances where the insurer itself had maintained two files because of the potential for a conflict of interest, there was a strong risk of confusion. While the AB release was accompanied by a great deal of information and cautionary language and provided for a cooling off period of two days, the tort release was in very general language. The plaintiff may well have concluded, as he has testified, that he was only settling the "top-up" amount and not that he was settling all future claims in respect of his knee injury.

[30] Accordingly, I find that the settlement of the plaintiff's tort claim was unconscionable and the release dated December 18, 2002 is therefore set aside. If the parties are unable to agree on costs, I will receive written submissions in accordance with the following schedule: The plaintiff may serve cost submissions within 20 days, the defendant within 10 days thereafter and reply by the plaintiff, if any, within 5 days. All materials are to be bound together by the plaintiff and filed with the court on reply.

van Rensburg J.

DATE: April 10, 2007

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REASONS FOR JUDGMENT

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van Rensburg J.

DATE: April 10, 2007