

CITATION: Wadhvani v. State Farm Mutual Automobile Insurance Company, 2010 ONSC 2479
COURT FILE NO.: 07-CV-346017 PD2
DATE: 20100510

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

KAMEENEE (CARMEN) WADHWANI

) Daniel Daly, for the Plaintiff

- and -

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

) Christopher J. Schnarr, for the Defendant

) **HEARD:** March 24, 2010

ENDORSEMENT

GRACE J.

[1] On September 26, 1997, Carmen Wadhvani was driving a motor vehicle insured by the defendant ("State Farm") when she was involved in an accident and injured. While she continued her career as an aesthetician for several years, Ms Wadhvani's evidence is that her physical condition deteriorated to the point where, in August, 2005, she could no longer continue. She has not worked since.

[2] While State Farm provided certain benefits, the relationship reached the point where Ms Wadhvani commenced these proceedings in 2007 seeking income replacement, medical and rehabilitation benefits under the Statutory Accident Benefits Schedule – Accidents On or After November 1, 1996, O. Reg. 403-96 ("SABS"). She also seeks \$35 million in damages for breach

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of contract and breach of fiduciary duty and an award in the same amount on account of punitive, aggravated and exemplary damages for "bad faith".

[3] State Farm seeks to dismiss all or alternatively, portions of the claim pursuant to Rule 20.01(3). State Farm argues there is no genuine issue requiring a trial with respect to any portion of the claim.

BACKGROUND

[4] At the time of the accident Ms Wadhvani was 33 years old. She had recently started her own business as an aesthetician. Her revenue was modest.

[5] While not hospitalized, it is undisputed Ms Wadhvani was injured. Four days after the accident she was first seen by her family physician Dr. Cameron. Her visits to Dr. Cameron and other health professionals have been frequent. While she continued to work, she consistently complained of neck and back pain and severe, nausea inducing, headaches. She also experienced persistent pain in her left knee attributed to her knees coming into contact with the dashboard on impact.

[6] On October 2, 1997, Ms Wadhvani signed an Application for Accident Benefits. She did not complete the portion of the application which asked whether she was unable to work. Ms Wadhvani soldiered on. In February, 1998, Ms Wadhvani described her efforts to the claims consultants retained by State Farm as follows:

"Although I have continued to work in my business since the accident, I feel that it has effected (sic) my ability to work and the amount of work that I have been able to do."

[7] By late February, 1998, State Farm had received:

- a. an opinion from its claims consultant, McCully & Associates Inc. ('McCully'), that Ms Wadhvani had no entitlement to income replacement benefits given her modest earnings; and
- b. an opinion from Kingsway Health & Rehabilitation Associates ('Kingsway') that Ms Wadhvani was "not substantially disabled from performing the essential tasks of her job or her activities of daily living as a result of injuries sustained".

[8] On February, 24, 1998 State Farm advised Ms Wadhvani of its decision to cease paying income replacement benefits after March 9, 1998. She was advised of her right to be assessed at a Designated Assessment Centre ('DAC'). A copy of the letter was sent to Ms Wadhvani's lawyer.

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[9] While the required DAC forms were not returned, the first of three mediations was conducted by the Ontario Insurance Commission. A report of mediator was released June 16, 1998. The inability of the parties to resolve the income replacement benefit claim was outlined. The report indicated that claims to medical and rehabilitation benefits were not then in dispute. While correspondence passed between State Farm and Ms Wadhvani's lawyer, the issues between the parties do not appear to have been either settled or narrowed.

[10] A further treatment plan was presented to State Farm in October, 1998. It requested State Farm to fund the costs of additional physiotherapy and massage therapy. In light of the Kingsway report, State Farm declined. Ms Wadhvani did not seek a DAC assessment and did not request a further mediation. Silence reigned.

[11] On November 1, 2000 State Farm advised Ms Wadhvani and her lawyer, in writing, of the time frame within which details of any outstanding medical and rehabilitation expenses should be forwarded and of State Farm's intention to then close its file.

[12] While there appears to have been no communication between the parties for between three (Ms Wadhvani's position) and five (State Farm's position) years, visits to health professionals were unabated. Ms Wadhvani was examined by an orthopaedic surgeon (Dr. Nguyen) and two neurologists (Drs. Koponen, and McKenzie). She also saw Dr. Cameron regularly. Pain in her knees was becoming worse but Ms Wadhvani was unwilling to undergo the suggested treatment of cortisone injections followed by arthroscopic surgery if her symptoms did not improve.

[14] On May 17, 2000 Dr. Cameron reported that Ms Wadhvani:

"related that her job required her to be in the job upwards to twelve hours per day and this was very difficult for her. She related difficulty walking and standing due to knee pain...She related difficulty in concentrating as well as ongoing insomnia."

[15] On January 15, 2001, Dr. Cameron advised Mr. Daly:

"She has chronic/patella/femoral syndrome, headache and posttraumatic (sic) syndrome. Her prognosis is guarded as it has now been over three years since the accident. It is unclear at present whether or not her symptoms and health will recover to her pre accident level."

[16] By the time Dr. Koponen saw her in June, 2001, Ms Wadhvani was frustrated. Her symptoms were not improving but she seemed unwilling to undergo the follow up investigations proposed by the neurologist. In October, 2001, after examining Ms Wadhvani, Dr. Jacobs, a family physician with additional training in chronic pain medicine concluded:

"It is my opinion...this lady has a poor prognosis for any long-term relief of her ongoing pain...she will continue to suffer with a chronic pain disorder and...has

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severe impairments and ongoing disability as a result of this motor vehicle accident.”

[17] On September 20, 2004, Dr. Cameron wrote a short note to Ms Wadhvani’s lawyer. It read:

“Ms Wadhvani has a permanent disability. She has chronic pain for which there is no cure but only management as her condition is chronic. I have known her for 19 years and she has not had any pre existing condition.”

[18] Throughout these years, Ms Wadhvani continued to work.

[19] In 2005 Ms Wadhvani was assessed a number of times and courses of treatment were recommended. Previously reported symptoms persisted. Finally, in August, 2005, Ms Wadhvani stopped working. She has not returned.

[20] Unsuccessful attempts to mediate certain issues were the subject of reports dated February 6, 2006 (the cost of a surface electromyography or SEMG assessment) and August 30, 2007 (the claim for income replacement benefits). This action was commenced on December 20, 2007. More than ten years had passed since the accident.

[21] Paragraph 14 of the statement of claim alleges Ms Wadhvani became disabled “and unable to work at her chosen career path” in the “eighth year following” the accident. Similar but not identical claims for relief are set forth in paragraphs 1 and 20 of the statement of claim. Paragraph 20 A (i) of the statement of claim seeks payment of income replacement benefits “from on or about August, 2005...as long as” Ms Wadhvani “remains disabled” at the rate of \$400 per week. While paragraph 1 A (i) of the statement of claim does not contain a similar temporal limitation, it is my understanding income replacement benefits are not sought for any earlier period.

[22] The statement of claim also alleges State Farm failed to fund “necessary medical and rehabilitation treatment and modalities” and alleges the failure is wrongful and malicious. Paragraph 12 of the statement of claim alleges:

“the failure by State Farm Insurance to fund and otherwise pay for therapy treatments caused a worsening of her condition and caused her to become disabled approximately eight years following the September 26, 1997 motor vehicle accident.”

CLAIM TO INCOME REPLACEMENT BENEFITS

[23] Section 4(1) of SABS sets forth the eligibility criteria for a person seeking income replacement benefits. Insofar as is relevant it states:

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4. (1) The insurer shall pay an insured person who sustains an impairment as a result of an accident an income replacement benefit if the insured person meets any of the following qualifications:

1. The insured was employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of that employment. (Emphasis added)

[24] If the criteria are met, income replacement benefits are to be provided for the period outlined in section 5. It reads:

5. (1) Subject to subsection (2), an income replacement benefit is payable during the period that the insured person suffers a substantial inability to perform the essential tasks of the employment in respect of which he or she qualifies for the benefit under section 4. O. Reg. 403/96, s. 5 (1).

(2) The insurer is not required to pay an income replacement benefit,

(a) For the first week of the disability;

(b) For any period longer than 104 weeks of disability, unless, as a result of the accident, the insured person is suffering a complete inability to engage in any employment for which he or she is reasonably suited by education, training or experience; (Emphasis added)

[25] The parties seemed to agree that unless one of the qualifications in section 4 is met an analysis of section 5 is unnecessary. For the reasons set forth below I am not as certain but I start with section 4.

[26] In its amended factum, State Farm advanced three reasons why Ms. Wadhvani did not fit within section 4. Two of those were pursued in oral argument, A defence based on the limitation period set forth in s. 281.1 of the *Insurance Act*, was not.

[27] State Farm also submitted it did not, at any time, receive a disability certificate within the meaning of SABS. It argued delivery of a certificate was mandatory under s. 35(2) SABS and that the failure to provide one is fatal. I do not agree with State Farm's submission. Section 35(6)(a) of SABS gave State Farm the right to reject the claim for income replacement benefits on that ground but I have seen no evidence it did so. Its decision was based, instead, on the medical evidence it received. In my view it is too late for State Farm to change its course.

[28] State Farm's principal position is based on its assertion that Ms. Wadhvani cannot establish on the balance of probabilities that she suffered "a substantial inability to perform the essential tasks" of her employment as an aesthetician "as a result of or within 104 weeks after the accident" as set forth in s. 4(1) of SABS. Its submission is based on:

a. Ms Wadhvani's return to work almost immediately and the fact she continued on, albeit with difficulty, for almost eight years;

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- b. the absence of any medical opinion concluding Ms Wadhvani had met the requirements of section 4(1); and
- c. the Kingsway report dated February 16, 1998 which concluded Ms Wadhvani was not "substantially disabled from performing the essential tasks of her job."

[29] Despite Mr. Schnarr's able submissions, I am not satisfied there is no genuine issue requiring a trial as required by Rule 20.04(2)(a). While Ms Wadhvani did return to work, there is conflicting evidence as to precisely when that occurred and with respect to her ability to function. The evidence introduced during the motion did not satisfy me Ms Wadhvani's return to work was almost immediate and continued without further interruption.

[30] Ms Wadhvani addressed her return to work in paragraph 43 of her first affidavit. She deposed:

"I did miss time from work following my accident however, the more time I missed, it became clear to me I may lose my customers and for this reason, I tried to go back to work as quickly as I could even though I was suffering from significant pain problems, ongoing disability, swelling in my lower extremities, back pain, neck pain, shoulder pain, headaches and a sleep disorder. I developed a chronic pain problem and during the first two (2) years following my accident, I was working but I certainly was not performing all of my duties or my responsibilities...I considered myself to be disabled, as did my family doctor which is why he was prescribing medication and treatment, for me."

[31] Dr. Cameron made the following comments within a year of the accident:

"The patient was reviewed on August 4, 1998 with ongoing complaints of neck pain and headaches and she appeared upset and depressed with her situation. Knee pain persisted. She also complained of ongoing insomnia. She was not attending physiotherapy at this time as the insurance company had discontinued the benefits...

Her prognosis for improvement is good with time; but, it is difficult to predict when she will reach her pre-accident level of health. Since it is one year since the original injury, her condition is becoming chronic. Further observation and medical treatment will be required and I will continue to monitor the patient at regular intervals."

[32] Indeed, Ms Wadhvani pursued income replacement benefits in 1998 following receipt of State Farm's February 24, 1998 letter advising Ms Wadhvani of Kingsway's findings and that income replacement benefits would cease March 9, 1998.

[33] In paragraph 41 of her first affidavit, Ms Wadhvani said:

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"I have also sought to have my income replacement benefits paid for the period of time I was totally disabled following my September 26, 1997 accident and thereafter, when it became impossible for me to work any longer in any career path by way of my training, education or experience as of August, 2005 when I stopped working altogether as a result of my pain problems."

[34] As indicated previously mediation failed and no action was commenced. However, Ms Wadhvani has never conceded she did not fulfill one of the qualifications set forth in section 4(1). To the contrary, she has steadfastly maintained she did qualify and that she should not be faulted for trying to persevere in the face of economic necessity. She has a point. As evidenced by section 11 of SABS, attempts to return to work are encouraged. It reads:

11. A person receiving an income replacement benefit may return to or start an employment at any time during the 104 weeks following the onset of the disability in respect of which the benefit is paid without affecting his or her entitlement to resume receiving benefits under this Part if, as a result of the accident, he or she is unable to continue in the employment. O. Reg. 403/96, s. 11.

[35] State Farm points to the fact that Ms Wadhvani has not produced a single report of a health professional which supports Ms Wadhvani's view of the effect of her health concerns on her ability to perform her job during the first 104 weeks after the accident.

[36] While it is true no one has opined that Ms Wadhvani met the statutory test, for unexplained reasons it does not appear that anyone other than Kingsway was asked to address the question. Kingsway's report was prepared five months post-accident and not updated. Dr Cameron was clearly concerned and sympathetic. He noted the continuation of Ms Wadhvani's difficulties in May, 2000. That observation was approximately 141 weeks post accident and it did not go as far as paragraph 43 of Ms Wadhvani's first affidavit suggests. Nonetheless, it is not clear to me what his answer would have been if asked whether Ms Wadhvani fulfilled one of the qualifications in section 4(1). The fact Ms Wadhvani continued to work, with difficulty, until August, 2005 does not convince me Ms Wadhvani cannot possibly establish she suffered "a substantial inability to perform the essential tasks" of her employment within 104 weeks of the accident. A more detailed analysis of her work history during that time period is, in my view, required.

[37] Even if Ms Wadhvani fits within section 4, did any obligation of State Farm to provide income replacement benefits end prior to August, 2005? Section 5 bears repeating. It reads:

5. (1) Subject to subsection (2), an income replacement benefit is payable during the period that the insured person suffers a substantial inability to perform the essential tasks of the employment in respect of which he or she qualifies for the benefit under section 4. O. Reg. 403/96, s. 5 (1).

- (2) The insurer is not required to pay an income replacement benefit,
- (a) For the first week of the disability;
 - (b) *For any period longer than 104 weeks of disability, unless, as a result of the accident, the insured person is suffering a complete inability to engage in any employment for which he or she is reasonably suited by education, training or experience;* (Emphasis added)

[38] As evidenced by paragraphs 2, 12, 15, 17 (where it appears for the second time at page 13), 18, 20, 21 and 22 of the statement of claim and paragraphs 10, 11 and 35 of her September 24, 2009 affidavit, Ms Wadhwani has repeatedly alleged she became incapable of working in August, 2005.

[39] Her statements are supported. As outlined above, in 2004, Dr. Cameron described Ms Wadhwani as having "a permanent disability".

[40] In a November 27, 2007 letter to Ms Wadhwani's counsel, Dr. Cameron wrote:

"She appears to have reached her maximum level of medical recovery and therefore her prognosis for improvement is guarded...Her motivation to work is good but because of pain she cannot work at her regular job or at any job at present."

[41] On March 18, 2010, Dr. Aldridge, a chronic pain specialist, wrote:

"Having reviewed the above documentation and examined the claimant, it is my clinical opinion that Ms Wadhwani's prognosis is poor, and she is *significantly* disabled in regards to her occupational duties for the foreseeable future." (Emphasis added)

[42] As can be seen, section 5(2)(b) relieves the insurer of the obligation to provide income replacement benefits unless the insured is able to satisfy the higher "complete inability to engage..." test. Section 4 appears under the heading "Eligibility Criteria". Section 5 appears under the heading "Period of Benefit". However, the period of benefit is not the only thing addressed by section 5(2)(b). It addresses criteria. Instead of the phrase "104 weeks after the accident", section 5(2)(b) refers to the period "longer than 104 weeks of disability". Rather than requiring "substantial inability to perform the essential tasks" of the insured's pre-accident employment, section 5(2)(b) requires satisfaction of the more stringent "complete inability to engage in any employment for which he or she is reasonably suited by education, training or experience."

[43] It is tempting to conclude that section 5(2)(b) is only operative if one of the qualifications set forth in section 4 is met and to accept section 4 is a pre-condition to the operation of section 5. The structure of the regulation supports the argument. So does *Burtch v. Aviva Insurance Company of Canada*, 2009 ONCA 479, where section 5(2)(b) was described as being the "standard for entitlement to a *continuing* income replacement benefit under s. 4" (para. 23)

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(Emphasis added). However, in that case the parties agreed the insured had satisfied section 4. Is it possible for an insured to fail to meet any of the qualifications set forth in section 4 but to fit within section 5(2)(b)? Section 5(2)(a) refers to "the disability". Section 5(2)(b) does not include "the" in its description of "disability". The word "disability" does not appear in section 4 at all. Are any of those observations significant? In my view, they may be

[44] I have not been referred to any authority which analyzes the inter-relationship between sections 4 and 5(2)(b) of SABS. In my view, there are significant issues of fact and law to be resolved relating to entitlement to and potentially quantification of income replacement benefits. Those issues should be resolved at trial on a full evidentiary record: *Cipkar v. RBC General Insurance Co.* (2008), 92 O.R. (3d) 714 (Div. Ct.). The amendments to Rule 20 do not, in my view, justify a dismissal of Ms Wadhvani's claim to income replacement benefits for the period from August, 2005 onward at this stage of the proceedings.

CLAIM TO MEDICAL AND REHABILITATION BENEFITS

[45] The claim to medical and rehabilitation benefits is made by Ms Wadhvani in two different locations using different phraseology. Paragraph 20 A (iii) seeks:

"Payment of such medical, rehabilitation and care benefit expenses, prescription expenses, and traveling (sic) expenses, as may be found by this Honourable Court to be due and owing to Ms. Wadhvani by State Farm".

[47] Details of the expenses that are the subject of this portion of the claim were not provided to me.

[48] The operative provisions of SABS are as follows:

14. (1) The insurer shall pay an insured person who sustains an impairment as a result of an accident a medical benefit. O. Reg. 403/96, s. 14 (1).

(2) The medical benefit shall pay for all reasonable and necessary expenses incurred by or on behalf of the insured person as a result of the accident for,

- (a) medical services;
- (b) chiropractic, psychological, occupational therapy and physiotherapy services;
- (c) medication;
- (h) other goods and services of a medical nature that the insured person requires. O.Reg. 403/96, s.14 (2).

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15. (1) The insurer shall pay an insured person who sustains an impairment as a result of an accident a rehabilitation benefit. O. Reg. 403/96, s. 15 (1).

(2) The rehabilitation benefit shall pay for reasonable and necessary measures undertaken by an insured person to reduce or eliminate the effects of any disability resulting from the impairment or to facilitate the insured person's reintegration into his or her family, the rest of society and the labour market. O. Reg. 403/96, s. 15 (2).

(3) Measures to reintegrate an insured person into the labour market include measures that are reasonable and necessary to enable the person to,

- (a) engage in employment that is as similar as possible to employment in which he or she engaged before the accident; or
- (b) lead as normal a work life as possible. O. Reg. 403/96, s. 15 (3).

(4) In determining whether a measure is reasonable and necessary for the purpose of subsection (3), the insurer shall consider the insured person's personal and vocational characteristics. O. Reg. 403/96, s. 15 (4).

[49] The benefits are subject to temporal and monetary limits. State Farm submits this portion of the claim cannot proceed. Paragraph 63 of its amended factum expresses State Farm's position as follows:

"Although the plaintiff has been denied certain medical and rehabilitation benefits by State Farm since the time of the motor vehicle accident, she has not sought mediation in respect of medical or rehabilitation benefits.

[50] State Farm's position is that absent mediation, the court "has no jurisdiction to hear these claims until mediation has taken place."

[51] The *Insurance Act*, R.S.O. 1990, c. I.8 describes the dispute resolution process as follows:

279. (1) Disputes in respect of any insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled shall be resolved in accordance with sections 280 to 283 and the *Statutory Accident Benefits Schedule*. R.S.O. 1990, c. I.8, s. 279 (1); 1993, c. 10, s.1.

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280. (1) Either the insured person or the insurer may refer to a mediator any issue in dispute in respect of the insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which the insured person is entitled. R.S.O. 1990, c. I.8, s. 280 (1); 1993, c. 10, s. 1; 1996, c. 21, s. 35 (1)

281. (1) Subject to subsection (2),

- (a) the insured person may bring a proceeding in a court of competent jurisdiction;
- (b) the insured person may refer the issues in dispute to an arbitrator under section 282; or
- (c) the insurer and the insured person may agree to submit any issue in dispute to any person for arbitration in accordance with the *Arbitration Act, 1991*. 1996, c. 21, s. 37.

(2) No person may bring a proceeding in any court, refer the issues in dispute to an arbitrator under section 282 or agree to submit an issue for arbitration in accordance with the *Arbitration Act, 1991* unless mediation was sought, mediation failed 1996, c. 21, s. 37.

[52] State Farm's position is that s. 281(2) of the Insurance Act is only satisfied if the issue of medical and rehabilitation expenses was contentious and efforts to achieve a consensus through mediation were undertaken and unsuccessful.

[53] Mr. Schnarr concedes the mediator's report dated June 16, 1998 referenced medical and rehabilitation benefits. The mediator said that Ms Wadhwani sought a medical benefit "to fund cost of prescription drugs" and a rehabilitation benefit "to fund ongoing physiotherapy treatments" and indicated the parties "agreed" the issues were "not in dispute" at that time.

[54] Mr. Schnarr submits that fact does not assist Ms Wadhwani. Merely mentioning the fact the parties might require assistance in the vague manner outlined in 1998 is, Mr. Schnarr submits, insufficient. In other words, mediation cannot "fail" unless there is active disagreement.

[55] Mr. Schnarr relies, principally, on *Amorini v. Select Coffee Roasters Inc.*, [2001] O.J. No. 581 (Div. Ct.), *Christakos v. Dominion of Canada General Insurance*, [1997] O.J. No. 1279 (S.C.J.) and *Wancho v. Liberty Mutual*, [2001] O.J. No. 579 (Master). In each, an action commenced without a mediation first taking place was dismissed. In *Amorini* no mediation of any kind had occurred.

[56] In three pre-*Amorini* decisions, members of this Court dealt with situations where some, but not all, issues raised in a statement of claim had been mediated. In each case, the defendant unsuccessfully moved for an order dismissing the portion of the accident benefit claim which had not been mediated; *Pilon v. Zurich*, [1998] O.J. No. 333 (Gen. Div.); *Royal Insurance v. Pisani*,

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[1994] O.J. No. 2616 (Gen. Div.); *Woodman v. State Farm Mutual Automobile Insurance Co.*,
[1999] O.J. No. 521.

[57] In dismissing the insurer's motion in *Woodman*, Charbonneau J. held

"The legislator (sic) appears to have set up a comprehensive scheme for the orderly resolution of accident benefits claims and it should normally be followed. In the present case...I see valid reasons not to hold the plaintiff to the strict technical adherence to the requirements of the section. The factors which militate in favour of this approach are:

1. The plaintiff advised the defendant of this claim back on June 12th, 1997,
2. There had been a failed mediation involving the same accident,
3. Although the defendant drew the plaintiff's attention to section 281...the defendant continued to negotiate...,
4. Although the defendant brought this motion ...some 9 months after first raising the issue, the defendant consented to 7 adjournments and pursued attempts to settle allowing the limitation period to run its course in the meantime."

[58] In this case, there were three failed mediations. Two focused on income replacement benefits and the third the cost of an SEMG. As outlined above, medical and rehabilitation expenses were mentioned in the first mediator's report albeit under the heading "Issues Resolved". In reality, they appear to have been issues which were deferred and not mentioned again.

[59] In my view, section 281 (2) of the *Insurance Act* is not so broadly drafted so as to require a detailed analysis of every issue raised in a mediation. Indeed, such an analysis is impossible here. Given the purpose of mediation, the brevity of each mediator's report is unsurprising. It is not even clear to me from the reports who participated in the mediations. Counsel conceded the reports offered limited assistance. In short, the evidentiary record before me gives me no confidence the issues of medical and rehabilitation benefits were not specifically discussed. Since the parties could not even resolve the SEMG claim for \$401.95 in February, 2006 I have little doubt no agreement was or would have been reached on other, more economically significant, items.

[60] Unlike *Amorini*, mediations were held before this action commenced. They all failed. One specifically related to a medical benefit claim. The statutory precondition to the commencement of this action was satisfied. The parties did not provide to me a copy of State Farm's statement of defence. Even if this issue was raised there, the motion to dismiss a portion of this action based on a failure to satisfy a statutory precondition should have been brought immediately. No other grounds for dismissing Ms Wadhvani's claims for medical and rehabilitation expenses were advanced. Those claims may continue. State Farm has the right, of

course, to pursue its argument that such claims are subject to the ten year limit set forth in section 18(1)(a) of SABS.

OTHER CLAIMS

[61] The plaintiff also seeks \$35 million in additional damages for “breach of contract, breach of fiduciary duty and other damages (sic)” and the same amount as “[p]unitive, aggravated and exemplary damages for ‘bad faith’”.

[62] While unclear, it may be that the use of the phrase “other damages” was intended to cover any other cause of action set forth in the statement of claim. For example, in paragraph 18 of the statement of claim, it is alleged State Farm was negligent although negligence is not mentioned in the prayer for relief. Despite the length of the statement of claim, aside from a conclusory statement, it does not set forth facts capable of supporting each constituent element of a cause of action founded in negligence.

[63] The claim is similarly deficient to the extent it alleges a breach of fiduciary duty. It is well established an insurance contract does not, of itself, impose obligations on an insurer which are fiduciary in nature; *Ferne Gerald Laplante & Fils Ltee v. Grenville Patron Mutual Fire Insurance Co.* (2002), 61 O.R. (3d) 481 (C.A.); *Warrington v. Great-West Life Assurance Co.* (1996), 139 D.L.R. (4th) 18 (B.C.C.A.).

[64] In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, the Supreme Court of Canada observed:

“Relationships in which a fiduciary obligation have (sic) been imposed seem to possess three general characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power” (para. 32)

[65] The Court held dependency or vulnerability to be indispensable elements.

[66] In this case an allegation of breach of fiduciary duty is made and the basis for the allegation of *breach* is articulated. However, the basis for an allegation that a fiduciary duty *existed* is not articulated.

[67] Ms Wadhvani’s lengthy affidavit addresses ongoing medical issues and Ms Wadhvani expressed her view that State Farm has breached its “contractual duty”. The affidavit does not set forth any additional circumstances with respect to the relationship with State Farm which could impose upon State Farm obligations which are fiduciary in nature. Given the scope of

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State Farm's notice of motion and the requirements of Rule 20.02(2), more was required. The relationship between insurer and insured is not, absent special circumstances, different from other commercial relationships "in which the interest of the parties are not the same and each party seeks to secure its own interest and can reasonably believe only that the other party is doing the same." (*Baldwin et al. v. Daubney et al.* (2005), 78 O.R. (3d) 693 (S.C.J.) affirmed (2007), 83 O.R. (3d) 308 (C.A.)). I can find no basis for elevating the contractual relationship to one which is fiduciary in nature.

[68] To the extent the plaintiff relies on causes of action based on negligence and breach of fiduciary duty, I am satisfied there is no genuine issue requiring a trial. There is a genuine issue requiring a trial to the extent Ms Wadhvani claims State Farm breached its contractual obligation by failing to provide the statutory accident benefits outlined above.

[69] State Farm's motion also seeks to dismiss the claim for "[p]unitive, aggravated and exemplary damages" based on an allegation State Farm acted in "bad faith".

[71] Punitive damages are not compensatory. They are designed to address the purposes of retribution, deterrence and denunciation and may be awarded where there is misconduct that offends the court's sense of decency: *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595; *Fidler v. Sun Life Assurance Co. of Canada*, [2006] S.C.R. 3.

[72] A contract of insurance carries with it an implied obligation on the part of an insurer to act in utmost good faith. An insurer is, therefore, required "to act promptly and fairly at every step of the claims process": *702535 Ontario Inc. v. Lloyd's London, Non-Marine Underwriters* (2000), 184 D.I.R. (4th) 687 (Ont. C.A.) at paras. 28-30.

[73] An insurer has every right to investigate and assess claims. An award of punitive damages is exceptional and is only to be made in circumstances where there is a finding of "egregious and extreme" misconduct by the insurer; *Ferme Gerald Lapante & Fils Inc. v. Grenville Patron Mutual Fire Insurance Co.*, supra, at paragraph 87.

[74] In *Fidler*, the plaintiff failed to obtain an award of punitive damages although the insurer decided to terminate disability benefits in the absence of any medical evidence indicating the insured was able to return to work.

[75] *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 is an illustration of the kind of offensive behaviour which must exist. In that case, there was a steadfast and dogged refusal to accept a claim despite overwhelming evidence there was no basis to deny it.

[73] Ms Wadhvani alleges State Farm received, throughout, information from the various physicians and other health professionals with whom she met, knew details of the prescriptions she was taking and the treatments required. In paragraph 45 of her September 24, 2009 affidavit she deposes:

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“State Farm Insurance denied payment or funding for the same notwithstanding the evidence which they were aware of, of my continuing disability.”

[76] She alleges that without funding she could not obtain all of the needed treatments and therefore, her condition worsened to its current state. State Farm denies the allegation. Mr. Schnarr acknowledges State Farm did not fund every request. State Farm's refusal to fund certain expenses in 1998 was based on a report prepared several months earlier by a health professional it retained. Ms Wadhvani was offered a DAC assessment but did not respond. State Farm denies receiving any further treatment plan until 2005 although Ms Wadhvani alleges one was sent in 2003. During the period from 2005 until 2007 State Farm funded ten of fourteen treatment plans. Where not funded, Mr. Schnarr submits State Farm's decision was supported by the opinions of its health professionals.

[77] In this case, the evidence to support the allegation of bad faith is too thin.

[78] State Farm's refusal to pay income replacement benefits was supported by the opinions of Kingsway, its claims consultant McCully and by the fact it believed the return to work was not temporary or sporadic but constant until 2005. With respect to medical and rehabilitation benefits, portions of the claims have been allowed and paid. Portions have not. State Farm's decisions were supported by the medical input it received. Ms Wadhvani has, on several occasions, been unwilling to accept recommendations of medical professionals she has chosen. She has followed different courses of action and disagreement with the insurer has, on occasion, occurred.

[79] The refusal of State Farm to fund an SEMG when first requested on July 29, 2005 seems to be one of the main factual pillars upon which the “bad faith” claim is founded. Mr. Daly submitted State Farm's refusal was wrongful and resulted, needlessly, in a worsening of Ms Wadhvani's physical ailments and the onset of psychological issues. The result, he says, is depression, disillusionment, helplessness and complete frustration.

[80] Ms Wadhvani's current well-being is of concern. However, there is no evidence to establish misconduct on the part of State Farm with respect to the SEMG. In fact, there is evidence a fast-track assessment was completed in early September, 2005. It appears the assessor concluded the proposed SEMG investigation was not reasonable or necessary. Unsuccessful efforts to resolve the dispute through mediation were made between November 25, 2005 and February 6, 2006.

[81] The procedure was recommended again in March, 2007. Again State Farm declined the request for funding. State Farm alleges Ms Wadhvani failed to attend a scheduled insurer's examination to determine the reasonableness of the proposed treatment. Shortly before this motion was brought and for strategic reasons, State Farm forwarded a cheque in the amount of the payment originally requested plus interest. Due to difficult financial circumstances at the time of receipt, Ms Wadhvani used the money for personal purposes.

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[82] Given the small amount in issue and the circumstances surrounding the request for funding, disappointment in State Farm's intransigence in respect of the SEMG is understandable but the evidence does not come close to providing a basis for a finding of bad faith. Even if State Farm's position is ultimately unsuccessful, I have seen no basis for alleging misconduct. I am satisfied the issue of bad faith is not a genuine one requiring a trial. Therefore the claims for punitive and exemplary damages based on "bad faith" cannot stand.

[83] Since the claim to aggravated damages is, similarly, based on an allegation of bad faith, it must, similarly, be dismissed: *Fidler, supra* at paragraphs 51 and 52.

CONCLUSION

[84] Pursuant to Rule 20.01(3) the following portions of Ms Wadhvani's claim are to be dismissed:

- a. The claim for punitive, aggravated and exemplary damages for "bad faith" set out in paragraphs 1.A(ii), 8, 14, 15, 20, 26 and 28 of the statement of claim.
- b. The claim for damages based on an alleged breach of fiduciary duty set out in paragraphs 1.A(iii), 14 and 26 of the statement of claim.
- c. The claim for damages based on negligence set out in paragraph 18 of the statement of claim.

[85] There are, in my view, genuine issues requiring a trial with respect to the claim for income replacement benefits, the claim for medical and rehabilitation benefits and the claim for damages for breach of contract.

[86] Absent agreement of the parties cost submissions are requested by June 11, 2010.

" GRACE J. "

Released: May 10, 2010