

Court File Number: 06-CU-324024

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

The GERMANIA Farmers Mutual Fire Insurance Co
Plaintiff(s)

AND

Federated Insurance Company
Defendant(s)

Case Management Yes No by Judge: _____

Counsel	Telephone No.:	Facsimile No.:
Mark K Donaldson - Federated		
Henry P. Blum - Germania		

- Order Direction for Registrar (No formal order need be taken out)
- Above action transferred to the Commercial List at Toronto (No formal order need be taken out)

- Adjourned to: _____
- Time Table approved (as follows):

~~This~~ This is an appeal by way of application from the decision of Arbitrator Stephen Malachuk dated November 15, 2006. The issue for purposes of the appeal is whether or not the Arbitrator erred in determining liability for an automobile accident in applying the "Precedence Rules of Law" as opposed to O.6(2) of the Fault Determination Rules under s. 275 of the Insurance Act, RSO 1990, c.18.

The purpose of the section & the Rules is to provide an expedient & efficient resolution to disputes between insurers with respect to reimbursement for statutory accident benefits paid on behalf of a claimant.

On March 31, 2003 a collision occurred at an intersection of Grey County Road #10 & the Main - Napanee Town line involving a 1990 Ford dump truck driven by one Carter insured by Federated and a 1989 Chevrolet Astro Van driven by Murray & insured by Germania.

[Handwritten Signature]
Judge's Signature

Date

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Judges Endorsement Continued

The evidence is undisputed that at the time of the accident the weather was terrible with blinding snow. Carter because of the weather drove past the intersection where he intended to turn & then braked up with his 4 way flashers on.

The issue for the Arbitrator was just what the activity ~~was~~ Carter was engaged in when he was hit from behind.

The Arbitrator heard from 2 additional witnesses to the 2 drivers involved.

There is no doubt that Carter intended to back up to a point where he could proceed forward to turn at the intersection when he was hit from behind by the murray vehicle. The evidence accepted by the Arbitrator was somewhat inclusive as to whether was stopped with the intention of going forward or had actually commenced going forward when hit from behind.

The Arbitrator rejected the application of Rule 19 on the basis of his conclusion that the Carter vehicle was not backing up at the time of the collision. The Arbitrator rejected the application of Rule 17(2) on the basis that the dump truck was not illegally stopped or parked, stopped or standing.

The Arbitrator concluded with respect to Rule 6(1) that the vehicles were not travelling in the same direction at the time of impact & concluding that the Carter truck "was momentarily stopped again before making further again."

In this context the Arbitrator found that Rule 6 did not apply & in particular Rule 6(2) did not apply as the whole of Rule 6 - "travelling in the same direction" did not apply.

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As a result the Arbitrator applied the "ordinary
rules of law" & found Centre 2/3 at fault
& therefore Germaine entitled to recover 2/3 of
the benefits it paid to Murray.

I am not satisfied that there was error on
the part of the Arbitrator.

His conclusion was at best for the appellant
one of mixed fact & law.

The Arbitrator had to construe the nature of
the "stopping" in the inclusive evidence
before him within the context of the Rules
under the Statute.

The decision of the Arbitrator is entitled to
deference as not only is it one based
on mixed fact & law but is entitled
to deference unless it is "unreasonable"

In my view it is not unreasonable. I am
entitled to deference see *Expco Mutual
Insurance Company v Co-operators General
Insurance Co* 2006 CAN 211 37956
(ON CA). I do not think the result
will change the approach to
determination of other cases under Rule 6

In the result the appeal is dismissed.
Based on the agreement between
the parties there will be no issue of
costs