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## The Perils of Taking “No Position” on a Summary Judgment Motion

A recent decision of the Ontario Court of Appeal, *D’Onofrio v. Advantage Car & Truck Rentals Ltd.*, 2017 ONCA 5, asks whether a party who takes “no position” on a summary judgment motion is later bound by the motion judge’s findings in the ongoing litigation. The case highlights the dangers of taking “no position”: a party who does so may later be precluded from advancing positions at trial that were decided by the motions judge.

### Facts

*D’Onofrio* involved a motor vehicle accident. The plaintiff’s vehicle had been struck by another vehicle, but the driver of the other vehicle had left the scene of the accident without providing the plaintiff with her insurance information. An investigation ultimately traced the ownership of the unknown vehicle to the defendant rental company.

The plaintiff had an insurance policy with the defendant insurer which included an unidentified motorist provision. The plaintiff commenced an action against the defendant rental company, the driver of the unknown vehicle, and the plaintiff’s own insurer.

Following an investigation, the insurer discovered that an employee of the rental company was the unknown driver who had struck the plaintiff’s vehicle. At examinations for discovery, the plaintiff confirmed that the employee was the driver of the offending vehicle.

The insurer brought a motion for summary judgment to dismiss the action against it on the basis that the identity of the driver and the owner of the offending vehicles were known and therefore the plaintiff’s unidentified motorist coverage under his policy was not triggered.

The rental company advised the insurer that it would take “no position” on the summary judgment motion.

The insurer responded by stating that it would “agree to a consent motion to dismiss the action without costs”. The rental company did not respond to this letter, nor did it file responding materials or attend the hearing of the summary judgment motion.

At the hearing of the motion, the insurer, being the only party that attended the motion, erroneously advised the Court that the motion



### Marco P. Falco

Partner, Litigation & Written  
Advocacy

### PHONE

416 777 5421

### EMAIL

[mfalco@torkinmanes.com](mailto:mfalco@torkinmanes.com)

Marco is a partner in the Litigation Department at Torkin Manes. He provides written advocacy for a wide range of civil disputes, including commercial litigation and administrative law. He specializes in applications for judicial review and civil appeals.

was “on consent”. The motions judge granted the summary judgment motion. The motions judge noted in the order that the plaintiff had taken no position on the summary judgment motion and that the rental company had consented to it. The entire text of the reasons for decision simply stated, “On consent draft order shall issue”. The action against the insurer was accordingly dismissed and the rental company remained a defendant.

One month later, the rental company realized that there had been error in the summary judgment motion order. The rental company claimed that it had not consented to the motion, as the order stated, but had instead taken “no position”. The parties realized that the summary judgment motion had been based on a mistake in that the motions judge thought that all the parties had consented to the motion. Accordingly, the rental company advised the plaintiff that it still intended to rely on the identity defences at trial, i.e. that the identities of the driver and owner of the offending vehicle at the time of the accident were unknown, as was whether the driver was operating the offending vehicle without the owner’s consent.

On a second motion to clarify the summary judgment motion, the plaintiff asked the Court to preclude the rental company from raising the identity defences at trial. The plaintiff argued that the rental company was estopped from raising the identity defences by virtue of the position

it took on the summary judgment motion and by failing to put its best foot forward on the motion. In the alternative, the plaintiff sought an order that the summary judgment motion be set aside and the defendant insurer be brought back into the action.

The Court dismissed the plaintiff’s clarification motion. The Court further corrected the summary judgment order to state that the rental company had taken no position on the summary judgment motion.

The plaintiff appealed the summary judgment order and the clarification order.

On appeal, the Court of Appeal allowed the plaintiff’s appeal, set aside the summary judgment order and the clarification order, and dismissed the summary judgment motion, without prejudice to the insurer’s right to renew it.

### **Taking “No Position” on a Summary Judgment Motion Can Bind the Parties at Trial**

The Court of Appeal held that the rental company had notice of the summary judgment motion. If it wanted the right to defend the action based on the identity defences, it should have taken a position on the summary judgment motion. The Court held that the rental company failed to put its best foot forward:

...[the summary judgment motion order]...that there were no Identity Defences requiring a trial was binding on all parties to the action, including [the rental

company and its employee]...

...all of the parties to the action had notice of the Summary Judgment motion. All had the chance to fully participate. Had [the rental company] wished to retain the right to defend the action on the basis of the Identity Defences, they were obliged to contest the Summary Judgment Motion and show that there was a genuine issue requiring a trial on those matters. It goes without saying that in so doing, they were required to “put their best foot forward”.

Despite these findings, the Court of Appeal held that the rental company and its employee were not ultimately precluded from raising the identity defences at trial. This was because there had been no judicial determination of the identity defences on the summary judgment motion, so the doctrines of estoppel and *res judicata* did not apply.

The summary judgment motion judge had erroneously based his decision on the belief that the parties had consented to the order, based on the insurer’s submissions at the hearing of the motion.

In the Court of Appeal’s view, there was a significant difference between the rental company consenting to the motion and taking no position on it. Had the rental company actually consented to the motion, they could not then resile from the position that there were no genuine issues requiring a trial with respect to the identity defences.

In this case, however, the parties did not consent to the summary judgment motion and there was no adjudication of the identity defences on the merits. The summary judgment motion was accordingly dismissed, without prejudice to the insurer's right to renew the motion:

As [the rental company and its employee] took no position at the Summary Judgment motion, this court does not have the benefit of its submissions and evidence on the Identity Defences...

I acknowledge the validity of the Plaintiffs' contention that [the rental company and its employee] were required to respond to the Summary Judgment Motion if they wished to maintain their Identity Defences. However, this court is aware that [the rental company and its employee] wish to

advance those defences and that they mistakenly understood that by taking no position on the Summary Judgment Motion, it remained open to them to continue to assert those defences. In the circumstances, in my view, this court is not able to satisfactorily discharge its obligations...and decide the Summary Judgment Motion. Thus, I would dismiss it.

As the Summary Judgment Motion was never adjudicated on its merits, I would dismiss it but without prejudice to [the insurer's] right to renew it.

### Conclusion

The *D'Onofrio* decision stands as a stark warning to parties who take "no position" on a summary judgment motion. The findings on a summary judgment motion can subsequently bind the parties at trial, even those who remain neutral on the motion.

In *D'Onofrio*, the rental company could very well have been precluded from raising the identity defences after taking no position on the summary judgment motion, had the insurer not mistakenly advised the Court that all the parties had consented to the motion and had there had been an adjudication of the identity defences on the merits.

The lesson of *D'Onofrio* is clear: on a summary judgment motion, all parties have a duty to put their best foot forward. This includes the obligation to take a position on the motion that can affect positions advanced at trial.