

CITATION: Hazaveh v. Pacitto, 2018 ONSC 395  
COURT FILE NO.: CV-10-404841  
DATE: 20180116

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN:

FARZAD BIKMOHAMMADI-HAZAVEH

Plaintiff

)  
)  
)  
) *Adriana Vaduva*, for the Plaintiff  
)  
)

- and -

RBC GENERAL INSURANCE  
COMPANY AND ROYAL & SUN  
ALLIANCE INSURANCE COMPANY OF  
CANADA

Defendants

)  
) *Ashley Shmukler*, for the Defendant, RBC  
) General Insurance Company  
)  
)

) *Alexander Hartwig*, for the Defendant, Royal  
) & Sunalliance Insurance Company of  
) Canada  
)  
)

- and between -

THOMAS-FERDINAND PACITTO AND  
DAIMLER CHRYSLER FINANCIAL  
SERVICES CANADA INC.

Third Party Defendants

)  
) *Kevin Bunt*, for the Third Party, Daimler  
) Chrysler Financial Services Canada Inc.  
)  
)

) *Shawn Stringer*, for Thomas-Ferdinand  
) Pacitto, a Defendant in Action No. CV-09-  
) 381557  
)  
)

) *Nicholas Carmichael*, for State Farm Mutual  
) Automobile Insurance Company, a Third  
) Party in Action No. CV-09-381557A1  
)  
)  
)  
)

) HEARD: January 9, 2018  
)

CAVANAGH J.

REASONS FOR JUDGMENT

## **Introduction**

[1] This action relates to a motor vehicle accident that occurred on August 26, 2007 involving the plaintiff and Thomas-Ferdinando Pacitto. The defendants RBC General Insurance Company ("RBC") and Royal & Sunalliance Insurance Company of Canada ("RSA") are the insurers of the plaintiff and of the owner of the vehicle that the plaintiff was driving when the accident occurred, respectively.

[2] The plaintiff first sued Mr. Pacitto in a companion action, action no. CV-09-381557 (the "companion action"), and alleged that he was the owner and operator of the vehicle that he was driving when the accident occurred. The motor vehicle accident report that was prepared in respect of this accident described Mr. Pacitto as the owner and operator of the vehicle that he was driving and identified State Farm as his insurer.

[3] The plaintiff sued RBC and RSA in the within separate action because he and his legal counsel learned that Mr. Pacitto may have been uninsured for automobile coverage. If true, this would have resulted in a gap in insurance coverage for the plaintiff's claim unless he sued RBC and RSA.

[4] Mr. Pacitto was represented in the companion action by counsel appointed by State Farm Mutual Automobile Insurance Company ("State Farm") which insured Mr. Pacitto through a personal liability umbrella policy which would respond to provide coverage to Mr. Pacitto for liability to the plaintiff from \$300,000 to the policy limit of \$1 million.

[5] As I explain below, RBC, RSA and the plaintiff learned in September 2014 through a document that was produced by Mr. Pacitto that he was not the owner of vehicle that he was driving when the accident occurred. He had leased the vehicle from DaimlerChrysler Financial Services Canada, Inc. ("DaimlerChrysler") (which is now named TD Auto Finance Services Inc.). The lessor was insured by DaimlerChrysler Insurance Company ("DaimlerChrysler Insurance") under what is described as a Standard Excess Automobile Policy.

[6] RBC and RSA brought separate motions for summary judgment dismissing the plaintiff's action against them.

[7] At the hearing of these motions, the plaintiff consented to summary judgment dismissing the action against RBC and RSA. This left the issue of costs to be decided.

[8] RBC and RSA each submit that costs of the action should be paid by State Farm because, they submit, it failed to produce, or to cause Mr. Pacitto to produce, in a timely way relevant documents that show that Mr. Pacitto had leased the car he was driving and that the lessor was insured. They submit that because of this fact, there is no possibility of a gap in coverage and, therefore, no legal basis for the plaintiff's action against them. RBC and RSA submit that had State Farm disclosed these documents or the information contained in them when it was first called upon to do so, the plaintiff would not have sued them and they would not have become involved in this litigation. Each of RBC and RSA seeks a Sanderson order requiring State Farm to pay its costs of the action.

[9] For the following reasons:

- a. The motions by RBC and RSA for summary judgment are granted. The plaintiff's action against them is dismissed.
- b. The costs of RBC and RSA in this action in the amounts fixed below are to be paid by State Farm, as the insurer providing a defence for the defendant in the companion action (and not as a third party in that action), on a partial indemnity scale. The plaintiff's costs of these motions, in the amount fixed below, are to be paid by State Farm on a partial indemnity scale. The plaintiff's request for payment of other costs of the actions by State Farm that he submits were incurred because of State Farm's failure to disclose relevant documents and information in a timely way is left to be determined by the trial judge.

### **Background Facts**

[10] This action relates to a motor vehicle accident that occurred on August 26, 2007 involving the plaintiff and Thomas-Ferdinando Pacitto.

[11] On June 23, 2009, the plaintiff issued a statement of claim against Mr. Pacitto in the companion action. The plaintiff alleges that Mr. Pacitto rear-ended the plaintiff's vehicle and that the plaintiff suffered personal injuries from the accident. This statement of claim contains an allegation that Mr. Pacitto is both the owner and operator of the vehicle that was involved in the collision with the plaintiff.

[12] After the companion action was commenced, the plaintiff learned that Mr. Pacitto's insurer, State Farm, would be taking the position that Mr. Pacitto did not have a valid automobile policy of insurance with State Farm. However, Mr. Pacitto carried a valid Personal Liability Umbrella Policy ("PLUB") with State Farm with a limit of \$1 million. State Farm's position was that because Mr. Pacitto had failed to maintain his underlying automobile insurance, the PLUB would only cover damages above \$300,000 up to \$1 million. Because the PLUB was in place, a defence was provided by State Farm to Mr. Pacitto in the companion action.

[13] The plaintiff, as a result of learning this information, commenced the within action on or about June 14, 2010 by a statement of claim issued against RBC, the plaintiff's own insurer, seeking uninsured/underinsured coverage in this action. Later, in November 2012, the plaintiff added RSA, the insurer of the owner of the vehicle that the plaintiff was driving when the accident occurred, as a defendant. These insurers were sued to fill the gap in insurance coverage for any liability on the part of Mr. Pacitto between \$1 and \$300,000.

[14] RSA, as a defendant in this action, commenced a third party claim against Mr. Pacitto. No defence was delivered on behalf of Mr. Pacitto and he was noted in default.

[15] At the times when the plaintiff commenced his actions against Mr. Pacitto and against RBC and RSA, and when RSA sued Mr. Pacitto in the third party action, the plaintiff, RBC and RSA believed that Mr. Pacitto was both the operator of the vehicle that he was driving when the accident occurred and its owner. No licence plate search was done by any of the plaintiff, RBC or RSA to verify the information in the motor vehicle accident report that appeared to show that Mr. Pacitto was the owner of the vehicle that he was driving when the accident occurred.

[16] The examination for discovery of Mr. Pacitto in the companion action took place on August 16, 2012. At this examination for discovery, counsel for Mr. Pacitto provided a sworn affidavit of documents. The list of relevant documents in this affidavit of documents did not include documents in the possession of State Farm as the insurer providing a defence to Mr. Pacitto in the companion action that showed that he was not the owner of the vehicle he was driving when the accident occurred, and that DaimlerChrysler was the owner and lessor. Mr. Pacitto was not asked on discovery whether he owned the vehicle that he was driving when the accident occurred.

[17] By order dated October 25, 2012, this action and the companion action were ordered to be heard at the same time or one immediately after the other at the discretion of the trial judge.

[18] Counsel for RSA wrote to counsel for Mr. Pacitto in the companion action on March 15 and April 4, 2013 requesting a copy of the certificate of insurance that was issued by State Farm to Mr. Pacitto. On August 1, 2014, counsel for RSA wrote to counsel for Mr. Pacitto requesting production of Mr. Pacitto's policy of insurance, the cancellation letter and the information pertaining to the umbrella policy from State Farm. These requests went unanswered.

[19] On September 16, 2014, following a mediation for both actions, counsel for Mr. Pacitto produced to the other parties copies of documents from State Farm's insurance file. Included among these documents was a document entitled Ontario Application for Automobile Insurance declaration that showed that the vehicle which Mr. Pacitto was driving on the date of the accident was leased from DaimlerChrysler. Through their receipt of this document, the plaintiff, RBC and RSA learned that Mr. Pacitto was not the owner of the vehicle he was driving when the accident occurred; he had leased this vehicle from DaimlerChrysler.

[20] RSA obtained an order on February 11, 2015 granting leave to amend the Third Party Claim to add DaimlerChrysler as third party.

[21] The plaintiff obtained an order dated May 25, 2015 to amend the statement of claim in the companion action to add TD Auto Finance Services Inc. ("TD"), the successor to DaimlerChrysler, as a defendant.

[22] TD issued a Third Party Claim dated April 4, 2016 in the companion action against State Farm as a third party seeking, among other things, a declaration that the State Farm automobile policy issued to Mr. Pacitto was in full force and effect as of the date of the accident.

[23] On October 16, 2017 the plaintiff's counsel wrote to counsel for other parties (except counsel for DaimlerChrysler because of a transmission error) advising that he had instructions to release RBC and RSA from the action provided that either Toronto Dominion General Insurance (the successor to DaimlerChrysler Insurance) on behalf of DaimlerChrysler, or State Farm on behalf of Mr. Pacitto, confirm that there is a valid policy of insurance that would respond to the first \$300,000 of his client's claim. This letter was transmitted to counsel for DaimlerChrysler on December 20, 2017.

[24] On December 15, 2017 RSA served a Request to Admit asking that DaimlerChrysler admit that it owned the vehicle driven by Mr. Pacitto on the date of loss and that it held a valid policy of automobile insurance pertaining to this vehicle.

[25] DaimlerChrysler served a Response to Request to Admit on December 22, 2017 in which it admits that (i) it was the owner/lessor of the vehicle driven by Mr. Pacitto on the date of the accident, and (ii) as of the date of the accident, DaimlerChrysler was an insured under a valid policy of insurance which indemnified it as the owner of the vehicle being driven by Mr. Pacitto on the date of the accident and that it was an insured under a policy of automobile insurance issued by State Farm to Mr. Pacitto. DaimlerChrysler also stated in its Response to Request to Admit that the plaintiff “failed to bring action as against them” pursuant to the *Limitations Act*.

[26] On January 5, 2018, counsel for DaimlerChrysler wrote to the plaintiff’s counsel advising that (i) his client’s policy does not apply to the lessee and it states it is excess to any other policy of insurance, and (ii) he is not in a position to admit that his client will respond to the first \$300,000 of liability for the plaintiff’s claim.

[27] At the hearing of these motions, counsel for DaimlerChrysler confirmed that DaimlerChrysler agrees that if the State Farm policy does not cover Mr. Pacitto’s liability for the first \$300,000 of the plaintiff’s claim, then the DaimlerChrysler Insurance policy provides coverage for this liability, provided that this position with respect to coverage is subject to DaimlerChrysler’s / TD’s position as pleaded in its statement of defence in the companion action that the plaintiff failed to bring his action against DaimlerChrysler / TD within the limitation period under the *Limitations Act*.

[28] At the hearing of these motions, upon receiving confirmation from counsel for DaimlerChrysler / TD of this stipulation, counsel for the plaintiff consented on behalf of her client to summary judgment dismissing the plaintiff’s action as against RBC and RSA.

[29] This left only the questions as to costs to be decided.

**Analysis**

[30] The questions on this motion are:

- a. Are RBC and RSA entitled to an order in the nature of a Sanderson order providing for payment of costs of the plaintiff’s action against them by Mr. Pacitto or by State Farm in its capacity as insurer providing a defence for Mr. Pacitto in the companion action?
- b. Is the plaintiff entitled to an award of costs of all of the steps taken in the within action that resulted from the failure of State Farm (through the defence that it was providing to Mr. Pacitto in the companion action) to produce documents in a timely way that showed that Mr. Pacitto was not the owner of the vehicle he was driving when the accident occurred? If not, is the plaintiff entitled to an award of costs of these motions against State Farm?

***Are RBC and RSA entitled to an order in the nature of a Sanderson order providing for payment of costs of the plaintiff's action against them by Mr. Pacitto, by or State Farm in its capacity as insurer providing a defence for Mr. Pacitto in the companion action?***

[31] RSA and RBC submit that the failure of Mr. Pacitto or State Farm (through the defence that it provided to Pacitto) to produce in a timely way the relevant insurance documents that show that the car that Pacitto was driving when the accident occurred was leased from DaimlerChrysler justifies an award of costs against State Farm.

[32] In support of this submission, they rely upon Rule 57.01(1)(e) and (g) of the *Rules of Civil Procedure* which provide that the court may consider when awarding costs the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding, and a party's denial of or refusal to admit anything that should have been admitted. They submit that courts have properly taken into account a failure to produce documents in a timely way when awarding costs: *Couper v. Nu-Life Corp.*, 2016 ONSC 4207 at paras. 34 to 36; *OZ Optics Ltd. v. Timbercon Inc.*, 2012 ONCA 735 at para. 16.

[33] RSA and RBC submit that this is an appropriate case to award costs by way of a Sanderson order that provides for costs to be paid by an unsuccessful defendant to a successful defendant.

[34] In *Moore v. Wienecke*, 2008 ONCA 162 at para. 41 the Court of Appeal endorsed a two-step test for determining whether a Sanderson order is appropriate. First, the courts ask a threshold question: whether it was reasonable to join the defendants together in one action. If the answer is yes, courts must use their discretion to determine whether a Sanderson order would be just and fair in the circumstances. In the step two of the analysis, the Court of Appeal in *Moore* considered four factors in the exercise of its discretion: whether the defendants tried to shift responsibility onto each other, whether the unsuccessful party caused to the successful party to be added, whether the two causes of action were independent of each other, and the ability of the parties to pay costs.

[35] In this case, the plaintiff made a procedural decision to commence a new action against RBC, in which he later added RSA as a defendant, rather than moving to add them as defendants to his action against Mr. Pacitto. The two actions would need to be heard together under any circumstances, and an order was made so providing. The fact that RBC and RSA were sued in a separate action, rather than in the action against Mr. Pacitto, does not affect whether a Sanderson order is appropriate in these circumstances: *Girao v. Cunningham*, 2017 ONSC 4102 at paras. 29-30.

[36] Counsel for Mr. Pacitto submits that it was not reasonable for the plaintiff to sue RBC and RSA. He submits that the plaintiff was under an obligation to act with due diligence in ascertaining the identity of the owner of the Pacitto vehicle, and that RBC and RSA had a similar obligation. Counsel for Mr. Pacitto submits that it was not reasonable for these parties to have relied solely on the motor vehicle accident report to determine vehicle ownership, and that a license plate/registration search of public records held by the Ministry of Transport, at a minimal cost, is a rudimentary step that should have been taken. Counsel for Mr. Pacitto submits that had such a search been conducted, these parties would have known that the Pacitto vehicle was

leased, and that these parties failed to conduct such a search at their own peril. He submits that no costs should be awarded to RBC or RSA against Mr. Pacitto or against State Farm.

[37] In support of this submission, counsel for Mr. Pacitto relies upon several authorities.

[38] In *Weisler v. Doman*, 1952 CarswellOnt 331, there was an application for payment out of the unsatisfied judgment fund in respect of which, under the *Highway Traffic Act*, the applicant was required to show that he or she had commenced action against all persons “against whom the applicant might reasonably be considered as having a cause of action in respect of such damages”. The applicant had been misinformed by the investigating officer that the other driver was also the owner of the car in question when, in fact, this car was owned by the driver’s mother. Ayles J. held that the owner should be joined as a defendant unless for some reason and after the most careful inquiries it is impractical or undesirable to do so. Ayles J. held that the applicant’s failure to search the records of the Registrar of Motor Vehicles constituted a failure to make every reasonable effort to ascertain the name of the owner and, for this reason, the application was dismissed.

[39] In *White v. Ontario Minister of Finance*, [2007] O. J. No. 1709, the applicant sought payment from the Motor Vehicle Accident Claim Fund of a judgment against an uninsured operator of a motor vehicle. Section 7 of the *Motor Vehicle Accident Claims Act*, R.S.O. 1990, c. M41 provided that the Minister shall not pay out of the fund any amount in respect of a judgment unless it was given in an action brought “against all persons against whom the applicant might reasonably be considered as having a cause of action in respect of the damages in question”. Although the accident report indicated that the person against whom the applicant obtained the judgment was the owner of the vehicle, this information was incorrect, and Pattillo J. concluded at paras. 34-36 that the applicant had failed to make reasonable inquiries in order to identify the owner of the vehicle.

[40] In *Lockett v. Boutin*, 2011 ONSC 2098, a motion was brought to add an additional defendant. The proposed defendant opposed the motion on the ground that the statutory limitation period for an action against it had expired. Lalonde J. held that the plaintiff had failed to provide sufficient evidence of the steps taken to determine the involvement of the proposed added defendant, and wrote at para. 36 that “[w]aiting for a companion action or waiting for someone to inform you does not satisfy due diligence”. The motion to add the proposed defendant was dismissed. This decision was affirmed on appeal: *Lockett v. Boutin*, 2011 ONCA 809 at para. 8.

[41] The plaintiff submits that it was reasonable for a plaintiff to rely upon a motor vehicle accident report, particularly when identifying owners and/or insurers of defendant vehicles, until information to the contrary comes to a plaintiff’s attention or becomes a live issue. In support of this submission, the plaintiff relies upon *Lingard v. Milne-McIsaac*, 2015 ONCA 213.

[42] In *Lingard*, the plaintiff appealed from a dismissal of his motion for leave to amend the statement of claim to claim uninsured motorist coverage from his own insurer. The plaintiff had relied on a motor vehicle accident report that listed the insurer for the owner of the vehicle in question. It turned out that this insurance had been cancelled before the accident. The motion judge had held that the plaintiff failed to act with due diligence in discovering the factual basis of

its claim against his own insurer. The Court of Appeal reviewed cases in which the plaintiff had relied upon the identification of the other vehicle's owner set out in the motor vehicle accident report, and concluded that the motion judge had erred in imposing a standard of reasonable diligence that was significantly higher than the standard described in those cases. The Court of Appeal wrote:

By relying on the statement in the MVA Report that the McIsaac vehicle defendant was insured, and until receiving actual notice that it was not, the appellant acted reasonably. It was reasonable for the appellant to assume that the police officer who completed the MVA Report asked Mr. Milne-McIsaac for proof of insurance. There was no reason for the appellant to treat insurance coverage as a live issue until the appellant became aware of a potential coverage issue when he received Mr. McIsaac's email on January 25, 2011.

The Court of Appeal held that the plaintiff brought his action against his insurer for uninsured motorist coverage well within the applicable limitation period.

[43] The cases cited by Mr. Pacitto and by the plaintiff involve application of a standard of diligence in circumstances where there is a legal requirement for the plaintiff to demonstrate reasonable diligence in relation to a claim against the statutory fund for payment of uninsured claims or in relation to claims that raise the question of whether a statutory limitation period has expired. These circumstances do not arise on the motions for summary judgment by RBC and RSA and their claims for costs. I do not need to decide whether the plaintiff did or did not act with due diligence in relation to the claim against the owner of the Pacitto vehicle in which a limitations defence has been raised because this issue is not before me.

[44] Mr. Pacitto, through State Farm which was providing his defence in the companion action, was in possession of the insurance documents that showed that the Pacitto vehicle was leased. These documents should have been disclosed early in the litigation when ownership of the Pacitto vehicle became an issue, either through disclosure of such documents in Mr. Pacitto's affidavit of documents or through a response to correspondence from counsel for RSA requesting insurance information. In addition, Rule 30.02(3) specifically requires that a party shall disclose any insurance policy under which an insurer may be liable to satisfy all or part of a judgment in the action. This rule, in my view, required Mr. Pacitto to disclose that the insurer for the lessor of the Pacitto vehicle may be liable to satisfy all or part of a judgment in the companion action. No explanation was provided by Mr. Pacitto or State Farm in the evidence filed in response to these motions for why the relevant documents that showed that the Pacitto vehicle was leased were not produced until September 2014.

[45] Although it may have been prudent for RBC or RSA to have conducted a licence plate search that would have identified DaimlerChrysler as the lessor and owner of the Pacitto vehicle, I conclude that Mr. Pacitto and State Farm, who had possession of the documents that showed that the Pacitto vehicle was leased from DaimlerChrysler and who did not produce such documents in a timely way, are not entitled to rely upon the fact that RBC and RSA did not conduct such a search to oppose their request for a Sanderson order. Had Mr. Pacitto produced the relevant documents in a timely way when first called upon to do so, the plaintiff would not have sued RBC and RSA. In my view, in relation to the questions before me as to costs, the



failure of the plaintiff, RBC and RSA to have conducted a licence plate search does not disentitle them to costs from Mr. Pacitto or State Farm.

[46] Therefore, in response to the threshold question for a Sanderson order, I conclude that it was reasonable for the plaintiff to commence this action against RBC and RSA and to obtain an order for this action to be tried with the companion action against Mr. Pacitto. By taking the position that Mr. Pacitto's automobile insurance coverage had been cancelled without producing documents that showed that the Pacitto vehicle was not owned by him, but was leased, State Farm was seeking to shift responsibility for liability for the first \$300,000 of the plaintiff's damages, if he was successful in the action against Mr. Pacitto, to RBC and RSA. By taking this position without disclosing the relevant insurance documents, State Farm caused the plaintiff to sue RBC and RSA. This action and the companion action arise in relation to the same automobile accident and they are not independent of each other. There is no evidence before me concerning the ability of the plaintiff to pay costs.

[47] Having regard to these considerations, I conclude that it would be just and fair for State Farm (in its capacity as an insurer providing a defence for Mr. Pacitto and not as a third party in the companion action) to pay the costs of RBC and RSA of this action. These costs would not have been incurred had State Farm produced in a timely way the insurance documents in its possession that show that the Pacitto vehicle was leased from DaimlerChrysler.

[48] Although State Farm as the insurer providing coverage for Mr. Pacitto's defence is not named as a party, the position that was taken by State Farm that Mr. Pacitto is uninsured for the first \$300,000 of any liability to the plaintiff (without disclosing the insurance documents that show that the Pacitto vehicle was leased by DaimlerChrysler) was a position taken by State Farm to advance its own interests, and not to advance the interests of Mr. Pacitto. The court has discretion in awarding costs, including to award costs against a non-party: *Courts of Justice Act*, s. 131(1). In my view, the circumstances are such that it would not be appropriate to award costs against Mr. Pacitto. The failure to produce the relevant insurance documents in a timely way is conduct for which State Farm is responsible, and it is proper that costs be paid by State Farm: see *Schmieder Estate v. Dominion of Canada General Insurance Co.*, 1998 CanLII 6411 (Ont. C.A.) at paras. 23-26 and 32-34.

[49] RBC and RSA submit that costs should be awarded against State Farm on a substantial indemnity scale. I do not agree that the circumstances are such as to show that State Farm engaged in reprehensible conduct that would justify an award of costs on a substantial indemnity scale. I award costs on a partial indemnity scale.

[50] RSA provided a Costs Outline supporting a request for costs on a partial indemnity scale in the amount of \$29,710.67 comprised of fees of \$23,996.94, fees for appearance at the summary judgment motion of \$712.80, HST on fees of \$3,212.26 and disbursements of \$1,788.67. Counsel for Mr. Pacitto did not take issue with the amount of costs requested by RSA. In my view, the amount requested by RSA for costs is reasonable and proportionate.

[51] RBC submitted a Costs Outline in support of its request for costs on a partial indemnity scale in the amount of \$64,456.95 comprised of pre-motion fees of \$53,192.75, fees for attendance at these motions in the amount of \$519.25, HST of \$6,982.56 and disbursements in

the amount of \$3,762.39. Counsel for Mr. Pacitto submits that the amount of costs requested by RBC exceeds the amount that is reasonable and proportionate, and that if costs are awarded against State Farm, costs awarded to RBC should not exceed the amount of costs to be paid to RSA. RBC responds that it was sued by the plaintiff before RSA was added as a defendant, and that it incurred significant costs defending the plaintiff's action before RSA was added as a defendant. For this reason, RBC submits that it would be expected that its costs would exceed RSA's costs. RBC submits that the amount reflected in its Costs Outline is reasonable.

[52] I agree with the submissions made on behalf of RBC. RBC has been involved in this litigation since June 2010. RSA was not added as a third party by RBC until June 2012, and it was not added as a defendant until November 2012. In my view, given the legal services that were required during the course of this litigation, as described in RBC's Costs Outline, the amount of costs requested by RBC is reasonable and proportionate.

***Is the plaintiff entitled to an award of costs of all of the steps taken in the within action that resulted from the failure of State Farm (through the defence that it was providing to Mr. Pacitto in the companion action) to produce documents in a timely way that showed that Mr. Pacitto was not the owner of the vehicle he was driving when the accident occurred? If not, is the plaintiff entitled to an award of costs of these motions against State Farm?***

[53] At the hearing of these motions, the plaintiff requested an award of costs of his action against RBC and RSA from State Farm as the insurer providing a defence to Mr. Pacitto in the companion action.

[54] In response, counsel for Mr. Pacitto submits that no motion was brought by the plaintiff seeking costs against State Farm of the plaintiff's action against RBC and RSA, and that the question of whether the plaintiff is entitled to an award of costs in respect of this action should be determined at the trial of the companion action brought by the plaintiff against Mr. Pacitto.

[55] I accept this submission by counsel for Mr. Pacitto. There is no motion before me by which the plaintiff seeks costs from State Farm of his action against RBC and RSA. I agree that the question of entitlement to these costs should be determined in the companion action that is proceeding brought by the plaintiff against Mr. Pacitto.

[56] The plaintiff, in the alternative, seeks costs of the motions by RBC and RSA for summary judgment from State Farm. The plaintiff took the position that it would consent to the motions if it were shown that there is a valid insurance policy that would respond to the plaintiff's claims, even if the action against Daimler Chrysler or its successor TD is subject to a limitation period defence. When this fact was acknowledged at the hearing of these motions, the plaintiff consented to summary judgment dismissing the actions against RBC and RSA.

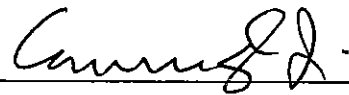
[57] These motions would not have been necessary if the insurance documents that show that the Pacitto vehicle was leased had been produced on a timely basis and the plaintiff would not have incurred costs in responding to these motions. For this reason, I exercise my discretion to order that the plaintiff's costs of these motions be paid by State Farm on a partial indemnity scale.

[58] According to the plaintiff's Bill of Costs, the plaintiff incurred costs in the amount of \$18,912 for fees in responding to these motions. I regard the amount of time expended and the partial indemnity rates charged to be reasonable and proportionate. I award costs to the plaintiff of these motions to be paid by State Farm in this amount.

**Disposition**

[59] For these reasons:

- a. Summary judgment is granted to RBC and RSA on their respective motions dismissing the plaintiff's action against each of them.
- b. State Farm, in its capacity as the insurer providing coverage to Mr. Pacitto for his defence of the companion action (and not in its capacity as a third party in the companion action) shall:
  - i. Pay to RBC its costs of this action on a partial indemnity scale fixed in the amount of \$64,456.95.
  - ii. Pay to RSA its costs of this action on a partial indemnity scale fixed in the amount of \$29,710.67.
- c. State Farm, in the same capacity, shall pay to the plaintiff his costs of these motions on a partial indemnity scale in the amount of \$18,912. The plaintiff's request for payment by State Farm of other costs of the actions that he submits were incurred because of State Farm's failure to disclose relevant documents and information in a timely way is left to be determined by the trial judge in the companion action.



Cavanagh J.

**Released:** January 16, 2018

**CITATION:** Hazaveh v. Pacitto, 2018 ONSC 395  
**COURT FILE NO.:** CV-10-404841  
**DATE:** 20180116

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

FARZAD BIKMOHAMMADI-HAZAVEH

Plaintiff

**- and -**

RBC GENERAL INSURANCE COMPANY AND  
ROYAL & SUN ALLIANCE INSURANCE  
COMPANY OF CANADA

Defendants

**- and between-**

THOMAS-FERDINAND PACITTO AND DAIMLER  
CHRYSLER FINANCIAL SERVICES CANADA INC.

Third Party Defendants

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**REASONS FOR JUDGMENT**

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Cavanagh J.

**Released:** January 16, 2018