IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Fitzgerald v. Royal Sun Alliance Insurance Company, 2011 NSSC 132

Date:20110331
Docket: SYDJC332089
Registry: Sydney

Between:

Jody Fitzgerald

Plaintiff

v.

Royal Sun Alliance Insurance Company of Canada

Defendant

Judge: The Honourable Justice Frank Edwards.

Heard: March 17, 2011, Sydney Nova Scotia

Counsel: Hugh McLeod, for the plaintiff
Kevin Quigley, for the defendant

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By the Court:

A. OVERVIEW

This is a motion by the Defendant for Summary Judgment.

[1] The action arises out of an incident which occurred on February 26, 2008 in which the Plaintiff, Jody Fitzgerald ("Fitzgerald"), has alleged she suffered personal injury as a result of a fall from the tailgate of her truck (the "Incident"). Fitzgerald alleges that the Incident occurred in the parking lot of a Wal-Mart store located on Spar Road in Sydney, Nova Scotia and was caused by an unknown vehicle striking the front of her Chevrolet Silverado (the "Truck") while parked in the parking lot.

[2] The Defendant, Royal and Sun Alliance Insurance Company of Canada (Royal), was at all material times the insurer of the Plaintiff. Fitzgerald has commenced the within action against Royal pursuant to Section D of the policy of insurance held by the Plaintiff with Royal (the "Policy"), which provides Uninsured and Unidentified Automobile Coverage.

[3] Royal has filed the within motion for summary judgment seeking the dismissal of the Plaintiff's claim on the basis of the following three arguments:

> (I) there is insufficient evidence for the Plaintiff to prove, on a balance of probabilities, that the negligence of an unidentified driver caused the Incident;
>
> (ll) further, or in the alternative, the Plaintiff's claim pursuant to the Policy has been forfeited due to the Plaintiff's failure to comply with the notice requirements of Section D of the Policy;
>
> (lll) further, or in the alternative, the Plaintiff is precluded from pursuing the within action due to the Plaintiff's failure to commence this action within the applicable 2-year limitation period.

B. BACKGROUND

[4] The Incident was not reported by Fitzgerald to Royal until April 13, 2010. Royal first received notice of the Incident on or about April 13, 2010, which was more than 2 years after the Plaintiff alleges the Incident occurred. On that date, Royal received a letter from Hugh McLeod, Counsel for the Plaintiff, addressed to Bluenose Insurance wherein Mr. McLeod advised that Fitzgerald had been injured on February 21, 2010 and wanted to open up a "Section B and Section D claim."

[5] Upon obtaining notice of the Incident, Royal retained an adjuster to meet with the Plaintiff on May 13, 2010 and obtain a written statement with respect to the Incident.

[6] In her statement, dated May 13, 2010, Fitzgerald provided the following with respect to the Incident:

> With regard to my accident the time of day was about 8:15 or 8:30am. The accident happened in the parking lot of the Wal-Mart on Spar Road in Sydney. I was alone at the time the accident happened. The truck involved was my 2004 Chev Silverado. The truck was registered to my [sp]. I no longer have that truck. The truck did not sustain any damage besides some scratches on the front. On the morning of this incident I went to Wal-Mart to exchange a battery. I pulled into one of the parking spaces close to the front of the store. After I stop my truck and just as I am getting out of my truck the car that is ahead me backs out and pulls away. I next make my way to the back of the truck and get up into the bed of the truck to get the battery that is in the back of the truck. As I am just about to get down off of the bed of the truck, the truck moves backwards and this knocks me off of the bed of the truck onto the ground. I was on the tailgate of the truck upon impact and was knocked off when I was going to step down…
>
> I did not see what vehicle bumped my truck. I did not hear any noise from another vehicle hitting my truck. The police were not at the scene and I never reported the accident to them…
>
> I felt a jolt to my truck upon impact and I felt the truck move. [emphasis added]
>
> **Reference**: Statement of Fitzgerald, dated May 13, 2010 - Affidavit of Anne Gallant at paragraph 6 and Exhibit "3".

[7] The Plaintiff was discovered on September 30, 2010. During the discovery the Plaintiff testified that she did not see (either before or after her fall) the unidentified automobile she alleges hit the Truck and did not hear any impact between the alleged unidentified automobile and the Truck. A review of the most relevant portion of the Plaintiff's discovery relating to how she says the Incident occurred is outlined as follows:

> Q. No, I understand. Did you notice anybody with shopping carts, somebody pushing a shopping cart in your area?
>
> A. No.
>
> Q. Did you notice anybody on a, on a bike or on some other vehicle of some kind?
>
> A. It was in the winter. There weren't people around on bikes.
>
> Q. Yeah. So I guess there weren't anybody around on bikes that you know of.
>
> A. <u>No, and when I first pulled in, there was a car ahead of me.</u>
>
> Q. <u>Yes.</u>
>
> A. <u>And as I was getting into the tail, the back of my truck, that car pulled out.</u>
>
> Q. <u>And left.</u>
>
> A. And left.
>
> Q. Do you know what kind of car that was, any …
>
> A. It was a small one. I'm not sure, I just remember it being small because I remember when I pulled in with my truck, I, it was, like I

was scared that I might bump it but I pulled in, no problem, and they pulled out just as I was getting out of my truck.

…

Q. All right. In any event that car left before …

A. They …

Q. … anything happened.

A. Exactly. They left before anything happened and left the spot in front of me vacant which is where …

Q. All right. And did you notice any I guess you were, you were parked somewhere near one of those cart corrals, were you?

A. Uh-huh.

Q. Yes?

A. Yes.

Q. Did you notice any ice on top of the car corral?

A. No.

Q. And did …

A. The pavement was dry.

Q. Uh-huh. Did you notice any moving vehicles around you prior to you falling?

A. There was one that drove by me as I was …

Q. Yes.

A. Like, they drove around to the front of the store as I was getting into the back of the truck.

Q. All right. Do you remember any specifics about that vehicle?

A. I know it was a car but that's all I remember about it.

Q. All right. But it went past your vehicle, did it?

A. It went past me and went towards the front of the store.

Q. All right. Do you remember seeing any other moving vehicles before you fell?

A. That's the only one I remember seeing.

Q. All right. Do you remember hearing any horn sound?
A. No.

Q. Do you remember hearing any brakes, …

A. No.

Q. … the squealing of brakes?

A. No.

Q. Do you remember hearing any sounds of impact of a vehicle?

A. No. I just felt, just felt it.

Q. You felt your vehicle move.

A. Yes.

Q. And afterwards, after you fell, do you remember seeing any other moving vehicle?

A. No. I looked around because where I was, where I fell, I was right directly behind my truck.
Q. Yeah.

A. And I tried to look around to see what was going on ahead of me but I, I couldn't see anything.

Q. All right. So you didn't, you couldn't see any vehicle …

A. The next vehicle that I Seen pull in was the guys that came to help me and that was, oh, it had to be three to five minutes that I was there.

Q. All right. And did they pull into the spot that the other vehicle vacated?

A. No. They pulled into a spot that was, the park … Where I was parked was here. They pulled into a spot on the opposite lane a couple of cars up.

Q. All right. And so for the three to five minutes that you were on the ground after the, after you fell, you, you couldn't tell if there was any vehicle, any other vehicle that was in the spot where the small car vacated …

A. No.

Q. … prior to you falling.

A. I couldn't tell. I, I, I felt the car, the truck move and then after a couple of seconds when I, when I fell, I was there and I could hear a car but I couldn't see a car.

Q. Okay.

A. I could hear like a car moving on the gravel, well, the pavement which had rocks and everything in it but I couldn't see it. So I'm assum … I'm thinking that when they, they bumped the truck, they pulled out and went back towards the Wal-Mart store. They didn't go out towards the exit.

Q. Okay. but I guess the, the spot that you're talking about was vacated …

A. Uh-huh.

Q. … the moment you got out of your truck.

A. Within a few seconds, yes.

Q. And then you got into the back cab of your truck.

A. Uh-huh.

Q. And then you think …

A. Someone …

Q. I guess, the theory is that somebody …

A. Pulled in.

Q. … pulled in and then pulled right back out again.

A. Yes.

Q. All right. But you don't know that for sure but that's your theory.

A. Yes.

Q. Okay. And did anybody ever indicate to you that they saw any vehicle strike your vehicle?

A. No. Because the two guys that came to help me, they pulled in after the fact and they had asked me what was going on, like what happened and I told them and they, they were like, oh, I wish I had've

been here to see what happened but.

Q. All right. And I guess you didn't see what happened either.

A. I didn't even see what happened. [emphasis added]

Reference: Discovery Transcript at pages 31-36 - Affidavit of Kevin Quigley at paragraph 4 and Exhibit "1".

[8] The Plaintiff went on to provide the following during her discovery:

A. I was returning a battery to Wal-Mart and, of course, as you know, with a truck how everything slides to the front. I was into the box. I pulled the battery down to the back. I was standing on the tailgate getting ready to get down out of the truck and that's when the truck moved.

Q. So you're on the tailgate and the tailgate's flat down, is it?

A. It's, it's flat down, yes.

Q. And you drag the battery to the, …

A. To the end.

Q. … towards the tailgate.

A. Uh-huh. The battery's sitting there on the end. Well, actually it's not sitting on the end. It's sitting like up where the joining part of the bed and tailgate is. I left the battery there and I was getting ready to step down. The front, the truck moved. I felt the jolt, the truck moved, I fell, landed right down. Oh, my god, it was, it was a lot of pain.

Q. All right. And what direction were you facing in term …

A. I was facing the front of the truck.

Q. All right. With your head down.

A. Yes, with my head down getting ready to step down because I had, I was getting ready to put my hand down so that I can lower myself down.

Q. And you're motioning with your right hand.

A. Uh-huh.

Q. So you're facing forward. You've pulled the battery towards the back of the truck.

A. Yes.

Q. You're standing on the tailgate.

A. Uh-huh. Yes.

Q. And you're about to put your right hand down on the tailgate so then you can kind of jump down.

A. Right.

Q. And when, just before you fell, in the moment that you began to fall, did you see any vehicle then?

A. No.

Reference: Discovery Transcript at pages 43-44 - Affidavit of Kevin Quigley at paragraph 4 and Exhibit "1".

[9] Fitzgerald did not take any photographs of where the Incident occurred until sometime in 2010. A copy of the photographs of the area where the Plaintiff says the Incident occurred can be found at Exhibit "2" of the Affidavit of Kevin Quigley.

Reference: Discovery Transcript at pages 23-25 - Affidavit of Kevin Quigley at paragraph 4 and Exhibit "1" and Photographs - Affidavit of Kevin Quigley at paragraph 5 and Exhibit "2".

[10] During her discovery, the Plaintiff was referred to the photographs noted above in paragraph 9. She advised that at the time the Incident occurred the Truck was parked in the empty parking space adjacent to the silver car in photograph No. 2 with the front of the Truck facing to the left side of the photograph.

> **Reference**: Photograph No. 2 - Affidavit of Kevin Quigley at paragraph 5 and Exhibit "2" and Discovery Transcript at pages 92-95 - Affidavit of Kevin Quigley at paragraph 4 and Exhibit "1".

[11] The Plaintiff did not report the Incident to the police at any time nor did the Plaintiff report the Incident to Royal (her insurance company), Wal-Mart (where the Incident occurred) or any other person until 2010 when she spoke with her Counsel, Mr. McLeod.

> **Reference**: Discovery Transcript at pages 23 and 27 - Affidavit of Kevin Quigley at paragraph 4 and Exhibit "1".

[12] Fitzgerald did not take any photographs of the Truck following the Incident. Unfortunately, the Truck was damaged and written off in an accident that occurred

in 2009. The Plaintiff is unaware of the whereabouts of the Truck.

> **Reference**: Discovery Transcript at pages 23-25 - Affidavit of Kevin Quigley at paragraph 4 and Exhibit "1".

[13] The Plaintiff advised as follows with respect to the damage the Plaintiff claims may have been caused to the Truck as a result of the Incident:

> Q. Did you take any photographs of any damage to the truck, like a closeup of damage to the truck anywhere?
>
> A. No.
>
> Q. All right.
>
> A. There wasn't really any damage to the, to the truck.
>
> Q. Okay.
>
> A. It was just like a little,…
>
> Q. Well. That explains why.
>
> A. … like a little tiny pain [sp] scrape on the bumper. That was it.

Q. Was it a coloured paint scrape or do you remember?

A. There was a pain scrape. I don't remember. I don't remember if there, if it had colour to it or it was just black.

Q. Did you get it fixed?

A. No. It was just like a little cosmetic thing.

Q. All right. And I take it with regards to the scratches on the front of your vehicle, you don't know what caused those, do you?

A. No. Like I said, it's just like they weren't really scratched. Like they were more like a, almost like a paint rub or something along that lines.

Q. But in terms of what caused them, you don't know.

A. No.

Reference: Discovery Transcript at pages 25-26 and 39 - Affidavit of Kevin Quigley at paragraph 4 and Exhibit "1".

[14] The Plaintiff claims that upon falling from the tailgate of the Truck she landed directly on her buttocks area/tailbone and twisted her ankle. Immediately

following the Incident the Plaintiff complained of lower back pain and swelling of her ankle.

> **Reference**: Discovery Transcript at pages 40-42 - Affidavit of Kevin Quigley at paragraph 4 and Exhibit "1".

[15] The Plaintiff claims she missed approximately seven (7) months from her employment beginning immediately after the Incident, as a result of the injuries suffered by the Plaintiff in the Incident. The Plaintiff collected short-term and long-term disability benefits during this time period.

> **Reference**: Discovery Transcript at pages 16-17 - Affidavit of Kevin Quigley at paragraph 4 and Exhibit "1".

C. ISSUES on the CPR 13 Motion

(l) Is there sufficient evidence to prove, on a balance of probabilities that the negligence of an unidentified driver caused the accident.

[16] In determining whether I should exercise discretion under Rule 13 and grant summary judgment in favour of the Defendant Royal, I must consider two issues:

(a) Is there a genuine issue of material fact requiring trial? If the answer is no, than I must consider;

(b) Can Fitzgerald establish that her claim has a real chance of success?

D. THE LAW ON SUMMARY JUDGMENT

[17] Nova Scotia ***Civil Procedure Rule*** 13 governs summary judgment proceedings. ***Civil Procedure Rule 13.01*** reads as follows:

> 13.01 Scope of Rule 13
>
> (1) This Rule allows a party to move for summary judgment on the pleadings that are clearly unsustainable and to move for summary judgment on evidence establishing that there is no genuine issue for trial.
>
> (2) A frivolous, vexatious, scandalous, or otherwise abusive pleading may be dealt with under Rule 88 - Abuse of Process.

[18] ***Civil Procedure Rule*** 13.04 specifies that:

> 13.04(1) A judge who is satisfied that evidence or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must

> grant summary judgment.
>
> (2) The judge may grant judgment for the Plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.
>
> (4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross examination, or other means permitted by a judge.

[19] The purpose of a summary judgment motion is to allow a party to apply to the court for a determination that a trial is not required in order to dispose of some or all of the issues between the parties.

[20] In order to succeed, the applicant must first establish that there are no arguable issues of material fact requiring trial. Once it is shown that there are no arguable issues of fact, the onus is on the responding party to prove that its defence or claim, as the case may be, has a real chance of success based upon the undisputed material facts.

[21] The leading case that outlines the analysis to be undertaken upon an application for summary judgment is ***Guarantee Co. of North America v. Gordon Capital Corp.,*** [1999] 3 S.C.R. 423 (S.C.C.) ("Guarantee")(**Defendant's Book of Authorities - TAB 5**). In ***Guarantee***, the Supreme Court of Canada, at paragraph 27, set forth the following test:

> The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success" [emphasis added].

[22] This test was adopted by the Nova Scotia Supreme Court in ***Binder v. Royal Bank of Canada***, 2003 NSSC 174 ("Binder")**(Defendant's Book of Authorities - TAB 1)** at paragraph 7:

> … The applicant must meet a threshold. Generally, that threshold is met when the case is such that the Court should properly inquire into the presence or absence of a genuine issue (Hercules, para. 5 and 15), which I would equate with a reasonably arguable issue. Specifically, the threshold is met in cases where "there is no genuine issue of material fact requiring trial" (Guarantee Co. of North America, para. 27, emphasis added). Once the threshold is met, the respondent is required to show a real chance of success in its claim or defence.

(a) Is there a genuine issue of material fact requiring trial?

[23] In its Statement of Claim, Fitzgerald has alleged that:

> (a) an unknown driver struck the front end of the Truck causing the Plaintiff to fall from the tailgate of the Truck resulting in personal injury to the Plaintiff; and
>
> **Reference**: paragraph 3 of the Statement of Claim.
>
> (b) the injuries suffered by the Plaintiff were caused by the negligence of the unknown driver.
>
> **Reference**: paragraph 4 of the Statement of Claim.

[24] Although it is not clear from the pleadings, the claim put forward by the Plaintiff against Royal is pursuant to Section D of the Policy, which provides that Royal is required to pay all sums for bodily injury resulting from an accident involving an automobile that Fitzgerald is entitled to recover from the owner or driver of an uninsured or unidentified automobile. Section D of the Policy further provides that the insurer may contest the issue of the legal entitlement of the Plaintiff to recover damages and the amount of damages payable in an action

commenced by an insured against Royal pursuant to Section D of the Policy.

> **Reference**: Standard Automobile Policy at paragraphs 2(1) and 5(3) - Affidavit of Anne Gallant at paragraph 4 and Exhibit "1".

[25] The legal issues to be determined in this matter include the following:

> (a) whether the Plaintiff can meet her burden to prove that the negligence of an unidentified vehicle/driver caused the Incident;
>
> (b) whether the Plaintiff can meet its burden to prove that Incident caused the Plaintiff's injuries, as alleged (which issue does not form part of the within motion); and
>
> (c) the quantification of the Plaintiff's injuries arising from the Incident, if any (which issue does not form part of the within motion).

[26] The summary judgment motion is limited to a determination as to whether an unidentified vehicle was present at the time of the Incident and, if so, whether the Incident was caused by the negligent actions of the unidentified vehicle as alleged. In other words, can the Plaintiff establish that the unidentified vehicle/driver is liable for the Incident.

[27] It is clear that there is a genuine issue of material fact requiring trial.

Fitzgerald's evidence is that she was standing on the tailgate of her truck when she felt a bump which caused her vehicle to move. The bump caused her to lose her balance and fall. She thereby sustained injury. Fitzgerald says that when she fell she could hear but could not see a car.

[28] At trial, the case will hinge upon Fitzgerald's credibility. If she is believed, then her evidence amounts to more than a theory (as suggested by the Defendant's Counsel) of what occurred. Her testimony would be circumstantial evidence that an unidentified driver struck her stationary vehicle. In the circumstances, if the trier is satisfied that an unidentified driver/vehicle struck the Plaintiff's vehicle and thereby caused her to fall, then it will be open to the trier to infer negligence on the part of the unidentified driver.

[29] Accordingly, I have concluded that there is a genuine issue of material fact requiring trial. I need not proceed further. In other words, I do not have to consider whether Fitzgerald has established that her claim has a real chance of success.

(II) **Is the Plaintiff's Claim forfeit due to her failure to comply with the Notice**

Requirements of Section D of the Policy?

[30] Section D of the Policy provides certain terms and conditions for Uninsured and Unidentified Automobile Coverage (which terms and conditions are derived from the *Uninsured Automobile and Unidentified Automobile Coverage Regulations*, N.S. Reg. 94/96 (**Defendant's Book of Authorities - TAB 13**)).

[31] Section 9 of Section D outlines the limitations of coverage as follows,

> 9. Limitations
>
> (1) No person shall commence an action to recover the amount of a claim provided under this policy and under subsection 139(2) of the Insurance Act unless the requirements under this section have been complied with.
>
> (2) Every action or other legal proceeding against an insurer for the recovery of an amount of damages shall be commenced ***within two years*** after the date on which the cause of action against the insurer arose and not afterward. (Emphasis added)
>
> **Reference:** Standard Automobile Policy - Affidavit of Anne Gallant at paragraph 4 and Exhibit "1".

[32] The pertinent requirements under Section D of the Policy, as referred to in section (9)(1) above, fall specifically under section 4 and 6 of Section D of the

Policy, which provides:

4. Accidents Involving Unidentified Automobiles

Where bodily injuries to or the death of a person insured under this policy results from an accident involving an unidentified automobile, the claimant or a person acting on behalf of the claimant ***shall***

(1) report the accident within twenty-four hours after the accident or as soon after that period as practicable to a peace officer, a judicial officer or an administrator of motor vehicle laws,

(2) deliver to the Insurer within thirty days after the accident or as soon after that period as practicable a written notice, stating that the claimant has a cause of action arising out of the accident for damages against a person whose identity cannot be ascertained and setting out the facts in support of the cause of action, and

(3) at the request of the Insurer, make available for inspection by the Insurer, where practicable, any automobile involved in the accident in which the person insured under this policy was an occupant at the time of the accident.

6. Notice and Proof of Claim

(1) A person claiming damages for bodily injury to or the death of a person resulting from an accident involving an uninsured automobile or unidentified automobile or a person acting on behalf of the claimant ***shall***

(a) within thirty days after the date of the accident or as soon after that period as practicable, give written notice of the claim to the insurer by delivering it personally or by sending it by registered mail to the chief

agent or head office of the insurer in Nova Scotia;

(b) within ninety days after the date of the accident or as soon after that period as practicable, deliver to the insurer as fully detailed a proof of claim as is reasonably possible in the circumstances respecting the events surrounding the accident and the damages resulting from it;

(c) provide the insurer, at the insurer's request, with the certificate of a medical practitioner legally qualified to practice medicine, describing the cause and nature of the bodily injury or death to which the claim relates and the duration of any disability resulting from the accident; and

(d) provide the insurer with details of any policies of insurance, other than life insurance, to which the claimant may have recourse. [emphasis added]

(2) Subsection 4 of Section F - Mandatory Conditions applies with the necessary modifications where a claimant claims damages for accidental damage to an insured automobile or its contents or to both an insured automobile and its contents.

Reference: Standard Automobile Policy - Affidavit of Anne Gallant at paragraph 4 and Exhibit "1".

Failure of the Plaintiff to Report the Incident

[33] Sections 4 and 6 of Section D of the Policy outline certain time-sensitive reporting requirements that must be complied with in order for the Plaintiff to recover her alleged loss pursuant to the Policy.

[34] As noted in the text *Insurance Law in Canada*, by Craig Brown and Thomas Donnelly (**Defendant's Book of Authorities - TAB 7**), at page 9-3:

> It is a condition precedent to recovery under a policy that notice requirements be met. It is therefore a ground of forfeiture of the claim if notice is not filed in time in accordance with the relevant policy or statutory provision.

[35] First, Section 4(1) of Section D of the Policy states that where bodily injury to a person insured results from an accident involving an "unidentified automobile" the Plaintiff shall report the accident to a "peace officer, a judicial officer or an administrator of motor vehicle laws" within 24 hours after the accident "or as soon after that period as practicable".

[36] The Plaintiff's discovery evidence clearly provides that the Plaintiff did not report the accident in question to a peace officer, a judicial officer or an administrator of motor vehicle laws within 24 hours of the accident. In fact, there is no evidence that the Plaintiff reported the Incident to a peace officer, a judicial officer or an administrator of motor vehicle laws at any time following the Incident.

[37] Second, Section 4(2) of Section D of the Policy states that where bodily injury to a person insured results from an accident involving an "unidentified automobile" the Plaintiff shall deliver to her insurer (Royal), within thirty days after the accident or "as soon after that period as practicable", a written notice stating that she has a cause of action arising out of the accident for damages against a person whose identity cannot be ascertained and setting out the facts in support of the cause of action.

[38] Fitzgerald did not provide written notice of the Incident to Royal within 30 days of the Incident or "as soon after that period as practicable". In fact, Fitzgerald did not report the Incident to Royal, in writing or otherwise, until April 13, 2010 when Fitzgerald's Counsel, Hugh McLeod, wrote to Bluenose Insurance and advised that Fitzgerald had been injured on February 21, 2010 and wanted to open up a "Section B and Section D claim." This "written notice" was, therefore, not received by Royal until over 770 days after the Incident occurred, which in Royal's submission, cannot be construed in any way to be within the time period required by the Policy.

Reference: Affidavit of Anne Gallant at paragraph 5.

[39] Third, Section 6(1)(b) of Section D of the Policy states that a person claiming damages for bodily injury resulting from an accident involving an unidentified automobile shall within ninety days after the date of the accident or "as soon after that period as practicable", deliver to the insurer a proof of claim form.

[40] Fitzgerald did not provide a proof of claim form within 90 days of the Incident or "as soon after that period as practicable". As noted above, Royal did not receive any written notice of the Incident until approximately 770 days after the Incident occurred, which in Royal's submission, cannot be construed in any way to be within the time period required by the Policy.

[41] Fourth, Section 4(3) of Section D of the Policy states that where bodily injury to a person insured results from an accident involving an "unidentified automobile" the Plaintiff shall make available for inspection by the insurer any automobile involved in the accident.

[42] Fitzgerald was unable to produce the Truck for inspection as by the time the Incident was reported to Royal on or about April 13, 2010, the Truck was no

longer in the possession of the Plaintiff nor did the Plaintiff have any idea where the Truck was located. In fact, the Plaintiff advised during her discovery that the Truck had been involved in a motor vehicle accident in 2009 (which was unrelated to the Incident) that resulted in the Truck being written off.

> **Reference**: Discovery Transcript at page 25 - Affidavit of Kevin Quigley at paragraph 4 and Exhibit "1".

[43] The Plaintiff failed to comply with all of the above-noted statutory conditions of the Policy that were required, as a condition precedent, for recovery pursuant to Section D of the Policy. Royal submits that as a result of the Plaintiff's failure to comply with these conditions precedent, the Plaintiff's claim pursuant to the Policy should be forfeited. Royal submits that, given all of the circumstances, this is not a case where the Court should use its discretion, pursuant to section 33 of the Insurance Act, to relieve the Plaintiff against the forfeiture of coverage pursuant to the Policy. Section 33 of the ***Insurance Act***, R.S.N.S. 1989, c. 231 (**Defendant's Book of Authorities - TAB 6**) states:

> **Court may relieve against forfeiture**
>
> 33 Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be

> done or omitted by the insured with respect to the loss, and a consequent forfeiture or avoidance of the insurance in whole or in part, and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just. R.S., c. 231, s. 33. [Emphasis added]

[44] I disagree with Royal's position. In the particular circumstances of this case, it would be inequitable that the insurance should be forfeited because of imperfect compliance with the statutory conditions. This is not a case where the insurance contract was broken by the Plaintiff with ..."a careless disregard for the rights of the insurer so as to cause actual or potential injury to the insurer's position." [See ***Canadian Equipment Sales & Service v. Continental Insurance Co.*** (Ont C.A.) at para.30 where the opposite was the case].

[45] Here, I am satisfied that the Plaintiff honestly but mistakenly believed that she had no cause of action because she could not identify the vehicle which caused her injury. She has Grade XII education but is unsophisticated with respect to insurance law or her responsibilities under a contract of insurance. This is not to say that everyone can avoid their responsibilities under the statutory conditions merely by saying they were not aware. Each situation has to be assessed on a case by case basis.

[46] This situation is quite unusual. As soon as the Plaintiff became aware that she might have a cause of action, she took immediate steps to advance her position. Plaintiff's Counsel gave notice to the Insurer on April 13, 2010 - i.e., less than two months after the expiry of the two year time limit. (The action itself was commenced on July 28, 2010).

[47] I am satisfied that any prejudice to the insurer caused by the delay or failure to comply with the statutory conditions is minimal or highly speculative. I accept the Plaintiff's argument that it is highly unlikely that immediate notification would have produced any witnesses to the alleged event. It is also unlikely that, had she inevitably reported the matter to police, a police investigation would have produced any tangible results. The Plaintiff would have been unable to give even a vague description of the vehicle she claims had bumped her truck. It is unlikely that anyone in the parking lot would have noticed such a low impact collision. Ms. Fitzgerald says she was lying on the ground for three to four minutes and no one came forward to say they had witnessed what had happened. The Defendant put forward no evidence that the parking lot had been under video surveillance which had since been destroyed.

[48] Further, the fact that the Plaintiff's vehicle is no longer available is inconsequential. At most, an inspection at the time would have revealed a scrape on the paint of the front bumper. Such evidence would be useless in the absence of a run vehicle with which to match it. Defendant's Counsel argued that perhaps they would have found no paint scrape. Again, that would not have assisted the Defendant given the Plaintiff's description of "a little tiny paint scrape on the bumper". Whether or not such a scrape existed would probably be of no assistance to the insurer. The bump described by the Plaintiff may have caused no damage.

[49] The Defendant also contended that an inspection would have determined whether the tailgate or its hinges were faulty or whether the parking brake was faulty. The incident occurred in a relatively level parking lot. (See photos referred to in paragraph 9). In that circumstance, it is difficult to understand the relevance of the condition of the parking brake. The point about the condition of the tailgate is speculative. In sum, the Defendant speculates on areas of possible prejudice but is unable to point to real (or even probable) prejudice.

[50] In short, I am exercising my discretion pursuant to section 33 of the ***Insurance Act*** to relieve the Plaintiff against forfeiture or avoidance of her insurance.

(III) Two Year Limitation Period

[51] Section 9(2) of Section D requires that any action against the insurer pursuant to Section D "shall be commenced within two years after the date on which the cause of action against the insurer arose and not afterward."

[52] As I have noted, the Defendant was put on notice less than two months after the expiration of the two year time limit. In the circumstances, it would be unfair to deprive the Plaintiff of her cause of action by insisting upon strict compliance with Section 9(2) of Section D of the Policy. In any event, the policy provisions are trumped by the provisions of the ***Limitation of Actions Act***, R.S. c.258, s.1. Section 2(f) of the Act contains a **three** year limitation period. It reads:

> (f) actions for recovery of damages on account of injury to persons or damage to property occasioned by or arising out of the ownership, maintenance, operation or use of a motor vehicle, within three years after the cause of action arose.

[53] Section 3(2) reads:

> 3. (2) Where an action is commenced without regard to a time limitation, and an order has not been made pursuant to subsection (3), the court in which it is brought, upon application, may disallow a defence based on the time limitation and allow the action to proceed if it appears to the court to be equitable having regard to the degree to which
>
> (a) the time limitation prejudices the Plaintiff or any person whom he represents; and
>
> (b) any decision of the court under this Section would prejudice the Defendant or any person whom he represents, or any other person. [Emphasis added]

[54] Section 3(4) (a) to (g) read:

> 3. (4) In making a determination pursuant to subsection (2), the court shall have regard to all the circumstances of the case and in particular to
>
> (a) the length of and the reasons for the delay on the part of the Plaintiff;
>
> (b) any information or notice given by the Defendant to the Plaintiff respecting the time limitation;
>
> (c) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the Plaintiff or the Defendant is or is likely to be less cogent than if the action had been brought or notice had been given within the time limitation;

> (d) the conduct of the Defendant after the cause of action arose, including the extent, if any, to which he responded to requests reasonably made by the Plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the Plaintiff's cause of action against the Defendant;
>
> (e) the duration of any disability of the Plaintiff arising after the date of the accrual of the cause of action;
>
> (f) <u>the extent to which the Plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the Defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages.</u>
>
> (g) <u>the steps, if any, taken by the Plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.</u> [Emphasis added]

[55] With respect to Section 3(2)(b), it is obvious from what I have already written that I believe the prejudice suffered by the Defendant has been minimal to non-existent. Accordingly, I am satisfied that it would be equitable to disallow a defence based on the time limitation in the policy. In making this determination I have had regard to the provisions of Section 3(4) and, in particular, the provisions of subparagraphs 3(4) (a), (c), (f) and (g) . That consideration will be apparent from what I have written earlier in this decision. As I have noted previously, the Defendant is not prejudiced by the delay and the Plaintiff acted immediately after she learned that she had a possible cause of action.

(IV) **<u>Conclusion:</u>** The Defendant's motion is dismissed. Costs shall be in the cause.

Order Accordingly.

J.

Sydney, Nova Scotia