SUPREME COURT OF NOVA SCOTIA
Citation: *Totino v. St. James Mullen Estate*, 2020 NSSC 281

Date: 20201008
Docket: Hfx No. 429875
Registry: Halifax

Between:

Andre Totino

Plaintiff

v.

Estate of Cody St. James Mullen, and Intact Insurance Company

Defendants

Decision – Summary Judgment

Judge:	The Honourable Justice Christa M. Brothers
Heard:	September 23 and 24, 2020, in Halifax, Nova Scotia
Counsel:	David S. Green, for the Plaintiff Christopher W. Madill and Ryan Blood, for the Defendants

Overview

[1] On September 2, 2013, a tragic motor vehicle accident took the lives of two young people. The plaintiff, Andre Totino, survived the accident but claims that, as a front seat passenger in the motor vehicle accident, he suffered serious and lasting injuries.

[2] This matter is set down for trial to commence May 25, 2021, and run for 14 days. In advance of this trial, the plaintiff seeks summary judgment on the evidence pursuant to *Civil Procedure Rule* 13.04, as well as an order pursuant to Rule 70.08 for interim payment in an amount between $100,000 and $200,000.

[3] For the following reasons, I cannot, in the circumstances of this motion, grant summary judgment and consequently cannot order an interim payment. While I have sympathy for the plaintiff's position and the fact that this motor vehicle accident occurred on September 2, 2013, and despite the defendant's admission that the plaintiff suffered a concussion and a parietal lobe hemorrhage in the accident, there are too many material facts in issue to conclude that summary judgment is appropriate.

Background

[4] This action arises from a motor vehicle accident which occurred on September 2, 2013. The plaintiff maintains this was a single motor vehicle accident where the vehicle in which he was a passenger was travelling at 167 kilometres an hour at the time of the accident. The photos of the scene appended to affidavits tendered in this motion depict a serious accident. The deceased defendant, Cody St. James Mullen, was the driver of a motor vehicle (the Mullen vehicle) in which the plaintiff was a front-seat passenger. The plaintiff says the defendant driver was uninsured at the time of the accident and, consequently, claims against his own Section D insurer, Intact Insurance Company ("Intact").

[5] The plaintiff says that Intact will be called upon to pay damages in this matter. Intact disputes that Section D is triggered, pointing to the allegation of a second motor vehicle being involved. Intact submits that there is evidence that a friend of the plaintiff, Blake Nugent, was driving a second vehicle, (the Mumford vehicle) owned by Jake Mumford, which was involved in the accident.

[6] Intact submits that there is evidence that this second vehicle, the Mumford vehicle, was racing with the Mullen vehicle and came into contact with the rear of

the Mullen vehicle prior to it going off the road. Intact submits that this is a material fact in dispute which prevents the plaintiff from obtaining summary judgment. Intact also says it has maintained its rights under the insurance policy. Furthermore, Intact argues that there is no admissible evidence on this motion that proves Cody St. James Mullen was uninsured at the time of this accident.

[7] The plaintiff seeks to admit the RCMP investigation report, which is attached to Andre Totino's affidavit. The report concluded that there was no second motor vehicle involved in the accident. As noted earlier, the plaintiff maintains that this was a single-vehicle accident where the Mullen vehicle was travelling at 167 kilometres an hour. The plaintiff relies on documents from Aviva Insurance Company, including a notice of cancellation appended to Mr. Totino's affidavit, as evidence that the Mullen vehicle was uninsured.

[8] The plaintiff says there was no second motor vehicle and, even if there is some evidence of a second vehicle potentially being involved in the accident, Intact has already admitted responsibility. The plaintiff relies on a letter dated November 27, 2017, from Intact's counsel, Mr. Christopher Madill. The plaintiff interprets this letter as being an admission that Intact must and will respond to this claim.

[9] The plaintiff seeks an interim payment. The plaintiff argues an amount between $100,000 and $200,000 is appropriate, arguing that he has suffered serious injuries, and a loss of employment. The plaintiff relies on a number of expert reports, which were both appended to affidavits in this motion, as well as expert reports which were neither appended to any affidavit in this motion, nor entered into evidence in another manner. The reports are found in the file filed pursuant to Rule 55.04 in advance of the trial of this action. These reports included a number of neurologists, psychologists, and physiatrists. The plaintiff claims to have suffered soft tissue injuries, a traumatic brain injury, and psychological sequelae caused by this accident.

Issues

[10] Should summary judgment be granted?

[11] If summary judgment is granted, is an interim payment appropriate, and in what quantum?

Law and analysis

[12] I recently canvassed the law on summary judgment in *Inglis v. Medway Pine Stables*, 2020 NSSC 97. This motion is brought pursuant to Rule 13.04, which states:

> 13.04 Summary judgment on evidence in an action
>
> **(1)** A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
>
> (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> **(2)** When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> **(3)** The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> **(4)** On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
>
> **(5)** 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.
>
> **(6)** A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:
>
> (a) determine a question of law, if there is no genuine issue of material fact for trial;
>
> (b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[13] The test on a motion for summary judgment on evidence was articulated by Fichaud, J.A. in *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89, as follows:

> [33] The amended Rule 13.04 frames, but does not materially change *Burton*'s tests. On the first test, instead of the former Rule's "genuine issue for trial", the new

Rule 13.04(1) speaks of a "genuine issue of material fact, whether on its own or mixed with a question of law". On the second, the amended Rule 13.04(3) repeats the former Rule 13.04(2), that the judge may grant judgment, dismiss a proceeding, and allow or dismiss a claim or defence. These provisions remain consistent with Justice Saunders' formulation in *Burton*.

[34] I interpret the amended Rule 13.04 to pose five sequential questions:

- **First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?** [Rules 13.04(1), (2) and (4)]

If Yes, it should not be determined by summary judgment. It should either be considered for conversion to an application under Rules 13.08(1)(b) and 6 as discussed below [paras. 37-42], or go to trial.

The analysis of this question follows *Burton*'s first step.

A "material fact" is one that would affect the result. A dispute about an incidental fact - *i.e.* one that would not affect the outcome - will not derail a summary judgment motion: *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74, para. 27, adopted by *Burton*, para. 41, and see also para. 87 (#8).

The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes. [Rules 13.04(4) and (5)]

Burton, paras. 85-86, said that, if the responding party reasonably requires time to marshal his evidence, the judge should adjourn the motion for summary judgment. Summary judgment isn't an ambush. Neither is the adjournment permission to procrastinate. The amended Rule 13.04(6)(b) allows the judge to balance these factors.

- **Second Question:** If the answer to #1 is No, then: **Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?**

If the answers to #1 and #2 are both No, summary judgment "must" issue: Rules 13.04(1) and (2). This would be a nuisance claim with no genuine issue of any kind – whether material fact, law, or mixed fact and law.

- **Third Question:** If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: Rule 13.04(3). Governing that discretion is the principle in *Burton*'s second test: **"Does the challenged pleading have a real chance of success?"**

Nothing in the amended Rule 13.04 changes *Burton*'s test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance

> of success at a later trial or application hearing, would be a patently unjust exercise of discretion.
>
> It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.
>
> • **Fourth Question:** If the answer to #3 is Yes, leaving only an issue of law with a real chance of success, then, under Rule 13.04(6)(a): **Should the judge exercise the "discretion" to finally determine the issue of law?**
>
> If the judge does not exercise this discretion, then: (1) the judge dismisses the motion for summary judgment, and (2) the matter with a "real chance of success" goes onward either to a converted application under Rules 13.08(1)(b) and 6, as discussed below [paras. 37-42], or to trial. If the judge exercises the discretion, he or she determines the full merits of the legal issue once and for all. Then the judge's conclusion generates issue estoppel, subject to any appeal.
>
> This is not the case to catalogue the principles that will govern the judge's discretion under Rule 13.04(6)(a). Those principles will develop over time. Proportionality criteria, such as those discussed in *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 S.C.R. 87, will play a role.
>
> A party who wishes the judge to exercise discretion under Rule 13.04(6)(a) should state that request, with notice to the other party. The judge who, on his or her own motion, intends to exercise the discretion under Rule 13.04(6)(a) should notify the parties that the point is under consideration. Then, after the hearing, the judge's decision should state whether and why the discretion was exercised. The reasons for this process are obvious: (1) fairness requires that both parties know the ground rules and whether the ruling will generate issue estoppel; (2) the judge's standard differs between summary mode ("real chance of success") and full-merits mode; (3) the judge's choice may affect the standard of review on appeal.

[14] This case sets out the five sequential questions I am to pose and answer. The first question is whether or not the challenged pleading discloses a "genuine issue of material fact", either pure or mixed with a question of law. If there is a genuine issue of material fact, summary judgment should not be granted. The following comment on the nature of summary judgment from *Burton Canada Co. v. Coady*, 2013 NSCA 95, is instructive as I embark upon this question:

> [22] In my respectful opinion this process has become needlessly complicated and cumbersome. Summary judgment should be just that. Summary. "Summary" is intended to mean quick and effective and less costly and time consuming than a trial. The purpose of summary judgment is to put an end to claims or defences that have no real prospect of success. Such cases are seen by an experienced judge as being doomed to fail. These matters are weeded out to free the system for other cases that deserve to be heard on their merits. That is the objective. Lawyers and judges should apply the Rules to ensure that such an outcome is achieved.

[15] In *Canada (Attorney General) v. Lameman*, 2008 SCC 14, the court also commented upon the purpose of summary judgment which I must bear in mind as I embark on these sequential questions:

> [10] This appeal is from an application for summary judgment. The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.
>
> [11] For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial"... The defendant must prove this; it cannot rely on mere allegations or the pleadings... If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal... Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried... The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts... [Citations omitted.]

[16] I keep in mind all these comments while engaging in the *Shannex* analysis.

Genuine Issue of Material Fact

[17] I must first look at whether there are, or is, a genuine material issue of fact. The plaintiff has the onus of satisfying me that summary judgment is a proper question for determination. He bears the burden of showing there is no genuine issue of material fact for trial. If he fails, the motion for summary judgment must be dismissed. If the motion for summary judgment is dismissed, I do not go on to entertain the motion for an interim payment.

[18] In reviewing this matter, I have regard to *Hatch Limited v. Atlantic Sub-Sea Construction and Consulting Inc*., 2017 NSCA 61, where the court stated:

> [23] The role of the motions judge on a summary judgment motion is to determine whether the challenged claim discloses a genuine issue of material fact (either pure or mixed with a question of law). The onus is on the moving party to show there is no genuine issue of material fact. If it fails to do so the motion is dismissed. A material fact being one that would affect the result.

> [24] The motions judge must determine whether the evidence is sufficient to support the pleading, but he/she cannot draw inferences from the available evidence to resolve disputed facts.
>
> [25] This prohibition on weighing evidence was addressed by Saunders, J.A. in *Coady*. After discussing the law of summary judgment in Nova Scotia, he provides a list of principles, including:
>
> > [87] …
> >
> > 10. Summary judgment applications are not the appropriate forum to resolve disputed questions of fact, or mixed law and fact, or the appropriate inferences to be drawn from disputed facts.
> >
> > 11. Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility.

[19] Is there a material fact in dispute in relation to these claims? A material fact has been defined by various decisions in this province, including *2420188 Nova Scotia Limited v. Hiltz*, 2011 NSCA 74, where the court stated:

> [27] The disputed fact under Stage 1 must be "material", *ie.* essential to the claim or defence. A dispute over an incidental fact will not derail a summary judgment motion at Stage 1.

[20] Further, in *Burton, supra*, Saunders, J.A., described material facts as "important factual matters that anchor the cause of action or defence". In *Shannex*, Fichaud, J.A., described a "material of fact" as "one that would affect the result".

[21] To summarize, a material fact is essential to the claim or defence. It is important in that it anchors a cause of action or defence. A material fact will affect the result of an action.

[22] The plaintiff's claim is framed in both negligence and contract. The plaintiff claims negligence in relation to the actions of the defendant, Mullen. He claims in contract, in relation to the position that Intact must respond as his Section D insurer, pursuant to the insurance policy.

[23] After hearing the able submissions of counsel and reviewing all of the vast amount of materials placed before me, I have determined that there are many material facts in dispute in this matter. However sympathetic I am to the fact that the plaintiff is awaiting a determination as to his entitlement to compensation, and has been waiting for seven years, I cannot ignore the real facts that are in issue in

this case and that need to be resolved at the trial in May 2021. The following are some of the material facts in issue in this matter.

Second motor vehicle accident

[24] Was this a single motor vehicle accident involving only the Mullen vehicle or was this an accident that involved both the Mullen vehicle and the Mumford vehicle being driven by Mr. Nugent? This is a live issue.

[25] There is conflicting evidence on this issue. First, there is the RCMP information appended to the plaintiff's affidavit. I have concerns whether this information is even properly adduced on this motion given the decision in *MacAuley v. Lai*, 2013 NSSC 271. However, it is clear, based on the discovery evidence of the plaintiff, and his own video statement to police that there is a genuine issue of material fact in dispute – that is, whether another vehicle was involved in this accident.

Discovery Evidence

[26] There was much material appended from discoveries both attached to the supplemental affidavit of Andre Totino, dated September 8, 2020, as well as discovery excerpts attached to the affidavit of Kathleen Mitchell, dated September 16, 2020. These excerpts, taken together with the other materials filed, demonstrate a material fact in issue.

The plaintiff appended the following excerpts from Andre Totino's supplemental affidavit dated September 8, 2020, at Tab B. The plaintiff was discovered on November 4, 2015, and gave the following evidence:

> Page 94
>
> Q. And when it was time to leave, a decision was made that you and the two girls would travel with Cody ---
>
> A. That's right.
>
> Q. --- and go to Blake's house.
>
> A. Yeah.
>
> A. Was that the original intention, that you would travel with Cody back to Blake's place?

A. It was.
Q. I saw there was some reference in the materials that you were planning on driving back with Blake but he had a carload, so you went with Cody.
A. Possibly. I don't recall.

Page 95

Q. Okay. And did Blake leave the party at the same time?
A. He did.
Q. And how did he get back to his place?
A. His friend, Jake
Q. And was there any discussion that you recall about you travelling with Blake in Jake's vehicle?
A. Possibly, I don't recall.
A. You don't remember? Okay. Did you know -- yes, you knew Jake before the evening in question. Do you know whether he had anything to drink while at the party?
A. I don't.
Q. Don't know. Do you know whether he in fact left with Blake heading back towards Blake's place?
A. Possibly
Q. Do you know? Do you remember?
A. I don't remember.

Page 97

Q. Okay. Do you recall if anyone else left party at the same time as the four of you?
A. Blake and Jake.

Page 98

Q. Did they leave before you are after you?
A. After us.
Q. Were they going back – well, they were obviously going back to Blake's place, as well.
A. That's right.
Q. How soon after you and Cody and the girls left did Blake and Jake leave?
A. Right after.
Q. Were the two vehicles kind of racing along or playing cat and mouse?
A. I think so.
Q. Yeah, Okay.
A. And the girls weren't helping in the back either. The girls were egging Cody on to speed up or whatever, I don't know.

Page102

Q. Okay. So, when you left, Cody was driving. Jake was following. Do you recall what type of car Jake was driving?
A. A Honda Civic.
Q. And did you make any observations as to whether and to what extend Jake was drinking at the party?
A. I didn't.
Q. So, tell me about the trip from the time you left the party up until the time of the accident. You said that the girls in the back weren't helping and there was a bit of chasing between the vehicles.
A. That's right.

Q. Tell me what went on, Andre, as best you can.
A. We were heading back to Blake's house. I believe they were behind us, but like, I'm not sure. I remember the girls egging Cody on, "Speed up (blah blah blah)." And then I seen a corner coming up. I told Cody to "Slow down, it's foggy.". He said, "Don't worry. I know these roads." And next thing you know, hit the telephone pole, and I was yelling his name. That's the last I remember.

Page 106

Q. Okay. And then, at some point in time, things started picking up, you started driving quicker, and the girls were egging him on?
A. It was the girls that got him going.
Q. And do you know if that was because they

Page 107

saw the headlights of Jake's car?
A. Yeah, that's why.
Q. Okay. So, they saw Jake's headlights come upon them, and the girls started egging Cody on to go faster.
A. Yeah
Q. Were you participating in that discussion?
A. No.
Q. No. You said nothing at that point in time?
A. That's right.

Q. And do you recall what Cody's speed had been prior to the girls getting him going?
A. I don't recall
Q. And do you recall how quickly he started driving once the girls egged him on?
A. Maybe 120. I'm not sure. I don't recall.
…
Q. And you told me that you cautioned him

Page 108

to slow down and he told you not to worry, he knew ---
A. He knew the roads.
Q. --- knew the roads? Okay. And how long Before he lost control did that discussion take place?
A. Minutes after.
Q. Okay. And did you have any further discussion with Cody about his driving at anytime before he lost control?
A. No.
Q. So, tell me then what happened. Was he going around a corner?
A. He was going around a corner. And I don't know if we got bumped from behind or he just lost control. I'm not too sure, but I just remember yelling his name and then he hit the telephone pole.
Q. Has it been suggested to you by someone that Jake's vehicle bumped into the rear of Cody's vehicle?
A. It has.
Q. Who suggested that?
A. Just the community. Family. Family of

Cody's.
Q. Okay.
A. I'm not sure, no.
Q. Did anyone in Jake's vehicle suggest
that to you or anyone that you know?

Page 109

A. No
Q. Do you know if anyone ever reported that
to the police?
A. I don't know.
Q. Have you made any inquires yourself to
determine whether, in fact, Jake's vehicle bumped into the
rear of Cody's vehicle before Cody lost control?
A. No.
Q. And when you say it was discussion in
the community, where did you hear from, Andre?
A. I heard it from Cody's family. He was
supposedly behind us, right? But I don't know, I blacked
out when he ---
Q. Blake was supposed to be behind you.
A. Blake and Jake, yeah.
Q. Yeah. Sorry, Jake was driving, wasn't
he? Yeah. So, Cody's family, they'd be the grieving
parents of the driver of your vehicle. Do you know if they
ever reported that to the police?
A. I don't recall, no.
Q. Do you know if anything ever became of
that suggestion that Cody lost control because he was
bumped from behind?
A. No.

[27] Some of this evidence is hearsay and not admissible. However, the evidence which is admissible on this motion is the plaintiff's stated knowledge of the Mumford vehicle travelling behind the Mullen vehicle and the cars speeding and racing. This alone is an issue but I have considered it as well in relation to the plaintiff's later statements to the RCMP.

RCMP Statement

[28] Next is the video statement of Andre Totino given to the RCMP on December 19, 2015, just over a month after the evidence he gave at the discovery examination. The plaintiff argues that this is not admissible evidence on this motion. The argument is that Mr. Totino was not under oath during the video statement and therefore, it should not be considered by this court. The plaintiff argues that the he was on a high dosage of medication at the time and his statements to the RCMP cannot be accepted. Again, this later information about medication is not even properly before the court, but was mentioned by counsel in argument. Even if the evidence were admissible all it does is raise a material fact in issue.

[29] The defendant argues that this is a party statement and can be considered as a party admission. While this may be an unsworn statement given to the RCMP it certainly is admissible as words coming from the plaintiff.

[30] When the plaintiff starts the statement, he says, " I just want to tell you the truth"(2:51:17); "Blake and Jake… at the time we left the party Blake and Jake were behind us" (2:51:37); "We come around the bend and I think we got hit from behind by Blake" (2:51:54); "I felt a push" (2:52:00); "and then we went right into the telephone pole and after that I blacked out from there. No, I felt a nudge from behind" (2:52:29) "and then they left the scene" (2:52:38). In describing the impact, he said " a pretty good rear end job" (2:55:04) and "Enough to remember" (2:55:06). He was asked by the RCMP officer if being struck by the other vehicle was a strong factor in Cody Mullen going off the road, or a factor. The plaintiff responded, "a strong factor" (2:59:48). He said he was coming off of pills and everything was coming back to him (2:59:24), and since going off his medication he feels clear (2:59:48) and "Really good".

[31] All of this evidence given to the RCMP on video indicates that there is a real issue as to whether what the plaintiff said on discovery is reliable, or whether what he said to the RCMP is reliable. There is quite a difference in the evidence. At discovery, he could not recall the mechanism of the accident, and then a month and

several days later, before the RCMP officer, he could remember that a vehicle struck the Mullen vehicle from behind.

[32] Counsel for the plaintiff argued in reply that the evidence from Mr. Totino to the RCMP that he felt a bump could have been brakes being applied. Plaintiff's counsel postulated it could have been a lurch, launching off the side of the road, or a sudden steering to control the movement of the car. However, it is not for me to speculate on a motion for summary judgment. This highlights the issue. The evidence raises a material fact for determination at trial – not speculation at this motion.

[33] The plaintiff argues that the material fact as to whether a second vehicle was involved was investigated by the RCMP. The defendant argues this report should not even be admitted at this motion. The plaintiff suggests the RCMP are professional investigators and their conclusion that there was no second vehicle involved should be accepted on this motion. Even if this report is admissible on this motion, the conclusion the plaintiff wishes me to draw is not appropriate. Whether there was a second motor vehicle responsible or partially responsible for this accident is the ultimate issue for the trier of fact. This is not a ready-made conclusion any trier of fact must or should accept, and it certainly is not one to be considered and weighed on a summary judgment motion. All this does is further highlight the material issue in dispute.

Notice of Action and Statement of Claim

[34] There is also the matter of a second Notice of Action and Statement of Claim filed by the plaintiff on September 1, 2016 alleging different individuals are responsible for this motor vehicle accident. The defendants named in the second statement are Blake Nugent and Jack Mumford.

[35] Counsel for the plaintiff, argues that no steps have been taken in relation to the statement of claim against Nugent and Mumford and that while the claim was filed to preserve a limitation period, it has not been served or renewed. The plaintiff says the only reason the second Notice of Action against Nugent and Mumford was filed was because the three-year limitation period was approaching and the parties had not yet received the RCMP disclosure. While this may be so, this is but one aspect of the evidence. The fact remains that two Notices of Action and Statements of Claim have been filed in relation to this accident, naming different defendants, one alleging a single motor vehicle accident and claiming the defendant driver was uninsured, a second alleging negligence on the part of the driver of a second vehicle.

[36] Mr. Totino's statements both at discovery and to the RCMP, the existence of the two statements of claim and the conflicting evidence found throughout the motion materials will all have to be considered, heard, weighed and assessed by a trier of fact. The cases are clear, I cannot undertake this exercise now on a summary judgment motion. It is not my role. I would fall into error if I did. On a summary judgment motion, a judge can neither weigh nor assess evidence nor evaluate credibility.

[37] Whether Intact responds to a claim for damages advanced by the plaintiff will require a determination of the facts concerning whether there was a second motor vehicle that contributed to the accident. If any other party is ever found one percent at fault for this accident, Intact, as the Section D insurer does not respond. Section D is a unique aspect of the Standard Automobile Policy. It is coverage of last resort.

[38] I refer to section 31(d) of the Nova Scotia Standard Automobile Policy, which states:

> 3. Limits and Exclusions
>
> (1) The Insurer is not liable under subsection 2(1) of this Section D
>
> …
>
> (d) to make any payment to a claimant who is legally entitled to recover a sum of money under the third party liability section of any motor vehicle liability policy.

[39] Whether Intact must respond to Mr. Totino's claim, because there is an absence of other coverage, is another material fact in issue. What involvement Nugent and Mumford may have had is a live issue. The plaintiff himself has put this into an issue with this various statements given on discovery, to the RCMP, and his two legal actions.

Alleged Admission by Intact

[40] The next argument advance by the plaintiff is that regardless of any material fact in issue, there has been an admission by Intact and there is no live dispute concerning whether they are required by law to respond to this claim. The plaintiff argues that Intact has admitted the plaintiff is legally entitled to recovery from Intact and has waived any arguments in relation to this issue. The plaintiff relies on a November 27, 2017 letter form defence counsel.

[41] The defendants argue that this is a disingenuous characterization of the letter of November 27, 2017, that was not relied upon initially in the motion documents by the plaintiff but only raised in reply.

[42] The plaintiff argues that the November 27, 2017, letter from defence counsel came after receipt of the RCMP file. Consequently, the plaintiff argues this is an admission. The plaintiff argues that the only rights being reserved by the defendant in that letter was the right to obtain a physical or mental examination. The plaintiff argues that he was seriously injured and deserves to have some compensation given how long it has been since the accident occurred. Through counsel, the plaintiff acknowledged that if the RCMP materials are admissible, and if the letter of November 27, 2017, is not considered an admission by the court on summary judgment, the plaintiff "doesn't have a leg to stand on" on this motion.

[43] The letter at issue states:

> Dear Mr. Green:
>
> Re: Hfx No. 429875 – Andre Totino v. Estate of Cody St. James
>
> Mullen, Allstate Insurance Company and Intact Insurance Company
>
> I have obtained further instructions from my client.
>
> Intact acknowledges that it is obligated to respond to Mr. Totino's claim pursuant to Section D of the Skyreach policy. The issues moving forward are causation and damages. With this, please confirm that you are going to release Mike Brooker's client from the action.
>
> With respect to your request for an interim payment, Intact is not prepared to consent to an interim advance to Mr. Totino.
>
> In terms of next steps, we have instructions to file a Request for Date Assignment Conference to get this matter moving forward towards trial. I will file the Request once I hear from you with respect to Allstate.
>
> As for experts, we will be moving forward with expert reports and IME's in accordance with the timelines set out in the Rules.
>
> Yours very truly,
>
> Christopher W. Madill

[44] The defendant provides context before and after this letter was authored to demonstrate that at no time did Intact waive any rights under the policy or make any admission. There are letters and draft orders in the affidavit of Tony Totino, Katherine Mitchell, and Christopher Madill (affidavit filed September 22, 2020)

showing ongoing discussions with all parties concerning Allstate being released from the claim. Much of the correspondence from Intact purports to expressly reserve Intact's rights under Section D of the insurance policy. The defendant argues the November 27, 2017, letter had as its sole goal, the release of Allstate from the action. Nothing more, nothing less.

[45] The defendant referred to the affidavit of Tony Totino and in particular, Tab E, wherein a letter of June 14, 2016, by the defendant's counsel sets forth the background leading up to the letter of November 27, 2017, to demonstrate that the parties were in discussions to consent to a dismissal order against Allstate. The background to both Allstate Insurance and Intact Insurance being named as Section D insurers had to do with the fact that Allstate insured vehicles owned and operated by Tony Totino which the plaintiff was permitted to drive on occasion, while Intact insured a number of vehicles owned by Skyreach Property Services, a business owned and operated by Tony Totino, and Intact specifically designates Andre Totino as principle operator of one of the seventeen vehicles insured.

[46] The question was which of the Section D insurers should respond if the plaintiff was legally entitled to claim from a Section D insurer. On August 12, 2016, Mr. Booker, then counsel for Allstate, explained the proposal to have Allstate dismissed from the action on a consent basis as follows:

> David
>
> I am not sure if your concern relates to the fact that during discovery there was some suggestion that the Mullen vehicle may have been bumped off the road by another vehicle. You had previously advised that the RCMP is looking into the issue at the request of the Mullen's family.
>
> If the evidence establishes that the Mullen vehicle was knocked off the road by the following vehicle and assuming the other vehicle can be identified and was subject to a valid liability policy then the claim would be a Section A claim and not a section D claim. In that event, neither Intact nor Allstate would be involved. That issue would be resolved once the RCMP have looked into the matter (if indeed that is their intention).
>
> In the meantime, as I understand it, Intact has agreed that if the claim is a proper Section D claim then Intact will respond and Allstate can therefore be released from the proceeding.
>
> If your concern is as above, then your client is not prejudiced at all by Intact's position and indeed is better off as he now knows which Section D carrier will respond if it is in fact a proper Section D claim. Put in other terms, if the situation was reversed and Intact was looking to get out as Andre was not a dependent

> relative under its Policy and assuming Allstate agreed, then Allstate would take the same position that Intact is now taking. That is to say, it would respond if it was found to be a proper Section D claim but would not respond if a Section A policy was in play.
>
> I hope this helps such that we can now see to the execution and filing of the dismissal order as it relates to Allstate.
>
> Mike

[47] This is again additional context in relation to the November 27, 2017, letter. The defendant points to all these various emails and correspondence as clear indication that the plaintiff was aware throughout that Intact had not waived its reliance on the terms of the policy.

[48] The Madill affidavit attaches various letters and emails. Without referencing all of them, there are several which are useful in this analysis. In a July 30, 2018, letter, defence counsel provides an email that includes the following language:

> The claim against Intact in this case is a contractual claim for coverage pursuant to Section D of the standard auto policy issued to Skyreach. Under the policy, section 2(1)(a) of Section D requires the Insurer in the absence of other coverage (and subject to the other provisions of the policy) to pay all sums that Andre, as a person insured under the policy, is legally entitled to recover from Mullen as the owner or driver of an uninsured automobile as damages for bodily injuries resulting from the subject accident.
>
> It goes without saying that Intact's contractual obligations are to do that which is set out in the contract, nothing more and nothing less. Intact is not in breach of the contract. The wording we proposed above represents an acknowledgement that Intact will in fact honour its contractual obligations and respond to Andre's claims subject to and according to the provisions of the policy, which is everything that Andre is entitled to under the policy.

[49] There are no emails provided on this motion indicating that the plaintiff took exception to these statements suggesting that Intact waived such rights.

[50] I have before me the Request for a Date Assignment Conference (filed by the plaintiff), appended to the Mitchell affidavit at Tab I which at page 3 states in relation to documents and electronic information to be introduced, "the plaintiff anticipates the following documentary and electronic evidence will be introduced at trial by any party":

> Liability and Causation related documents, photographs, statements and experts', reports, including reports of the RCMP relating to the investigation of a second

> vehicle potentially being involved in the accident, and the technical collision investigation prepared by Cst. T.E. Meldrum, Forensic Recontructionist.

[51] At Exhibit K to the Mitchell affidavit is the Date Assignment Conference Memorandum issued by the Honourable Justice Kevin Coady on September 27, 2019. At page two of that memorandum the following legal issues to be determined at trial are referred to: "Liability, Coverage-Section D, Damages." In the Date Assignment Conference Memorandum under the section "Admissions or Agreements" the following is entered: "not at this time".

[52] This reference suggests the plaintiff did not consider the November 27, 2017 letter to constitute a waiver or an admission. These issues concerning the November 27, 2017 letter cannot be resolved on summary judgment.

[53] When one goes through the various emails, correspondence, and documents, some, but not all of which I have reviewed here, it is clear there is a material dispute of fact as to whether there was an admission made by Intact. As a result, I find the plaintiff has not discharged his onus on this motion. That ends the inquiry. summary judgment is not granted.

[54] As for the preliminary motion brought by the defendant, which spanned fourteen pages of their brief regarding what portions of the plaintiff's materials the defendant sought to be struck, I did not rely on most of this material. This motion is unnecessary to address, as it related to information adduced on the interim payment motion. Given that summary judgment has not been granted, I do not go on to consider the interim payment motion.

Costs

[55] With regards to costs, the plaintiff suggested $1500.00 in the cause. The defendant indicated that if it was successful it would waive costs of this motion. As a result, I will award no costs.

Next Steps

[56] *Civil Procedure Rule* 13.08 indicates the next steps after a failed motion for summary judgment on the evidence. I am mindful that the rule requires a judge who dismisses a motion for summary judgment to take certain steps as soon as is practical after dismissal. This matter has already been scheduled for trial to commence on May 28, 2021. There remains nothing to address under Rule 13.08.

Brothers, J.