

Superior Court of Justice
ENDORSEMENT

INTACT INSURANCE COMPANY

Plaintiff

-and-

JAYNEE DRAKE-GHAFOORI

Defendant

In writing motion

Colin Empke and Anthony Gatensby, for the Plaintiff
No materials submitted by the Defendant

On September 14, 2016, Ms. Drake-Ghafoori reported to Intact Insurance Company that she had been in a car accident. She said she rear-ended a Mazda sedan that was stopped at a red light on September 11, 2016. Ms. Drake-Ghafoori was driving her 2012 Mercedes SUV, which was insured by Intact, at the time of the accident.

Emergency services were not called to the scene of the collision and Ms. Drake-Ghafoori did not report the collision to the Toronto Police until September 13, 2016.

The Mercedes sustained significant damage across the full width of the front of the car. The front driver airbag of the Mercedes deployed; the front passenger airbag did not deploy.

The Mazda sustained only minor damage to the rear license plate and left rear bumper. There was no damage to the taillights of the Mazda and only a small dent on the trunk lid.

The Mercedes was deemed a total loss. Intact paid Ms. Drake-Ghafoori \$40,100.36 for her loss. Intact also provided Ms. Drake-Ghafoori with a rental car from September 15, 2016 to October 4, 2016, which cost Intact \$2,752.68.

Ownership of the Mercedes was eventually transferred to Intact. Intact was able to recover \$4,195.12 from the salvage of the car.

In August 2018, three people (Mashmatullah Ghafoori, Khatera Ghafoori and Suria Ghafoori), who all claimed to have been in Ms. Drake-Ghafoori's SUV at the time of the collision, issued a statement of claim against Ms. Drake-Ghafoori and the driver of the Mazda. The claim states that Khatera and Suria were in the back seat of the Mercedes at the time of the accident. The claim says that Mashmatullah was a passenger in the car but does not specify whether Mashmatullah was in the front or back seat at the time of the collision. The plaintiffs each claimed they suffered serious physical and psychological injuries as a result of the accident.

Intact suspected that Ms. Drake-Ghafoori's claim and the civil claim against her were fraudulent. Intact hired an accident reconstructionist, Brett Campbell, to investigate the matter.

Mr. Campbell did not inspect the cars but was provided with photographs of the damage to the Mercedes and the Mazda. Based on the nature and location of the damage to both cars, Mr. Campbell concluded that the damage sustained by the Mercedes was unlikely the result of a rear end collision with the Mazda. Mr. Campbell was of the opinion that the damage to the hood of the Mercedes could not have occurred in a rear end collision without damaging the trunk lid and taillights of the Mazda.

Mr. Campbell also compared the damage to the two vehicles against other collisions and crash tests to determine the likely speed change required to produce the damage seen on the Mercedes and the Mazda. Mr. Campbell concluded that the damage to the Mercedes would have required a much higher speed change than the damage to the Mazda. However, because the Mercedes has a greater mass than the Mazda, it would experience a much lower speed change during a rear end collision than the Mazda would, not a higher speed change that would be required to cause the damage observed. He, therefore, concluded that the damage to the two vehicles was inconsistent with the collision described by Ms. Drake-Ghafoori in her accident report. This inconsistency contributed to Mr. Campbell's conclusion that the damage to the Mercedes was likely not caused during the rear end collision with the Mazda.

Finally, Mr. Campbell concluded that it is likely that nobody was in the front passenger seat at the time of the collision because the front passenger airbag of the Mercedes did not deploy.

Based on Mr. Campbell's report, Intact took the position that the collision that gave rise to the insurance claim was staged or did not occur as Ms. Drake-Ghafoori described it in her self-report. Intact denied coverage under the policy and told Ms. Drake-Ghafoori it intended to seek repayment of the money paid to her under the policy, as well as any money Intact was required to pay the plaintiffs in the outstanding lawsuit against Ms. Drake-Ghafoori and the driver of the Mazda.

The lawsuit against Ms. Drake-Ghafoori and the driver of the Mazda was discontinued without any monetary settlement to the plaintiffs in late 2019.

In July 2019, Intact started this lawsuit against Ms. Drake-Ghafoori seeking a declaration that her claim was fraudulent as well as general and punitive damages. Ms. Drake-Ghafoori did not deliver a Statement of Defence and was noted in default on March 11, 2020.

Intact now seeks default judgment in the amount of \$38,657.92.

Ms. Ghafoori was served with a copy of Intact's default judgment motion record on July 5, 2020. On July 9, 2020, I adjourned Intact's motion. I issued a brief endorsement explaining the adjournment. I gave Ms. Drake-Ghafoori until 5:00 p.m. on Monday July 27, 2020 to respond to Intact's motion. Ms. Drake-Ghafoori was served with a copy of my July 9, 2020 endorsement on July 10, 2020 at 5:30 p.m. Ms. Drake-Ghafoori has not filed any response to Intact's motion for default judgment.

Based on the expert report and the facts Ms. Drake-Ghafoori is deemed to have admitted, I am satisfied that the damage to Ms. Drake-Ghafoori's Mercedes did not occur during the collision on September 11, 2016 with the Mazda. I find that Ms. Drake-Ghafoori staged the collision to obtain insurance payments to which she was not entitled.

I find that Ms. Drake-Ghafoori's insurance claim was fraudulent and Intact is entitled to default judgment in the amount of \$38,657.92 in damages. This award represents the total paid to Ms. Drake-Ghafoori for the loss of her vehicle (\$40,100.36) plus the amount spent by Intact for the rental car for Ms. Drake-Ghafoori (\$2,752.68) less the amount recovered by Intact from the salvage of the vehicle (\$4,195.12).

Intact also seeks costs on a substantial indemnity basis in the amount of \$7,343.45 (\$5,724.70 in fees and \$1,618.75 in disbursements).

Counsel for Intact spent 38.6 hours preparing the original statement of claim and preparing for the motion for default judgment. An articling student completed a substantial amount of the work on this file (14.4 hours). I am satisfied that the time spent on this file is reasonable having regard to the nature and complexity of the claim. I am also satisfied that the hourly rates charged - \$185/hour for counsel and \$80/hour for the articling student – are reasonable.

The only issue for me to decide is whether to award costs on a substantial indemnity basis. Costs are ordinarily awarded on a partial indemnity basis. Substantial indemnity costs should only be awarded in rare cases where one of the parties has acted in a reprehensible, scandalous or outrageous manner either in the circumstances giving rise to the cause of action or during the proceedings; *Young v. Young*, [1994] 4 S.C.R. 3 at p. 134, *Davies v. Clarington (Municipality)*, 2009 ONCA 722 at paras. 28 – 31, and *Mars Canada Inc. v. Bemco Cash & Carry Inc.*, 2018 ONCA 239 at para. 43.

Intact argues that the complexity of the proceedings, the need to deter insurance fraud and the defendant's failure to respond to their claim justify a cost award on a substantial indemnity basis.

In my view, this matter is not particularly complex. The defendant engaged a single expert who provides the basis for their claim. Otherwise, this claim is a straightforward recovery claim. In any event, the complexity of a case is not a basis to award costs on a substantial indemnity basis.

Ms. Drake-Ghafoori's conduct during these proceedings does not justify an enhanced cost award. There is no evidence that she evaded service or took steps to frustrate the process. Her failure to respond to Intact's claim or the default judgment motion does not amount to reprehensible, scandalous or outrageous conduct.

The real question is whether Ms. Drake-Ghafoori's attempted to defraud Intact out of more than \$40,000.00 is worthy of sanction by way of an enhanced cost award. I certainly do not condone Ms. Drake-Ghafoori's conduct. Filing false insurance reports is a very serious matter and preventing insurance fraud is an important objective. However, I do not find Ms. Drake-Ghafoori's conduct sufficiently reprehensible or outrageous to justify an enhanced cost award in this case. While Intact alleges that Ms. Drake-Ghafoori was acting in conjunction with others, there are no facts pleaded and no evidence filed on the motion to support that claim. There is also no evidence that her false claim was part of a broader scheme or a pattern of deceptive behavior on her part.

I, therefore, grant costs on a partial indemnity basis in the amount of \$4,000 in fees (inclusive of HST) plus disbursements for a total of \$5,618.75.

Counsel is to provide a revised draft Judgment in accordance with this endorsement, including a calculation of the pre-judgment interest, for my review and signature. The draft Judgment should include the following additional terms:

THE COURT ORDERS THAT upon the courthouse reopening to the public, the Plaintiff shall file with the Civil Motions Office a copy of all the material it delivered electronically for this proceeding, with proof of service, and pay the appropriate fees.

THE COURT ORDERS THAT notwithstanding Rule 59.05, this Judgment is effective and enforceable from the date it is signed without any need for it to be entered or filed. In accordance with Rules 77.07(6) and 1.04, no formal Judgment needs to be entered and

filed unless an appeal or a motion for leave to appeal is brought to an appellate court. Any party to this Judgment may nonetheless submit a formal Judgment for original signing, entry and filing when the Court returns to regular operations.

August 7, 2020
Date



Justice B. Davies