CITATION: Ross v. Hertz Canada, 2013 ONSC 1797
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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: TARA ROSS and PAUL DUNN v. HERTZ CANADA, JOHN DOE, SAJEEVAN YOGENDRARAJAH and RBC INSURANCE COMPANY OF CANADA

BEFORE: Master R. Dash

COUNSEL: Jillian Van Allen, for the plaintiffs

Heather Kawaguchi, for the defendant Yogendrarajah

REASONS FOR DECISION

[1] This is a motion by the plaintiffs under rule 37.14(1) to set aside the registrar's order dated July 13, 2011 dismissing the action as abandoned made pursuant to rule 48.15. The plaintiffs also seek an order extending the time for service of the statement of claim.

BACKGROUND

[2] The action arises out of a motor vehicle accident occurring on July 5, 2009 in which the vehicle driven by the plaintiff Ross was rear-ended by a vehicle rented by the defendant Sajeevan Yogendrarajah ("Sajeevan") from the defendant Hertz Canada, the owner of the vehicle. The Hertz vehicle was driven by Vakeesan Yogendrarajah ("Vakeesan"), the brother of Sajeevan and driven with his consent. Vakeesan is not a defendant in this action, but the plaintiffs have commenced a separate action against him.[1]

[3] Sajeevan (and in turn Vakeesan) were at all material times insured by State Farm Mutual Automobile Insurance Company ("State Farm"). Pursuant to section 192 of the *Highway Traffic Act*[2] each of the driver (Vakeesan), owner (Hertz) and lessee (Sajeevan) are liable for the plaintiffs' damages by reason of negligence in the operation of the Hertz vehicle. Pursuant to section 277(1.1) of the *Insurance Act*[3] third party liability policies apply in the following order:

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[1] The plaintiffs were advised that Vakeesan was the driver only on February 6, 2012.
[2] *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended by S.O. 2005, c. 31, Sched. 10, s. 2
[3] *Insurance Act*, R.S.O. 1990, Chapter I.8 as amended by S.O. 2005, c. 31, Sched. 12, s. 6(1)

firstly any policy in which the lessee is entitled to indemnity (State Farm for the defendant Sajeevan), secondly any policy in which the driver is entitled to indemnity (there is no separate policy indemnifying Vakeesan other than Sajeevan's policy with State Farm) and thirdly any policy in which the owner (Hertz) is entitled to indemnity.

[4] The action was commenced on May 17, 2010. The deadline for defence (or other steps) under rule 48.15 was extended for six months by order made on January 26, 2011. No defence having been filed the action was dismissed by the registrar under rule 48.15 on July 13, 2011.

[5] The motion to set aside the registrar's dismissal order is opposed by State Farm on behalf of Sajeevan, but it is not opposed by the defendant Hertz. The plaintiffs are letting the defendant RBC Insurance Company of Canada ("RBC"), the plaintiffs' uninsured and underinsured carrier, out of the action. As a result they seek to set aside the dismissal of the action only as against Hertz and Sajeevan but have the dismissal remain in effect as against RBC.

[6] Hertz and RBC were served with the statement of claim within the deadline set out in rule 14.08, namely within six months after the statement of claim was issued. Sajeevan was added as a defendant by order dated January 26, 2011, but the amended statement of claim was not filed until February 27, 2012 and was not served on Sajeevan until March 1, 2012, after the action was dismissed by the registrar. The plaintiffs seek an order extending the time for service on Sajeevan nunc pro tunc to March 1, 2012. This is opposed by Sajeevan.

[7] The action was commenced in Newmarket, but was transferred to Toronto on April 1, 2012 together with this motion. Because the Toronto court system failed to record the registrar's dismissal made in Newmarket, the plaintiffs were permitted to file the amended statement of claim.

THE LAW

[8] The law relating to setting aside registrar's dismissal orders has been considered by a number of recent decisions of the court of appeal and has been recently summarized by Master Muir in *Vogrin v. Ticknor Estate*[4] as follows (citations omitted):

> In the last five years, the law relating to setting aside registrar's dismissal orders has been the subject of seven decisions of the Court of Appeal for Ontario. Although each of those decisions brings a slightly different approach to the decision making process, the general approach first set out by the Court of Appeal in *Scaini* has been followed consistently. The principles that emerge from those decisions can be summarized as follows:
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> - the court must consider and weigh all relevant factors, including the four *Reid* factors[5] which are likely to be of central importance in most cases;

[4] *Vogrin v. Ticknor Estate*, 2012 ONSC 1640, [2012] O.J. No. 1119 at para. 32

[5] The factors summarized in *Reid v. Dow Corning Corp.*, [2001] O.J. No. 2365, 11 C.P.C. (5th) 80, reversed on other grounds [2002] O.J. No. 3414, 48 C.P.C. (5th) 93 (Div. Ct.) are often referred to as the *Reid* factors.

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- the *Reid* factors, as cited by the Court of Appeal in *Giant Tiger*, are as follows:

  (1) *Explanation of the Litigation Delay*: The plaintiff must adequately explain the delay in the progress of the litigation from the institution of the action until the deadline for setting the action down for trial as set out in the status notice. She must satisfy the court that steps were being taken to advance the litigation toward trial, or if such steps were not taken to explain why.... If either the solicitor or the client made a deliberate decision not to advance the litigation toward trial then the motion to set aside the dismissal will fail.

  (2) *Inadvertence in Missing the Deadline*: The plaintiff or her solicitor must lead satisfactory evidence to explain that they always intended to set the action down within the time limit set out in the status notice, or request a status hearing, but failed to do so through inadvertence. In other words the penultimate dismissal order was made as a result of inadvertence.

  (3) *The Motion is Brought Promptly*: The plaintiff must demonstrate that she moved forthwith to set aside the dismissal order as soon as the order came to her attention.

  (4) *No Prejudice to the Defendant*: The plaintiff must convince the court that the defendants have not demonstrated any significant prejudice in presenting their case at trial as a result of the plaintiff's delay or as a result of steps taken following the dismissal of the action;

- a plaintiff need not satisfy all four of the *Reid* factors but rather a contextual approach is required;

- the key point is that the court is to consider and weigh all relevant factors to determine the order that is just in the circumstances of each particular case;

- all factors are important but prejudice is the key consideration;

- prejudice to a defendant may be presumed, particularly if a lengthy period of time has passed since the order was made or a limitation period has expired, in which case the plaintiff must lead evidence to rebut the presumption;

- once a plaintiff has rebutted the presumption of prejudice, the onus shifts to the defendant to establish actual prejudice;

- prejudice to a defendant is not prejudice inherent in facing an action in the first place but prejudice in reviving the action after it has been dismissed as a result of the plaintiff's delay or as a result of steps taken following the dismissal of the action;

- the party who commences the litigation bears the primary responsibility under the Rules for the progress of the action;

- in weighing the relevant factors, the court should not ordinarily engage in speculation concerning the rights of action a plaintiff may have against his or her lawyer but it may be a factor in certain circumstances, particularly where a lawyer's conduct has been deliberate. The primary focus should be on the rights of the litigants and not with the conduct of their counsel.

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[9] To this must be added statements by the court of appeal on motions to set aside a registrar's dismissal as to the effect of delay on the civil justice system. Although addressed in a number of cases it was perhaps best stated in *Marché D'Alimentation v. Giant Tiger Stores*[6] which I summarized in *Vaccaro v. Unifund Insurance*[7] as follows (citations omitted):

> *Marché v. Giant Tiger* emphasized the effect of delay on the civil justice system. The court stated that the *Reid* requirement of explanation for litigation delay "ties into a dominant theme in modern civil procedure: the discouragement of delay and the enhancement of an active judicial role to ensure timely justice." There is "a strong public interest in promoting the timely resolution of disputes. 'The notion that justice delayed is justice denied reaches back to the mists of time'...Litigants are entitled to have their disputes resolved quickly so that they can get on with their lives." The court stated that where despite the delay the defendant would not be unfairly prejudiced, "according the plaintiff an indulgence is generally favoured," however it is not sufficient to demonstrate that the defendant could still advance its case despite delay since "there are four branches to the *Reid* test, and...those factors are not exhaustive." The court emphasized that the law seeks a "finality to litigation" and the "finality principle grows stronger as the years pass. Even where the defendant could still defend itself despite the delay, "at some point the interest in the finality of litigation must trump the opposite party's plea for an indulgence."

[10] In *Vaccaro* I discussed the two competing themes articulated in the various decisions of the court of appeal, on one hand the discouragement of delay, which could result in the denial of reinstatement in appropriate cases even when there has been no actual prejudice to the defendant and on the other hand the importance of determining actions on their merits and granting an indulgence to an innocent plaintiff who should not be denied his day in court due to the actions of his lawyer, provided there be no prejudice to the defendant.[8] This tension between the principles of determining actions on their merits and the public interest in discouraging delay was highlighted by Laskin J.A. speaking for the court in *Hamilton (City) v. Svedas Koyanagi Architects Inc*[9]. where he states that in exercising discretion on such motions,

> two principles of our civil justice system come into play...The first...is that civil actions should be decided on their merits...The second principle is that civil actions should be resolved within a reasonable timeframe...Both the litigants and the public have an interest in timely justice. Their confidence in the administration of our civil justice system depends on it. On motions to set aside an order dismissing an action for delay, inevitably there is a tension between those two principles...The court's overriding objective is to achieve a just result – a result that balances the interests of the parties and takes into account the public's interest in the timely resolution of disputes.

[11] Of course in exercising my discretion I must consider all relevant factors, including the four *Reid* factors, on a contextual basis to determine the order that is most just in the circumstances of this case.

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[6] *Marché D'Alimentation Denis Thériault Lteé v. Giant Tiger Stores Ltd.*, 2007 ONCA 695, (2007), 87 O.R. (3d) 660, [2007] O.J. No. 3872 (C.A.)
[7] *Vaccaro v. Unifund Insurance*, [2011] ONSC 5318, [2011] O.J. No. 4433 at para. 13
[8] *Vaccaro v. Unifund*, supra at paras. 12-13
[9] *Hamilton (City) v. Svedas Koyanagi Architects Inc.*, 2010 ONCA 887, 104 O.R. (3d) 689, [2010] O.J. No. 5572 (C.A.) at paras. 20- 23

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ANALYSIS

[12] I will start by considering the four *Reid* factors on a contextual basis.

Explanation of Delay

[13] I must consider the delay between the issuance of the statement of claim on May 17, 2010 and the dismissal on July 13, 2011. The statement of claim named Hertz, RBC and John Doe (driver) as defendants. At the time of issuance, the plaintiffs' copy of the police report listed the driver of the Hertz vehicle as "unknown"[10], although there is evidence that Crawford & Company (Canada) Inc. ("Crawford"), the independent adjusters for Hertz, had advised the plaintiffs' lawyer of the name of the renter as early as December 10, 2009. RBC and Hertz were served with the statement of claim on May 20, 2010. It appears no further steps were taken until after the plaintiff received the notice from the court on November 15, 2010 under rule 48.15(1)5 that the action would be dismissed in 45 days if no defence was filed or one of the other steps taken under the rule.[11]

[14] Although Crawford had written to plaintiffs' counsel on December 10, 2009 to advise that the renter Sajeevan had a valid liability policy with State Farm, the plaintiffs waited until January 2011 to move to add him as a party defendant. Neither the motion nor the order was served on Sajeevan or on State Farm. On January 26, 2011 Mulligan J. granted an order substituting Sajeevan as a defendant in place of John Doe and extended the deadline for dismissal as abandoned under rule 48.15 for six months.

[15] No steps were taken at that time to formally amend the statement of claim pursuant to the order or to serve it on Sajeevan. No steps were taken by plaintiffs' lawyer to obtain the rental agreement from Hertz, to contact State Farm, to obtain Sajeevan's address for service or to demand a defence from Hertz. In fact nothing further was done by the plaintiffs and the action was dismissed as abandoned under rule 48.15 on July 13, 2011.[12]

[16] The delay of 14 months from commencement to dismissal of the action is, in my view, inordinate "considered in the context of the purpose of rule 48.15, to discourage delay at the front end of an action and compel at least one defence to be filed within six months"[13]. The

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[10] Another version of the police report sent by Hertz to the plaintiffs on March 1, 2012 includes the name of the Hertz driver. It has never been explained why there were two versions of the police report.

[11] The plaintiff can avoid a dismissal under rule 48.15 by either ensuring that a defence or notice of intent to defend is filed or by setting the action down for trial or disposing of the action by final order or judgment.

[12] It was not until December 16, 2011, long after the dismissal, that LawPro counsel wrote to Crawford to request Sajeevan's rental agreement to get an address for service. The statement of claim was finally amended on Feb. 27, 2012 and served on Sajeevan on March 6, 2012.

[13] *Vaccaro v. Unifund*, supra at para 41. In *Vaccaro*, the delay was "only" nine months and was considered "significant, if not inordinate.".

requirements of rule 48.15 serve to "prevent plaintiffs from commencing an action and then taking no steps or insufficient steps to pursue it" such as compelling the filing of a defence.[14]

[17] The court must consider the plaintiffs' explanation for the delay and determine if it is adequate or reasonable. Normally a front-end delay can be explained by "complexities in the action, difficulties in reasonable attempts to effect service or ongoing settlement discussions accompanied by a waiver of defence."[15] That is not the case here. The plaintiff was aware of the name of the renter (although not the driver) and there was no timely effort to add him as a defendant and serve him with the statement of claim. There is no evidence of complexities in the action, difficulties in service or settlement discussions. In fact Hertz had told the plaintiffs to look to State Farm for their damages. The only evidence of a waiver of defence was that given to RBC on February 1, 2011.

[18] The explanation for the failure to move the action forward (and for the failure to avoid the dismissal) is that the lawyer for the plaintiffs, Owen Elliot, was dealing with anxiety and depression, which escalated significantly following the death of his grandmother in December 2010 as well as pressures dealing with other files. He ultimately sought medical attention and in February 2011 began treatment for his depression. In April 2011 he began taking anti-depressants. The medication in turn caused nausea, extreme drowsiness and fatigue. At times his symptoms were so bad that they manifested as physical symptoms and he could not get out of bed or attend work. He was missing one to two and later two to three days of work per week. The motion on January 26, 2011 to extend the rule 48.15 deadline was brought by other members of his firm, albeit on his instructions.

[19] The best evidence as to Elliot's medical condition and how it affected his attention to his files would have been a report from his doctor. No such report was tendered in evidence. Despite this, Mr. Elliot has testified as to the state of his mental health under oath in an affidavit filed as part of a public record. He was cross-examined and in answering questions originally refused revealed details of his medical condition. I am satisfied that the lawyer's medical issues as described by him are authentic.

[20] Undoubtedly the lawyer was negligent in his handling of the file and in failing to turn the file over to another lawyer when he was unable to cope. I am prepared to accept however, in the context of the lawyer's medical condition, that the explanation is adequate, although barely so. It is a situation where the "court should be concerned primarily with the rights of the litigant, not with the conduct of their counsel…The law will not ordinarily allow an innocent client to suffer the irrevocable loss of the right to proceed by reason of the inadvertence of his or her solicitor."[16] The situation however "may be different where the lawyer's conduct is not inadvertent but

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[14] *Vaccaro*, supra, at para. 59

[15] *Kassam v. Sitzer*, [2004] O.J. No. 3431, aff'd [2005] O.J. No. 1849 (Div. Ct.) at para. 53

[16] *Finlay v. Van Passen*, 2010 ONCA 204, 101 O.R. (3d) 390, [2010] O.J. No. 1097 (C.A.) at para. 33

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deliberate"[17] or if the lawyer had "put the file in abeyance and intentionally and stubbornly refused to proceed with the action."[18]

[21] In this case there is no evidence that the lawyer intentionally caused the action to be delayed or that he deliberately put the file in abeyance. The plaintiffs filed their own affidavits on this motion and made it clear that they never intended to abandon their claim for damages. They should not lose their rights against the defendants because of their lawyer's mental health.

[22] Considered on a contextual basis, the plaintiffs have satisfied the first *Reid* factor.

Dismissal Resulting from Inadvertence

[23] As noted, the order of Mulligan J. made on January 26, 2011 extended the deadline for meeting the requirements of rule 48.15, such as having a defence filed, by six months, to June 26, 2011. It was during that extension of time that the lawyer's mental health deteriorated, he began taking anti-depressant medication that exacerbated his fatigue and he began missing more time from work. He never diarized the deadline. He failed to demand a defence from Hertz or RBC and failed to complete the steps to add Sajeevan as a defendant and serve him with the statement of claim.

[24] The court can consider as a factor that Hertz was served with the statement of claim in a timely manner and had it filed a defence or even a notice of intent to defend within the deadlines required by rule 18.01, the action would never have been dismissed as abandoned.[19] However in this case the plaintiff took no steps to require Hertz to file a defence and Hertz never misled the plaintiffs by inaccurately claiming to have failed a defence.

[25] As a result the action was dismissed as abandoned by the registrar on July 13, 2011.

[26] I have concluded that the deadline for dismissal as abandoned passed as a result of inadvertence caused by the state of the plaintiffs' lawyer's mental health. It did not result from a deliberate decision by the lawyer to ignore the deadline or abandon the file. The plaintiffs, who have each filed an affidavit, also did not deliberately abandon the action.

[27] Looked at in a context that considers the lawyer's mental health, the plaintiffs have satisfied the second *Reid* factor.

Moving Promptly after Learning of Dismissal

[28] The dismissal order was made on July 13, 2011. There was some delay while the lawyer reported this matter to LawPro and until LawPro counsel contacted Crawford on December 16, 2011 to get Sajeevan's address. There is no evidence as to when LawPro was contacted and no explanation of any delay after their involvement. It appears that the original motion record was

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[17] *Finlay v. Van Passen*, supra at para. 33
[18] *Aguas v, Rivard Estate*, 2011 ONCA 494, [2011] O.J. No. 3108 (C.A.) at para. 30
[19] *Ani v. Security National Insurance Co.*, 2012 ONSC 5177 (S.C.J.) at para. 39. In *Ani* however the defendant had misled the plaintiff by saying it had filed a notice of intent to defend it had served, but failed to do so.

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booked and prepared on or about December 19, 2011. It was served on Hertz, RBC and State Farm on December 28, 2011 returnable on March 14, 2012. Counsel finally made contact with a State Farm adjuster on January 20, 2012. While undoubtedly the plaintiffs' lawyer and his counsel at LawPro could have moved much more promptly, our courts have forgiven much longer delays than the 5½ month delay in this case.[20]

[29] There was further delay when the Newmarket courts decided to transfer the action and this motion to Toronto on April 11, 2012. A long motion was required and a hearing date was scheduled for October 23, 2012. It was adjourned because of a dispute over the admissibility of fresh evidence after cross-examinations were conducted and for cross-examination on affidavits in support of a motion for leave to introduce the fresh evidence and on that fresh evidence. The motion was ultimately heard on March 25, 2013. At that time I granted the motion for leave to introduce the fresh evidence and reserved on this motion to set aside the dismissal order.

[30] While the plaintiffs could not be said to have moved promptly, in light of the jurisprudence, the plaintiffs have satisfied the third *Reid* factor.

Prejudice

[31] One of the *Reid* factors for the court to weigh in determining such order as is just is whether the defendant has been prejudiced by the delay or by reliance on the finality of the dismissal. While prejudice is only one of the relevant factors[21], it is invariably a "key consideration."[22] The plaintiff is charged with the task of demonstrating, at least prima facie, that the defendants have suffered no prejudice as a result of the delay. The expiry of a limitation period gives rise to a presumption of prejudice. It is now common wisdom that memories of witnesses fade over time. Where the presumption arises, the plaintiff bears the burden of rebutting the presumption, on proper evidence. Where the presumption is so displaced, the onus shifts to the defendant to establish actual prejudice.[23]

[32] In this case it appears that the limitation period, at least with respect to Hertz, would have expired on July 5, 2011, two years after the accident.[24] As such, when the action was dismissed the limitation period had passed. There is some dispute as to when the plaintiffs discovered, or with reasonable diligence ought to have discovered the existence of Sajeevan. It appears that the plaintiffs actually became aware of the identity of Sajeevan on December 10, 2009 when their lawyers received the letter from Crawford. Although the limitation period with respect to

[20] See for example *Finlay*, supra where the delay was approximately two years.
[21] *Marché v. Giant Tiger*, supra at para. 35
[22] *Finlay v. Van Paassen*, supra, at para. 28.
[23] *Wellwood v. Ontario (Provincial Police)*, 2010 ONCA 386, 102 O.R. (3d) 555, [2010] O.J. No. 2225 (C.A.), supra at para. 60
[24] The plaintiffs do not submit that the start of the limitation period would have been delayed based on when the plaintiffs discovered that their injuries exceeded the threshold.

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Sajeevan had not expired when the action was dismissed on July 13, 2011 it would have expired before the motion to set aside the dismissal was served on December 28, 2011.[25]

[33] As a result, a presumption of prejudice arises with respect to Sajeevan and State Farm as well as Hertz. In my view however the plaintiffs have rebutted such presumption.

[34] How can a plaintiff rebut the presumption of prejudice on a motion to set aside a registrar's dismissal?

> The plaintiff can overcome the presumption of prejudice for example by evidence that relevant documents have been preserved, key witnesses are available, certain elements of the claim may not be in issue, and in the case of personal injury, that medical evidence of the progress of the injuries is available.[26]

[35] In this case the plaintiffs have gathered and produced to the defendants a number of medical records. They have provided clinical notes and records from the hospital and rehabilitation clinic for both plaintiffs and clinical notes and records from Ross's doctor. The hospital records include extensive out-patient reports, tests and assessments through 2011. I am not aware whether the plaintiffs attended other doctors in other facilities, but physicians are required to keep a patient's medical records for at least ten years[27] and as such any relevant records not yet obtained should currently be available at least back to 2003, six years pre-accident. Both plaintiffs have provided a decoded OHIP summary from April 1, 2005, to June 6, 2012 and since OHIP records are kept for seven years, an OHIP summary from four years pre-accident to date is still available. Income tax returns have been provided from 2004 (five year pre-accident) to present. The lawyers have requested accident benefits files from RBC for both plaintiffs as well as employment records for Ross, but as of the date the motion was heard there is no evidence they had been received. There is however no affirmation that the records and documents referenced by the plaintiffs are all of the material documents.

[36] In terms of witnesses, persons directly involved in the accident are parties to this action or the related action against Vakeesan and any health care providers are identified in the OHIP summaries. The plaintiffs have not confirmed whether there are doctors or other material witnesses not mentioned or whether those witnesses are alive and available.

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[25] The defendants may argue that had the plaintiffs exercised due diligence, such as by writing to Hertz for the identity of their renter, Sajeevan could have been identified at an earlier date. In particular Sajeevan may argue that by the time he was added as a defendant the limitation period had expired. There may be a question whether Sajeevan was "added" as a defendant when the order was made by Mulligan J. on January 26, 2011 or when the statement of claim was formally amended pursuant to that order on February 27, 2012. Determination of any limitation period as a defence to the action will be made at trial or possibly on a summary judgment motion, but that is not an issue I need determine on this motion.

[26] *Wellwood v. Ontario*, supra at para. 62, quoting *Kassam v. Sitzer*, supra.

[27] By policy directive of the College of Physicians and Surgeons of Ontario, Section 19 and by O. Reg. 114/94 under the *Medicine Act*.

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[37] What would have been better evidence from the plaintiffs, and what the court should expect on motions of this nature, is (a) a listing of all known material witnesses as to both liability and damages, including all health care professionals seen by the plaintiffs, and investigation made to ascertain if they are alive and (b) a more complete description of all material documents including medical records and whether they are preserved. This evidence is particularly important where, as here, there have been no affidavits of documents exchanged and no examinations for discovery conducted.

[38] Listing a number of records obtained or requested falls short of swearing that the records obtained constitute *all* of the plaintiffs' medical records. Although the evidence is not as thorough as it should have been respecting available witnesses and documents, in my view the plaintiffs have adduced sufficient evidence to rebut the presumption of prejudice.

[39] The presumption of prejudice having been rebutted, it falls to the defendants to adduce evidence of actual prejudice.

[40] The defendant's bald statement that "it is unknown whether witnesses are available, and undoubtedly even if they are found, then memories as to the events in question will be diminished" has no evidentiary value going to the issue of prejudice. State Farm has made no attempt to ascertain or attempt to contact potential witnesses or to question them about their memory of the events. They have not suggested that any specific witnesses are unavailable or that any specific documents cannot be located.

[41] This is a rear end collision and liability is relatively straightforward. State Farm says there may have been an issue with the trailer pulled by the plaintiffs not being properly attached, however it was destroyed in the accident and its being unavailable for inspection does not arise from the delay.

[42] The fact that the plaintiffs' claims exceed Sajeevan's insurance policy limits may be prejudicial to Sajeevan, but it is not prejudice that arises from the delay or from reliance on the dismissal.

[43] The plaintiffs have suggested that a suspension of pre-judgment interest under section 130 of the *Courts of Justice Act* between the date of dismissal and the date of reinstatement would compensate the defendants for any prejudice resulting from the accumulation of interest over the period of delay. I agree.

[44] Sajeevan and his insurer, State Farm, however claim they have been prejudiced by late notice of the plaintiffs' claims which prevented them from undertaking early investigations.

[45] Early notice to the defendant of a pending or existing action is clearly a factor in weighing prejudice:

> If the defendant has been unaware of a claim being asserted either by notice of the claim or by service of the statement of claim, such that he has been unable to undertake a timely investigation,

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then this may be taken into account in determining whether there is a substantial risk that a fair trial would not be possible.[28]

[46] State Farm asserts that they only became aware of the plaintiffs' claims when they were served with this motion on December 28, 2011, almost 2½ years after the accident. The plaintiffs claim that State Farm had notice on December 7, 2009. The plaintiffs, State Farm and Hertz have all adduced substantial evidence on the question of when State Farm first received notice. It is apparent that the plaintiffs did not put State Farm on notice until December 28, 2011, but the evidence before the court indicates that Crawford, the independent adjusters for Hertz, had put State Farm on notice much earlier.

[47] For reasons that follow I am of the view that State Farm had notice no later than November 15, 2010, before this action was commenced, and within the two year limitation following the accident. It is probable, but inconclusive, that they had notice as early as December 7, 2009. There is conflicting evidence whether their insured, Sajeevan, had notice as early as September 8, 2009.

[48] The following chronology sets out relevant dates put into evidence:

(a) August 26, 2009: Plaintiffs' lawyer puts Hertz on written notice of plaintiffs' claim.

(b) September 8, 2009: Crawford adjuster Elsie Kumar ("Kumar") claims she spoke to Sajeevan to advise him of the plaintiffs' claims and request a detailed description of the accident. Sajeevan promised to schedule an appointment but never did. (The conversation is confirmed in a file copy of a letter addressed to Sajeevan dated October 6, 2009.) Kumar did not put in her own affidavit, but her information was adduced from her files notes and put into evidence by subsequent Crawford adjuster Ian Mascarenhas ("Mascarenhas") who reviewed the file and filed an affidavit. Sajeevan filed an affidavit and averred that he had no recollection of speaking to Kumar. On cross-examination Sajeevan thought that either Hertz or his credit card company called him with respect to paying for the damage to the rented car. In my view it is logical that the adjusters for Hertz would call their renter after the plaintiffs' lawyer put them on notice of a claim. They would want to take a statement from their renter as to the occurrence of the accident. It is also likely that the adjusters would tell him that damage to the Hertz car was being put through on his credit card, and that this is the conversation recalled by Sajeevan. It is possible that Sajeevan gave Kumar the name of his agent at State Farm since correspondence in December demonstrated that Kumar had the name of the agent. Given the absence of an affidavit from Kumar however, I am not satisfied that she put Sajeevan on notice of a personal injury claim by the plaintiffs.

(c) October 6, 2009: The Crawford file has a copy of a letter written by Kumar to Sajeevan confirming the September 8, 2009 conversation, confirming that they were assigned to investigate the accident and requesting a detailed report. I am satisfied the

[28] *Kassam v. Sitzer*, supra, at para. 53

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letter was prepared, but given that Sajeevan denies receipt and in the absence of an affidavit from Kumar, I am not satisfied that it was received. In any event the reference in the letter is only to Hertz. There is nothing in the letter to put Sajeevan on notice of a personal injury claim and there is no reference to the plaintiffs' names.

(d) December 4, 2009: There is a Crawford file note that Kumar spoke to "Rose" at State Farm's head office to advise of the plaintiffs' bodily injury claims and that during that conversation Rose advised that Sajeevan had a valid policy with $1 million policy limits. Given the reference to the policy number in the December 7th letter that follows, and given Sajeevan's evidence that he did not provide his insurance policy to Hertz at the time of rental, Kumar had to have obtained the policy number from Sajeevan on September 8th (a conversation denied by Sajeevan) or from "Rose". Although State Farm has given evidence that there is no Rose at the agency there is no evidence that there was no Rose at State Farm's head office. On balance I accept that the telephone conversation took place, but, given the absence of best evidence from Kumar, I am not satisfied that a bodily injury claim was indicated.

(e) December 7, 2009: The Crawford file has a copy of a letter written by Kumar to Sajeevan's agent at State Farm, Jaidev Sukhu ("Sukhu"), to advise State Farm of the accident. The letter referenced Sajeevan as State Farm's insured as well as the correct State Farm policy number, 600973820. The letter made specific reference to the plaintiffs by name, as "claimants" and the date of loss. The letter put State Farm on notice of the priorities for third party liability set out in Bill 18 which amended the Insurance Act, noted that the renter's insurance with State Farm is first loss insurance and requested State Farm to set up a file for this loss. The letter was apparently copied to Sajeevan and Vakeesan. Was this letter received by State Farm? On one hand, in a subsequent letter by Crawford to plaintiffs' lawyer on December 10, 2009, Kumar purported to attach a copy of the December 7th letter to State Farm, but Elliot's evidence is that the December 7th letter was not attached. Sukhu stated that he did not receive the letter based on his recollection and a review of his records, although there is some confusion about what those "records" consist of. His evidence is that documents are kept until they are "handled" with log notes entered into an Agent Business System ("ABS") and that the only entry in the ABS was a "third party fax" without specifics. It is possible that the third party fax was the December 7, 2009 letter, but it is not known for certain. Sukhu's file was never produced and there is conflicting evidence whether it continues to exist. Sukhu however has little credibility when it comes to his memory and passing on information. For example in January or February 2011 State Farm head office left messages with Sukhu to discuss any information Sukhu may have had; however Sukhu failed to respond, despite a follow up request from head office, resulting in State Farm closing its file. Further Sukhu, without notes, denied a January 27, 2011 meeting with Mascarenhas, despite sworn evidence from Mascarenhas, who made notes of the meeting and was given Sukhu's business card. There is good reason to believe that the December 7th letter was sent to and received by Sukhu, who may or may not have passed it on to head office. I am hesitant to come to this conclusion definitively however because Hertz

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failed to file an affidavit from Kumar, which would have been the best evidence, relying instead on file review information by Mascarenhas.

(f) December 10, 2009: Crawford wrote to plaintiffs' lawyers to advise that Hertz's renter, Sajeevan, had a valid policy with State Farm and purported to enclose a copy of a letter Crawford claimed it had written to State Farm to advise them of their exposure. It is not disputed that the letter to State Farm was not enclosed.

(g) November 24, 2010: Mascarenhas wrote to Sukhu, stating that it was further to their earlier correspondence and that plaintiffs' lawyer had contacted Crawford. The letter again referenced the names of the plaintiffs, the insured Sajeevan, the correct State Farm policy number 600973820 and the priority of State Farm's liability in accordance with Bill 18 respecting the collision. Clearly this letter was received by State Farm, even if they hadn't received the earlier letter. Although its receipt was denied by Sukhu, I prefer the evidence of Mascarenhas, who has given evidence from his personal knowledge. This is also consistent with State Farm starting to make enquiries in January 2011, two months after the letter was written, although as it turned out, State Farm's investigation was flawed. Finally, in answer to an undertaking given by Colin Gill ("Gill"), a bodily injury claims manager with and affiant for State Farm, to provide copies of any letters between State Farm and Crawford, produced the Mascarenhas letter of November 24, 2010.

(h) January 27, 2011: Mascarenhas met with Sukhu at Sukhu's office. Sukhu confirmed coverage and that he would have State Farm contact Mascarenhas. Although Sukhu denies the meeting, I accept that it took place. Mascarenhas gave sworn evidence, recalls the address and that he had to wait for a half hour before he met with Sukhu, took log notes of the meeting, obtained a copy of Sukhu's business card which he produced in his evidence and recognized Sukhu on February 6, 2013 when they both attended for cross-examination on their respective affidavits.

(i) January 31, 2011: State Farm's property damage department set up a claim file on the basis of a third party report, which is never identified. It is never explained why a property damage claim, rather personal injury claim file is set up. It is never explained why a file was set up under a different file number, 1068200, which was a comprehensive policy without third party coverage, even though policy 600973820, the policy referenced in the letters from Crawford, was a third party liability policy in full force and effect on the date of the accident and would have responded to the plaintiffs' claims. Ultimately State Farm's underwriting department advised the property damage adjuster of policy 600973820. According to the Gill affidavit, an investigation showed that policy 600973820 was issued "after" the date of loss and as such there was no coverage under the policy. At his cross-examination Gill admitted that was incorrect and coverage was available under that policy on the date of loss. The error was never explained. State Farm also tried to establish contact with Sukhu, and when Sukhu failed to respond, despite a follow up call, State Farm closed its file on April 20, 2011 without further investigation. For reasons never satisfactorily

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explained, State Farm failed to contact the plaintiffs or their lawyers or their own insured, Sajeevan. State Farm failed to conduct an early investigation because of its own internal errors and miscommunications and its own agent's failure to respond.

(j) August 12, 2011: Mascarenhas faxed another copy of his November 24, 2010 letter directly to State Farm's head office, attempting to ascertain the adjuster assigned to the claim. Mascarenhas was advised no adjuster was assigned because they had no record of the claim. State Farm says that August 12, 2011 was the first letter they received from Crawford. That of course is contradicted by the fact that State Farm set up an (incorrect) file in relation to the accident in January 2011. Even then, State Farm assigned the file to an accident benefits adjuster, believing the dispute was about priority for accident benefits despite the precise reference to Bill 18 priorities. Again State Farm took no steps to contact their insured or the plaintiffs or to conduct an investigation.

(k) December 28, 2011: This motion was served on State Farm.

(l) January 4, 2012: State Farm finally opened a bodily injury file and the next day contacted Sajeevan, who told them his brother Vakeesan was driving the car.

[49] In the result, it is my view that State Farm, through its agent Sukhu, probably had notice of the plaintiffs' claim on December 7, 2009, five months after the accident, but definitely had notice by November 24, 2010, sixteen months after the accident and within the two year limitation period. It is only through poor communications and document handling by the agent and then compounded by State Farm, having been advised of the correct policy number, assigning a policy number that did not cover bodily injury and by incorrectly setting up a property damage and then accidents benefits file, and finally by closing its file when its own agent failed to respond that deprived State Farm of a timely investigation.

[50] Insurers are deemed to be sophisticated litigants, but their behaviour in relation to this file was far from sophisticated.

[51] As stated by the Court of Appeal, albeit in reference to prejudice caused by late service of a statement of claim: "The defence cannot create prejudice by its failure to do something that it reasonably could have or ought to have done."[29]

[52] In summary I find that State Farm was not prejudiced by failure to receive timely notice of the claim, since it did receive notice albeit from Hertz and not from then plaintiffs. Any prejudice arising from a failure to undertake a timely investigation arose because of its own internal mistakes and miscommunications and those of its agent.

[53] In my view the plaintiffs have rebutted any presumption of prejudice and I am not satisfied by any evidence from the defendants that they have been actually prejudiced by any

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[29] *Chiarelli v. Wiens* (2000), 46 O.R. (3d) 780. 129 O.A.C. 129 (C.A.) at para. 15

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delay in this action or by reliance on the registrar's dismissal. The plaintiffs have satisfied the fourth *Reid* factor.

CONCLUSION ON MOTION TO SET ASIDE DISMISSAL ORDER

[54] In the fourteen-month period from issuance of the statement of claim on May 17, 2010 until dismissal of the action on July 13, 2011 little was done to advance the litigation except to serve the statement of claim on Hertz and RBC and obtain an order substituting Sajeevan for John Doe as a defendant, but not formalize the amendment or serve Sajeevan. The delay herein was inordinate "in the context of the purposes for which rule 48.15 was enacted, namely to discourage delay at the front end of an action, prior to defence."[30] The delay was entirely due to neglect on the part of the plaintiff's lawyer; however the plaintiffs themselves always intended to pursue the action and did not condone the delay.

[55] As I stated in *Vaccaro*: "If the court consistently restores actions dismissed as abandoned simply because the rule 48.15 deadline is only six months" and if as in this case a 14 month delay is not considered inordinate, "then rule 48.15, and the front end delay it is designed to discourage, become meaningless and of no real effect."[31]

[56] I am mindful that where despite the delay the defendant is not unduly prejudiced, an indulgence is generally favoured, however the court must still consider all factors as well as the public interest in resolving disputes without excessive delay. Even where the defendant could still defend itself despite the delay, "at some point the interest in the finality of litigation must trump the opposite party's plea for an indulgence." [32] The court of appeal has stated that "delay in an individual case surpasses the rights of the particular litigants and engages the public interest" and "excusing delays of such magnitude risks undermining public confidence in the administration of justice". Clearly in appropriate cases the court must "send the right message" and "provide appropriate incentives to those involved in the civil justice system."[33]

[57] The questions I must ask are "whether the point has been reached *in this case* where finality of litigation should trump the plea for an indulgence and whether the magnitude of the delay *in this case* would undermine public confidence in the administration of justice such that the action not be reinstated in order to send the message that the court will not tolerate such delay."[34] In doing so, the court tries to resolve the tension in each case between determining the action on its merits and the public interest in discouraging delay.[35]

[58] I also take into account that if the action is not restored, the plaintiffs, who are personally innocent of the delay and default, may still have a remedy against their negligent lawyer for their damages.[36] They would however be barred from proceeding against the defendants who

[30] *Vaccaro*, supra at para. 59
[31] *Vaccaro*, supra at para. 61
[32] *Marché v. Giant Tiger,* supra at para. 39
[33] *Marché v. Giant Tiger,* supra at para. 32
[34] *Vaccaro*, supra, para. 64
[35] *Hamilton (City) v. Svedas Koyanagi Architects Inc.*, supra at paras. 20-22
[36] *Machacek v. Ontario Cycling Assn.*, 2011 ONCA 410, [2011] O.J. No. 2379 (C.A.) at para. 9-10

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allegedly caused their injuries. The courts however should be reluctant to engage in speculation as to what rights the plaintiffs may have against their lawyer. The primary focus should be on the rights of the litigants and not on the conduct of their lawyer, unless it is deliberate.[37] Even where the plaintiffs may have a claim against their lawyer, "it is not axiomatic that the court will foreclose pursuit of the action against the defendant insurer in order to satisfy the public's interest in discouraging delay."[38]

[59] Whether in this case the finality of litigation must trump the plaintiff's plea for an indulgence must be determined by examining all relevant factors on a contextual basis. "The court's overriding objective is to achieve a just result – a result that balances the interests of the parties and takes into account the public's interest in the timely resolution of disputes."[39]

[60] The inordinate delay arose as a result of Mr. Elliot's negligence in his file handling and his failure to refer the plaintiffs to new counsel when he became depressed and unable to regularly attend to his files.

[61] I have determined that missing the deadline under rule 48.15 arose from the lawyer's inadvertence, a further example of his neglect.

[62] Seen contextually however, I have concluded that it was Elliot's depressed mental or psychological state, further aggravated by the death of a close relative and the fatigue brought on by his anti-depressant medication that caused the delay and resulted in the inadvertent dismissal. I have determined that this was a reasonable explanation of the delay. The delay was not intentional on the part of Mr. Elliot or his clients.

[63] I also determined that the plaintiff rebutted the presumption of prejudice created by passage of the limitation period and that there was no actual prejudice arising from the delay or from reliance on the dismissal. Although the evidence before me could have been more thorough, I am satisfied that most material evidence has been preserved.

[64] If State Farm suffered prejudice because they failed to assign a bodily injury adjuster and commence their investigation until January 2012, they are the author of their own misfortune. They were aware or should have been aware of these claims through the efforts of Crawford no later than November 2010, and likely by October 2009, but they failed to open an appropriate file due to their own internal errors and miscommunications with their agent.

[65] There is clearly no prejudice to Hertz who had early notice and who do not oppose this motion. Indeed Hertz provided evidentiary assistance to the plaintiffs on this motion. Of course it is in Hertz's interests to ensure State Farm's insured remains a party to the action as State Farm would have priority to satisfy the plaintiffs' claims.

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[37] *Finlay v. Van Paassen*, supra, at para. 32-33
[38] *Vaccaro*, supra, at para. 65
[39] *Hamilton (City) v. Svedas Koyanagi Architects Inc.*, supra, at para. 23

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[66] Considering all factors in context, and mindful of balancing the interests of both parties as well as the public's interest in the timely resolution of disputes, I am of the view that the point has not been reached in this case where finality of litigation should trump the plea for an indulgence to the innocent plaintiffs nor has the magnitude of the delay in this case reached the point where it would undermine public confidence in the administration of justice.

[67] In short, this is a case where the plaintiffs should not irretrievably suffer as a result of their lawyer's mental state.

[68] Justice would be best served in the circumstances herein by allowing the action to proceed against the defendants and be determined on its merits. The order of the registrar dismissing the action as abandoned will be set aside.

[69] The plaintiffs do not intend to proceed with the action against RBC as the tort defendants have sufficient liability coverage. The plaintiffs had suggested that the order of the registrar be set aside only as against Hertz and Sajeevan and allow the registrar's dismissal to stand as against RBC. Procedurally, however, it is more appropriate to set aside the dismissal order and then order the action against RBC be dismissed without costs.

MOTION TO EXTEND TIME FOR SERVICE OF STATEMENT OF CLAIM

[70] A statement of claim is to be served within six months after it is issued in accordance with rule 14.08. Pursuant to rule 3.02(1) the court may extend any time prescribed by the rules, including the deadline to serve a statement of claim. The test to be applied on a motion to extend the time for service of a statement of claim has been set out by the court of appeal as follows:

> The basic consideration is whether the extension of time for service will advance the just resolution of the dispute, without prejudice or unfairness to the parties. And, the plaintiff has the onus to prove that extending the time for service will not prejudice the defence.[40]

[71] With respect to the onus the court held:

> Although the onus remains on the plaintiffs to show that the defendant will not be prejudiced by an extension…the plaintiffs cannot be expected to speculate on what witnesses or records might be relevant to the defence and then attempt to show that these witnesses and records are still available or that their unavailability will not cause prejudice. It seems to me that if the defence is seriously claiming that it will be prejudiced by an extension it has at least an evidentiary obligation to provide some details.[41]

[72] Further, the "prejudice that will defeat an extension of time for service must be caused by the delay".[42]

[40] *Chiarelli v. Wiens* (2000), 46 O.R. (3d) 780. 129 O.A.C. 129 (C.A.) at para. 12
[41] *Chiarelli v. Wiens*, supra, at para. 14
[42] *Chiarelli v. Wiens*, supra, at para. 16

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[73] Although the order granting leave to amend the statement of claim to add Sajeevan was made on January 26, 2011, the amendments were not made until February 27, 2012, and after receiving from Hertz a copy of the rental agreement disclosing Sajeevan's address, personally served the amended statement of claim on Sajeevan on March 6, 2012 together with the motion record.

[74] In my view the extension of time for service on Sajeevan will "advance the just resolution of the dispute" since State Farm, the insurer of the renter Sajeevan, has primary liability for the plaintiffs' damages, whereas Hertz has liability only for any excess above the State Farm policy limits.

[75] I have already set out in some detail that the defendant has not been prejudiced by the delay in the litigation. The same considerations apply to the delay in service of the statement of claim. The plaintiffs have led evidence that documentary evidence is still available. The plaintiffs cannot know if some of State Farms' evidence is no longer available and State Farm has led no evidence to that effect. As described in some detail in my reasons dealing with the registrar's dismissal, State Farm was the author of its own misfortune in failing to undertake a timely investigation. There is no additional evidence from the defendant of actual prejudice resulting from the delay in service of the statement of claim.

[76] The plaintiffs have satisfied their onus to demonstrate that the extension of time will not cause prejudice to Sajeevan or State Farm. As service was made at a time when the action was dismissed, service must be validated and the deadline extended nunc pro tunc to the date of service.

COSTS

[77] Although the plaintiff was successful in having the registrar's dismissal set aside and having the time for service of the statement of claim extended, a very significant indulgence was granted to the plaintiffs. Given the inordinate delays, inattention to the file and negligence of the plaintiffs' lawyers and the plaintiffs failure to provide details of all available records and witnesses, but providing only adequate evidence to rebut the presumption of prejudice, it was very reasonable for the defendant to oppose the motion. While I was of the view that the just order was to restore the action, an order maintaining the registrar's dismissal would also have been justified on the evidence. In my view this is a case where costs should be awarded to the defendant notwithstanding that it was unsuccessful in resisting the motion.

[78] Although the plaintiffs' lawyers' conduct in the action could be characterized as negligent, it was not the sort of reprehensible conduct which would attract costs on the substantial indemnity scale. Costs to Sajeevan will be on the partial indemnity scale.

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[79] Sajeevan is also entitled to the costs of the plaintiffs' motion for fresh evidence. This evidence was critical to the plaintiffs' success on the motion. While I admitted the evidence despite the plaintiffs having cross-examined the defendant's affiants based on a "flexible and contextual approach to rule 39.02(2)", I also stated in my March 25, 2013 endorsement: "The plaintiffs knew or should have known that when State Farm became aware of the claim was relevant to the motion to set aside the registrar's dismissal right from the start and before the cross-examination of Gill. Prudent counsel would have included this evidence ab initio...The explanation of why the Mascarenhas affidavit was not put in with the earlier materials is weak."

[80] The defendant should also have the costs thrown away of the adjournment on October 23, 2012, which was caused by the service of the fresh evidence on the eve of the motion. The adjournment was required to permit the defendants to respond and for cross-examinations on the fresh evidence.

[81] The defendant's cost outline claims costs of $30,434 on a full indemnity basis, inclusive of disbursements of $3,501. No partial indemnity rate is set out. No breakdown is provided of the different aspect of the work done. Considerable hours were claimed both for Ms. Kawaguchi and Mr. Lim, with no breakdown of their respective services. Disbursements are not itemized. Nonetheless my task is to consider the factors under rule 57.01(1) and fix costs that are fair and reasonable and within the reasonable expectations of the plaintiffs.

[82] The motion was of great importance to both the plaintiffs and Sajeevan, since the right to continue an action against him was at stake. Both parties filed extensive materials containing numerous affidavits, conducted cross-examinations and prepared factums and authorities. The issues were of greater than average complexity. In my view fair and reasonable costs of this motion to Sajeevan on a partial indemnity scale is $9,500 inclusive of disbursements and HST. Given the issues and volume of materials provided by both parties and the positions advanced by State Farm, and despite the absence of a costs outline from the plaintiffs (because they did not intend to seek costs even if successful), costs in that range should have been reasonably anticipated by the plaintiffs.

[83] Although Hertz has submitted a costs outline of $5,917 on a partial indemnity scale, the plaintiffs and Hertz have agreed that Hertz be paid costs of $750. Hertz provided the evidence of the Crawford adjuster to the plaintiffs, but otherwise did not oppose the motion or participate at the hearing of the motion. The plaintiffs suggest the costs be paid by Sajeevan. I disagree. The work done by Hertz and the Mascarenhas affidavit it provided were instrumental in the plaintiffs' success on the motion. Clearly those costs should be payable by the plaintiffs.

ORDER

[84] I hereby order as follows:

(1) The order of the registrar dated July 13, 2011 dismissing the action as abandoned is set aside.

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(2) The action is hereby dismissed without costs as against the defendant RBC Insurance Company of Canada.

(3) The deadline for service of the amended statement of claim on the defendant Sajeevan Yogendrarajah is extended to March 6, 2012 nunc pro tunc and service is validated as of that date, but deemed effective on April 24, 2013.

(4) The defendants Sajeevan Yogendrarajah and Hertz Canada shall serve and file their statements of defence no later than May 24, 2013, failing which they shall be noted in default.

(5) The deadline for dismissal of the action as abandoned under rule 48.15 is extended to July 31, 2013.

(6) The plaintiffs shall not be entitled to pre-judgment interest for the period between July 13, 2011 and April 24, 2013.

(7) The plaintiffs shall pay to the defendant Sajeevan Yogendrarajah his costs of this motion within 30 days fixed in the sum of $9,500.00

(8) The plaintiffs shall pay to Hertz Canada its costs of this motion within 30 days fixed in the sum of $750.00.

Master R. Dash

DATE: April 24, 2013

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