SCC File No.: 38949

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA

APPELLANT
(Respondent)

-and-

ROYAL AND SUN ALLIANCE INSURANCE COMPANY OF CANADA

RESPONDENT
(Appellant)

-and-

ONTARIO TRIAL LAWYERS ASSOCIATION

INTERVENER

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(Rules 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. Motor vehicle accidents happen and people do get hurt. Litigation does ensue. In Ontario, there is a comprehensive and highly regulated compensation framework to respond to both personal injury and property losses. This framework is generally handled by coverages available under automobile policies, contracts between insureds and insurers. Liability coverage at an early stage may impose a duty to defend. Thereafter, during the course of the litigation, developing circumstances may impact not only that original duty to defend, but the separate and distinct duty to indemnify. An insurer's defence should not equate to an assurance of coverage and a final duty to indemnify.

2. In the underlying litigation connected to this Appeal, all injured parties received full compensation, funded by a variety of insurers, in response to contractual or statutory obligations. The sole remaining dispute – the one that gave rise to this Appeal – is a subrogation claim by State Farm in the name of its insured, Bradfield, against the Respondent, Royal and Sun Alliance Insurance Company of Canada ("RSA").

3. As with most insurance disputes, particularly subrogation claims, the underlying financial dispute was resolved by way of settlement on June 22, 2020.[1] This occurred after Leave to Appeal was granted to this Court. RSA was successful previously on having the Bradfield / State Farm Appeal dismissed by the Ontario Court of Appeal.

4. The substituted Appellant, the Trial Lawyers Association of British Columbia ("TLABC"), concedes that the Appeal is moot; however, TLABC requests that the appeal be heard and decided to provide "clarity on the law." If this Honourable Court elects to hear this Appeal, the Respondent RSA submits that on the uncontested facts arising from the underlying litigation, the Appeal should be dismissed for the same reasons as articulated by the Ontario Court of Appeal.

[1] Appellant's Record ("AR"), Vol. II, p. 140.

Background Facts

5. This Appeal arises from facts relating to the conduct of various insureds, insurers, and their counsel in three related actions: *Caton v. Devecseri et al*., OSC 144/08[2], *Bradfield v. Devecseri et al*, OSC CV-07-085788[3] and *Bradfield v. Royal and Sun Alliance Insurance Company of Canada*, OSC 263/12.[4]

6. On May 29, 2006, Jeffrey Bradfield, Paul Latanski, and the late Steven Devecseri were riding their motorcycles. Devecseri, at high speed, recklessly drove onto the wrong side of the road and collided with the oncoming vehicle of Jeremy Caton. Bradfield, traveling nearby Devecseri, did not hit Caton's automobile, but was struck by debris from the collision. Devecseri was killed and Caton and Bradfield were injured.[5]

7. Two significant personal injury claims were commenced: one by Bradfield (as Plaintiff in his personal capacity), represented by solicitor Pitaro, in a claim against Devecseri and one by Caton, represented by solicitor Watt, in a claim against Devecseri, Bradfield, Latanski and Kingsway General Insurance Company.[6]

8. At the time of the accident, Devecseri was insured by RSA under a standard Ontario Automobile Policy ("OAP 1") covering his motorcycle with $1,000,000 liability limits.[7]

9. On learning of the accident, RSA engaged adjuster Tom Eddy ("Eddy") to investigate. RSA instructed Eddy to obtain information with regard to the accident and provided a list of non-mandatory, suggested areas to investigate. The list included a statement from Devecseri (deceased), witness information, investigation materials from the police service, and a Coroner's Report (death certificate).[8]

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[2] AR, Vol. II, p. 46.
[3] AR, Vol. VII, p. 141.
[4] AR, Vol. II, p. 37.
[5] AR, Vol. III, pp. 4-5 and AR, Vol. III, pp. 145-156.
[6] AR, Vol. XIII, p. 11, AR, Vol. II, p. 46, AR, Vol VII, p. 141.
[7] AR, Vol. III, p. 11.
[8] AR, Vol. VIII, pp. 47-48 and AR, Vol. XII, p. 90 (3-11) and p. 94 (23-27).

10. Early in the investigation, a Motor Vehicle Accident Report ("MVAR") was secured detailing the preliminary facts of the collision, including that Devecseri had a M2 license. The MVAR also detailed that the other involved parties were Caton, who had been proceeding northbound in his own lane, and southbound motorcyclists, Bradfield and Latanski, both insured by State Farm. Bradfield and Latanski were either struck by the Devecseri motorcycle after its collision with the Caton automobile or by collision debris.[9]

11. The MVAR made no mention of alcohol by any drivers.[10]

12. The police investigation included substantial recorded statements from Latanski, Caton and two other motorcyclists not involved in the collision, but who had ridden that day, these being Scott Everton and Tim Clarkson. None of the motorcyclists gave any indication of alcohol consumption by Devecseri.[11]

13. During his investigation, Eddy spoke with Devecseri's mother regarding her discussions with the police about the cause of the accident. There was no suggestion of alcohol being involved.[12]

14. Eddy also spoke to Bradfield at some point after the accident. Eddy secured some personal information regarding Bradfield's injuries along with a description of the accident. In his First Report to RSA, Eddy indicated that he had spoken to Bradfield about the accident. Bradfield reported that he was travelling about 60-70 km/h when Devecseri accelerated very quickly while attempting to pass on a hill. Bradfield never advised Eddy about drinking before the accident. Eddy was scheduled to speak with Bradfield on September 12, 2006 to obtain further information, but Bradfield cancelled the appointment. Latanski and Caton were uncooperative, would not talk to Eddy and did not return Eddy's calls.[13]

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[9] AR, Vol. III, pp. 4-5 and AR, Vol. III, pp. 145-156.
[10] AR, Vol. III, pp. 4-5.
[11] AR, Vol. III, pp. 39-143.
[12] AR, Vol. IV, pp. 64-66 and 71.
[13] AR, Vol. IV, pp. 76, 77 and 80.

15. Bradfield's insurer, State Farm, also investigated the circumstances of the accident. When State Farm interviewed Bradfield, he did not advise that he and Devecseri had been drinking beer before the accident.[14]

16. State Farm never interviewed Latanski.[15]

17. Eddy subsequently received the Durham Regional Police Collision Investigation Report, which was consistent with the MVAR. The conclusions indicated that Devecseri was killed as a result of the collision and Bradfield "sustained serious life threatening injuries". The other motorcyclist, Latanski, sustained "minor injuries". Excessive speed was considered "a major contributing factor in this collision". There was no mention of alcohol.[16]

18. Eddy testified that he did not believe alcohol was involved in the collision because it was not disclosed in the police report. In Eddy's experience, if alcohol was involved, it would have also been disclosed in the Accident Reconstruction Report.[17]

19. Eddy spent 22 hours investigating the circumstances of the accident. He obtained the MVAR and Accident Reconstruction Report, spoke to Bradfield, spoke to Mrs. Devecseri (mother), and attempted to speak to Latanski and Caton without success. By the time Eddy closed his file, he did not have any information that Devecseri had consumed alcohol before the accident.[18]

20. Devecseri's mother advised defence counsel appointed by RSA in the fall of 2008 that her son did not drink alcohol.[19]

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[14] AR, Vol. XII, pp. 65-66.
[15] AR, Vol. XII, p. 61(15-29).
[16] AR, Vol. III, pp. 145-156.
[17] AR, Vol. XI, p. 186 (17-30).
[18] AR, Vol. XI, p. 196 (7-15).
[19] AR, Vol. XIII, pp. 17 (20-30)-18 (1-3).

21. The Bradfield action was initiated in Newmarket on September 6, 2007, claiming damages of $2,700,000.[20] The Caton action was initiated in Peterborough on May 27, 2008, claiming damages of $1,000,000.[21]

22. In advance of issuing their claims, counsel for Bradfield and Caton each made disclosure of their intention to do so, as required under Section 258.3 of the *Insurance Act*, to which RSA responded confirming that the Devecseri vehicle had $1,000,000 in liability coverage.[22]

23. Bradfield and Caton both arranged for a Litigation Administrator to be appointed as Devecseri died intestate. The Litigation Administrator was Keith Smockum, consenting to act as a gratuitous favour to counsel Watt.[23]

24. The Defendants in the Caton action were the Estate of Devecseri, the two other motorcyclists involved, Bradfield and Latanski, and Caton's OPCF 44R insurer, Kingsway General.[24]

25. RSA retained solicitor Forbes to defend the Estate of Devecseri ("Devecseri") in both actions. The defences in both actions, dated March 5, 2009, were thereafter served and filed.[25]

26. Examinations for Discovery proceeded in June 2009 at which Latanski testified for the first time that Devecseri and Bradfield had been drinking beer shortly before the accident.[26] As a result, two weeks after Latanski's examination, RSA instructed Forbes to get off the record for Devecseri and to add RSA as a statutory third party on the basis of a likely breach of a statutory condition.[27]

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[20] AR, Vol. VII, p. 141-143.
[21] AR, Vol. II, p. 46-48.
[22] AR, Vol. XI, p. 30 (7-20) and AR, Vol. III, p. 11.
[23] AR, Vol. XI, p. 29 (1-14).
[24] AR, Vol. II, p. 46 and 49.
[25] AR, Vol. V, p. 83and AR, Vol. II, p. 70 and 74.
[26] AR, Vol. XI, p. 45-46 and p. 76 (8-11).
[27] AR, Vol. V, p. 171, AR, Vol. V, p. 168, AR, Vol. XII, p. 98 (30-31), and AR, Vol. II, p. 78.

27. The Orders removing Forbes as counsel for Devecseri were granted on September 3 (Newmarket) and 4 (Peterborough), 2009, less than two months after the discovery of Latanski.[28]

28. The policy limits for Bradfield with State Farm were $1,000,000 and the policy limits for Caton with Kingsway were $1,000,000.[29] Both Bradfield and Caton had underinsured OPCF 44 coverage up to $1,000,000.[30]

29. Caton discontinued the action as against Latanski after discoveries.[31] He carried on against Devecseri and Bradfield and his OPCF 44 insurer, Kingsway.[32]

30. After discovery, solicitor Watt for Plaintiff Caton then brought a *Wagg* (disclosure) motion to obtain a copy of the Coroner's Report and same was provided to Watt and thereafter to others on October 28, 2019.[33] The securing of the Coroner's Report was apparently not pursuant to Section 18 (2) of the *Coroners Act*, in place at the time of the accident. RSA had no legal right to obtain the Coroner's Report. Only a next of kin for Devesceri or his personal representative (none existed) could have obtained the Coroner's Report.[34] The Coroner's Report confirmed the presence of alcohol in Devecseri's system at the time of the collision, confirming the evidence of Latanski on discovery.[35]

31. RSA secured Orders on January 15, 2010 adding itself as a Statutory Third Party in each action, under section 258 of the *Insurance Act*. The motions to add RSA were unopposed.[36]

32. The Bradfield and Caton actions continued towards Trial scheduled to be heard several years later in Peterborough. In advance of Trial, the Bradfield action settled for $750,000

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[28] AR, Vol. VI, pp.121-122, 131-133 and 141.
[29] AR, Vol. XI, p. 30 (12-30) and 31 (15-18).
[30] AR, Vol. XI, p. 68 (13-15), and AR, Vol. II, p. 46 and 49.
[31] AR, Vol. XI, p. 33 (1-10).
[32] AR, Vol. XI, p. 33-34.
[33] AR, Vol. XI, p. 51 (22-25) and p. 53 (5-14).
[34] *Coroners Act*, R.S.O. 1990, c. C. 37, s. 18(2)
[35] AR, Vol. IV, p. 13 and AR, Vol. XI, p. 52 (20-22).
[36] AR, Vol. VIII, p. 10-12 and AR, Vol. VI, p. 110 and 114.

all inclusive, broken down as follows:[37]

RSA for claim	$100,000
RSA for Plaintiff's costs	$50,000
State Farm OPCF 44 contribution	$600,000
Total:	$750,000

33. The Caton action continued to Trial in May to June 2012 on both liability and damages.[38] Unlike the Bradfield as Plaintiff action, Caton sued both Devecseri and Bradfield in addition to his own 44 insurer, Kingsway. Caton offered to settle his case for $1,000,000, being the available limits under the Bradfield policy with State Farm.[39] RSA did not contest the liability of Devecseri, as it had previously offered the $200,000 section 258 limits. Those funds, paid in advance of Trial, had been agreed to be split 50 / 50 as between Plaintiffs, Bradfield and Caton.[40]

34. Bradfield as defendant represented by his insurer, State Farm, despite being aware of the RSA coverage issue, delayed until the eve of Trial, approximately 3 years, to have the matter determined by way of a motion. Bradfield as defendant represented by his insurer, State Farm, thereafter attempted to adjourn the Trial and to have the coverage position of RSA contested. The Trial Judge denied that request.[41]

35. At the Caton Trial, Bradfield argued that he was completely blameless. The liability contest on that issue was essentially between Kingsway and Bradfield / State Farm, as their policy limits matched.[42]

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[37] AR, Vol. II, p. 138, AR, Vol. XI, pp. 70 and 71, AR, Vol. II, p. 153, and Vol. I, p. 8; see also *Bradfield v. Royal and Sun Alliance Insurance Company of Canada*, 2018 ONSC 4477 ("Trial Decision"), at para 22 and *Caton v Devecseri*, 2012 ONSC 4640, at paras 21-24.
[38] AR, Vol. II, p. 94.
[39] AR, Vol. XI, p. 71 (18-20).
[40] AR, Vol. II, p. 152; see also *Caton v Devecseri*, 2012 ONSC 4640, at para 16.
[41] AR,Vol. I, p. 8; see also Trial Decision at para 23.
[42] AR, Vol. II, p. 151; see also *Caton v. Devecseri*, 2012 ONSC 4640, at paras 7-12.

36. The Jury apportioned liability 90% against Devecseri and 10% against Bradfield.[43] The Jury assessed the Caton damages at $1,863,714, which exceeded the Caton Offer to Settle and Bradfield's policy limits.[44].

37. Bradfield/State Farm was unsuccessful with respect to any Appeals of the underlying Caton action and State Farm paid the Judgment and the costs less the contribution of $150,000 from RSA ($100,000 for the claim) and $50,000 (for costs).[45]

38. Bradfield as defendant received a Crossclaim Judgment as against Devecseri, which formed the basis of the Section 258 subrogation claim against RSA at issue in this Appeal, challenging RSA's off-coverage position.[46]

39. At no time did RSA provide Devecseri, or any other party, notice in writing that it was waiving the policy violation of Devecseri.[47]

Trial Decision at Issue

39. In the Section 258 subrogation action, Justice Sosna was asked to determine whether RSA was entitled to take an off-coverage position and to reduce policy limits once it learned that Devecseri had been drinking before the accident, contrary to the terms of the OAP 1 insurance policy.[48]

40. Justice Sosna incorrectly held that RSA had waived its right to rely on Devecseri's policy breach. According to Justice Sosna, knowledge of the policy breach could be *imputed* on the basis that the evidence of the policy breach was *available* to RSA had it obtained the Coroner's Report in 2006. Having found waiver, Justice Sosna held that the issue of estoppel was moot.[49]

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[43] AR, Vol. IV, p. 57-59.
[44] AR, Vol. IV, p. 59 and AR, Vol. XI, p. 78 (23-24).
[45] AR, Vol. XI, pp. 11-12, 58-60 and AR, Vol. II., p. 139 and 156; see also *Caton v Devecseri*, 2012 ONSC 4640, at paras 46-56.
[46] AR, Vol. II, p. 97.
[47] AR, Vol. XII, p. 91 (18-21).
[48] Trial Decision, at para 7.
[49] Trial Decision, at paras 63, 69 and 70.

The Court of Appeal for Ontario

41. In a unanimous decision, the Court of Appeal for Ontario held that RSA did not waive its right to rely upon the policy breach nor was it estopped from relying upon the breach.[50]

42. The Court of Appeal reached the following conclusions:

(1) RSA did not have actual knowledge of the policy breach that entitled it to deny coverage until June 24 to 25, 2009;[51]

(2) knowledge of the policy breach could not be imputed, as RSA did not have material facts from which to determine there was a policy breach until it received Latanski's evidence in 2009;[52]

(3) the knowledge requirement is not whether the insurer *could* obtain the material facts, but whether they *did* have the material facts necessary to enable them to know of the policy breach;[53]

(4) RSA expressed no clear intention to forego the exercise of the right to deny coverage in writing as required under section 131(1) of the *Insurance Act*, R.S.O. 1990, c I.8;[54]

(5) RSA was not estopped from asserting a breach of the policy because:

i. it had no knowledge of the breach until 2009; and

ii. there was no evidence of detrimental reliance;[55]

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[50] *Bradfield v. Royal and Sun Alliance Insurance Company of Canada*, 2019 ONCA 800 ("C.A. Decision") at para 10.
[51] *Ibid.*, at paras 18, 37 and 52.
[52] *Ibid.*, at para 38 and 53.
[53] *Ibid.*, at para 53.
[54] C.A. Decision, at paras 40 and 54.
[55] *Ibid.*, at paras 47- 49 and 55.

(6) there was no legal authority to support the proposition that an insurer is required to investigate every reasonable possibility that a policy was breached.[56]

43. The Court of Appeal for Ontario therefore granted the appeal and set aside the decision of the Trial Judge.[57]

The SCC Appeal

44. On April 23, 2020, this Court granted leave to appeal to Bradfield. Shortly thereafter, Bradfield's subrogated insurer and RSA reached a compromised settlement. On June 22, 2020, Bradfield filed a Notice of Discontinuance ending this Appeal.[58]

45. On June 29, 2020, TLABC filed a motion seeking to be added or substituted in the role of Bradfield to assume carriage of the Appeal and revive the litigation.

46. On September 24, 2020, Justice Rowe granted TLABC's motion and substituted TLABC as the Appellant in this Appeal. The style of cause was updated accordingly. The issue of costs was deferred to this Appeal.

47. The action continues.

PART II – QUESTIONS IN ISSUE

48. There are only three questions on this Appeal:

(1) Should the Court exercise its discretion to decide this case, despite it having become moot?

(2) Did RSA waive its right to defend Bradfield's section 258 action based upon Devecseri's policy breach?

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[56] *Ibid.*, at paras 39 and 56.
[57] *Ibid.*, at para 57.
[58] AR, Vol. II, p. 140.

(3) Is RSA estopped from defending Bradfield's section 258 action based upon Devecseri's policy breach?

PART III - ARGUMENT

A. The Appeal is Moot and should be Dismissed

49. RSA agrees with the Appellant that the issue of mootness is a live issue on this Appeal. The Order of Justice Rowe, dated September 24, 2020, allowing the TLABC to be substituted as the Appellant in this Appeal, pursuant to Rule 18(1) of the *Rules of the Supreme Court of Canada*, did not decide the issue of mootness.

50. The Appellant concedes that this Appeal is moot due to the settlement between Bradfield's subrogated insurer and RSA.[59] There is no longer a "live controversy or concrete dispute". Accordingly, this Appeal is moot and should not be heard and/or should be dismissed.

51. In *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342, this Court established the test as to when the Court may exercise its discretion to hear a moot appeal. The onus is on the party seeking the hearing to show that the matter should still proceed.[60] The three primary factors discussed in *Borowski* are as follows:

(1) the presence of an adversarial context;

(2) concern for judicial economy; and

(3) the need for the Court to be sensitive to its role as the adjudicative branch of the political framework.

There Is No Presence of an Adversarial Context

52. This Court should not exercise its discretion to hear this moot appeal, as the adversarial component as between the parties disappeared when the matter settled. Clarity of the law is not a valid reason to hear a moot appeal. RSA should not have been required to expend

[59] Appellant's Factum, at para 53.
[60] *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342, at paras 31, 34 and 40.

additional time and resources on an appeal when neither it nor Bradfield's subrogated insurer have any interest in its outcome.

There Are Concerns for Judicial Economy

53. A concern for judicial economy also militates against this Appeal from continuing. As this Court noted in *Borowski*:

> It is an unfortunate reality that there is a need to ration scarce judicial resources among competing claimants. The fact that in this court the number of live controversies in respect of which leave is granted is a small percentage of those that are refused is sufficient to highlight this observation. [61]

54. In addition, waiver and estoppel are common issues that are frequently litigated. Waiver and estoppel are prevalent common law principles and will come before this Court again with parties who have a direct interest in the outcome of the litigation on a case that is not predominantly fact driven. It is preferable that this Court wait to determine these points in a genuine adversarial context.

The Need for the Court to be Sensitive to its Role as the Adjudicative Branch of the Political Framework

55. RSA submits that the final factor of the Court being sensitive to its role as the adjudicative branch does not weigh in favour of or against the hearing of this Appeal. However, this Court should not exercise its discretion to hear the matter on a purely academic basis.

RSA and Bradfield Settled Their Dispute

56. To suggest that Bradfield's subrogated insurer settled to maintain the Ontario Court of Appeal decision because it may be favourable to insurers is inconsistent with the fact that it was Bradfield's subrogated insurer that initiated the leave application in the first place. The Appellant is engaging in pure speculation on this point without any evidentiary basis and it is improper for the Appellant to raise this issue on this Appeal.

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[61] *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342, at at para 34.

57. Although often discussed in relation to settlement privilege, this Court has a long standing history of encouraging parties to settle their own disputes.[62]

58. RSA submits that it is not in the interests of encouraging parties to settle cases for this moot appeal to continue.

B. RSA Did Not Waive Its Right to Defend Bradfield's Section 258 Action

59. The Appellant quite rightly recognizes the error on the part of the Trial Judge that a waiver argument was available to Bradfield subrogating on its Crossclaim Judgment. The test for waiver by conduct was set by this Court in *Saskatchewan River Bungalows*:

> Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.[63]

60. This Court noted that: "The nature of waiver is such that hard and fast rules for what can and cannot constitute waiver should not be proposed. The overriding consideration in each case is whether one party communicated a clear intention to waive the right to the other party."[64]

61. The Appellant concedes[65] that written waiver pursuant to Section 131 (as it then was) of the Ontario *Insurance Act* applies. That section reads:

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[62] *Union Carbide Canada Inc. v Bombardier Inc*., 2014 SCC 35, at para 32; *Sable Offshore Energy Inc. v Ameron International Corp*., [2013] 2 SCR 632, at para 13; *Kelvin Energy Ltd. v Lee*, [1992] 3 SCR 235, at p. 259.
[63] *Saskatchewan River Bungalows Limited v. Maritime Life Assurance Company*, 1994 [2 SCR] 490, at para 20.
[64] *Saskatchewan River Bungalows Limited v. Maritime Life Assurance Company*, 1994 [2 SCR] 490, at para 24.
[65] Appellant's Factum at paras 91 and 95.

> ***Waiver of term or condition***
>
> **131.** (1) No term or condition of a contract shall be deemed to be waived by the insurer in whole or in part unless the waiver is stated in writing and signed by a person authorized for that purpose by the insurer. [66]

62. At no point did RSA provide any written notice waiving terms or conditions of the policy, and in particular relating to Devecseri's policy breach and lack of authority to drive.

63. Without full knowledge of its rights and without an unequivocal intention to abandon its rights under the policy in accordance with section 131(1) of the *Insurance Act*, R.S.O. 1990, c I.8, RSA cannot be said to have waived its right to take an off-coverage position.[67] Accordingly, the Court of Appeal for Ontario was correct in holding that RSA did not waive its right to refuse coverage for breach of the terms of the insurance policy.[68]

64. The Appellant also concedes that actual knowledge is required for waiver and that waiver by conduct is explicitly ruled out in the pre-2016 section 131(1) of the *Insurance Act*.[69] The Appellant is unable to prove that RSA waived its rights and instead must entirely rely upon estoppel.

C. RSA Is Not Estopped from Defending the Section 258 Action

65. Automobile insurance in Ontario is highly regulated, particularly with respect to policy wordings. The OAP 1 offers insureds the following coverages, some being mandatory and others optional. These coverages include:

(1) Liability;

(2) Accident Benefits;

(3) Uninsured Automobile;

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[66] *Insurance Act*, R.S.O. 1990, c I.8, s 131(1) and (2).
[67] *Ibid*.
[68] C.A. Decision, at para 10.
[69] Appellant's Factum, at para 95.

(4) Direct Compensation; and

(5) Loss or Damage.

66. The Devecseri vehicle had all coverages with the exception of loss or damage (property).

67. This Appeal, however, concerns itself with liability coverages, which engage two distinct benefits to an insured: (1) Defence costs invariably covered by the insurer appointing defence counsel when litigation is commenced; and (2) Indemnity coverage which, subject to the policy limits plus additional adverse costs, only crystalizes by payment on a settlement or a final judgment.

68. Unlike a property loss claim, which crystalizes as of the event (i.e. fire, robbery, flood etc.), a liability claim has a different timeline.

69. In Ontario, by virtue of section 258.3(b) of the *Insurance Act*, plaintiff counsel is obliged to give notice of a plaintiff's intention to commence an action within 120 days of a motor vehicle accident and thereafter, pursuant to section 258.4, the insurer of the involved motorist must "promptly inform the plaintiff" of the policy limits and whether the policy will respond.[70]

70. An action can be initiated very shortly after an accident event and in Ontario, upon service of the Statement of Claim, a Statement of Defence must be filed within twenty days (20 days).[71]

71. Once an action is started, Rule 30.02 *of the Rules of Civil Procedure*[72] directs disclosure by the defence of "any insurance policy under which an insurer may be liable" (emphasis added). An insurer however can at very early stages, before a liability claim materializes, be called upon to respond to an insured's property or Accident Benefit claims. Does prompt response to the latter claims estop the ongoing liability claim analysis?

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[70] *Insurance Act*, R.S.O. 1990, c. I.8, sections 258.3(b) and 258.4.
[71] *Rules of Civil Procedure*, Rule 18.01 (a).
[72] *Rules of Civil Procedure*, Rule 30.02.

72. Solicitors Pitaro (for Bradfield) and Watt (for Caton) provided their Notices of Intention to defend and RSA responded advising of the policy of Devecseri and its limits. RSA did so "promptly" as required by legislation on the information then known to it.

73. RSA had no knowledge of a policy breach until after the Latanski discovery evidence as later corroborated by the Coroner's Report. This established that Devecseri was driving his motorcycle on the day in question contrary to Statutory Condition 4 (1) of the policy.[73]

74. Insurance policies by their nature are contracts *uberrima fides* requiring good faith on the part of both insurer and insured. In the case of an insured, such good faith obligations start at inception (i.e. when making the application for insurance) and continue thereafter (prompt reporting of a claim, the duty to cooperate with the investigation and prosecution or defence of a claim, etc.).

75. The insurer's obligations generally arise in response to claims, whether to insureds for such matters as Accident Benefits or property coverages or, in the case of litigation, a duty to defend the insured to an action and potentially to indemnify at some later point for a legal liability (settlement or judgment).

76. The OAP 1 policy wording is approved by the Superintendent of Financial Services. Section 3.4 of the OAP 1 sets out the responsibilities of the insured and "other insured persons."[74] Further, the OAP 1 has Statutory Conditions as prescribed by the *Insurance Act*.

77. Statutory Condition 4 (1) states:

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[73] OAP 1: Ontario Automobile Policy Owner's Policy, Section 8, Statutory Condition 4 (1); see also *Logel (Litigation Administrator of) v. Wawanesa Mutual Insurance Company*, [2008] O.J. No. 3717, at paras 4 and 6.

[74] OAP 1: Ontario Automobile Policy Owner's Policy, Section 3.4.

> **Authority to Drive**
>
> The Insured shall not drive or operate or permit any other person to drive or operate the automobile unless the insured or other person is authorized by law to drive or operate it.[75]

78. Bradfield admitted that Devecseri was in breach of Statutory Condition 4 (1).[76]

79. The Appellant's suggestion that "an insurer's defence is an assurance of coverage, intended to be acted upon"[77] and thus leads to waiver or estoppel, ignores that although a duty to defend may arise at an early stage, an obligation to indemnify, whether under the policy or under section 258, is subject to constantly evolving information about the claim.

80. As this Court has recognized, "hard and fast rules" are not ones which fit neatly into waiver, nor should they with respect to arguments of estoppel.[78] There are any number of possible scenarios that could arise after an insurer has assumed the duty to defend but which could negate the duty to indemnify.

81. There is an express obligation on the insured to co-operate, which is contained in Statutory Condition 5 (3) of the OAP 1.[79]

82. Should indemnity apply under the policy when the insurer appoints defence counsel and a defence is filed, but the insured fails to co-operate? Failure to co-operate can result in a defence being struck for failure to attend discoveries (*Rules of Civil Procedure, Rule* 34.15 (1) (b), *Reid v. Gore Mutual*)[80] or produce a document (*Rules of Civil Procedure, Rule*

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[75] OAP 1: Ontario Automobile Policy Owner's Policy, Section 8, Statutory Condition 4 (1).
[76] AR, Vol XI, p. 7 (28-32).
[77] Appellant's Factum, at p. 24
[78] *Saskatchewan River Bungalows Limited v. Maritime Life Assurance Company*, [1994] 2 SCR 490, at para 24.
[79] OAP 1: Ontario Automobile Policy Owner's Policy, Section 8, Statutory Condition 5 (3).
[80] *Rules of Civil Procedure*, Rule 34.15 (1) (b); see also *Reid v. Gore Mutual*, [1980] OJ No. 750, at paras 11, 27 and 38.

30.08 (2) (b)).[81] No defence filed results in a default and a deemed admission to the pleadings of the adverse party as against the insured (Rule 19.01 (1) and 19.02 (1) (a)).[82]

83. Should indemnity apply under the policy when the insurer subsequently learns during the course of the litigation, from the insured or others, that the policy was entered into by misrepresentation or subsequent failure to advise the insurer of a material change in risk (i.e. ownership or use of automobile)?[83]

84. Should indemnity apply under the policy when defence counsel proceeds on information provided by the insured but later discovers that the insured person has not been truthful concerning the facts of the incident? For example, assuming Devecseri had not been killed and RSA had defended him after a denial by Devecseri to RSA of alcohol consumption, would RSA have to continue to defend and indemnify Devecseri once the evidence of his alcohol consumption came out?

85. A rigid bright line test that equates the filing of a statement of defence with an assurance of coverage does not respect the balance that the *Insurance Act*, and insurance policies including the policy at issue in this case, set between the rights of the insured (and those claiming through them) and the obligations of the insurer.

History of Section 258 of the Insurance Act

86. A Statutory right of a person, not an insured, to commence a direct action against an insurer on an unsatisfied Judgment where an insurance policy may respond dates back to at least 1924. The current legislation in Ontario is section 132 of the *Insurance Act*, which reads:

> **132. (1) Right of claimant against insurer where execution against insured returned unsatisfied** – Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against the person in respect of the person's liability, and an execution against the person in respect thereof is returned unsatisfied, the person entitled to the damages may recover

[81] *Rules of Civil Procedure*, Rule 30.08 (2) (b).
[82] *Rules of Civil Procedure*, Rules 19.01 (1) and 19.02 (1) (a).
[83] *Campanaro v. Kim*, (1998), 41 OR (3d) 545 (CA), at paras 8 and 14.

> by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.
>
> **(2) Exception** – This section does not apply to motor vehicle liability policies.[84]

87. The original legislation covered both motor vehicle insurance and other insurance. The section was subsequently split with motor vehicle insurance being dealt with separately in what is now section 258.

88. Section 258 can provide for the right of direct recourse by an injured party against the insurer of the operator or owner of the motor vehicle which caused the injury. Generally speaking, this section may create a cause of action against the insurer to enable the victim to enforce this beneficial / statutory right after first becoming a judgment creditor of the insured.

Limitations of a Section 258 Action

89. Section 258 (1) of the Insurance Act overrides the common law rule against third party beneficiaries' to the insurance contract and states:

> (1) Any person who has a claim against an insured for which indemnity is provided by a contract…may, **upon recovering a judgment therefor…against the insured**, have the insurance money payable under the contract applied in or toward satisfaction of the person's judgment…, and **maintain an action against the insurer** to have the insured money so applied. [Emphasis added].[85]

90. Section 258 provides a benefit to judgment creditors of motorists up to the provincial statutory minimum limits ($200,000). To this extent, an insurer will be held absolutely liable for such limits:

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[84] *Insurance Act*, section 132.
[85] *Insurance Act*, section 258 (1).

> **Insurer absolutely liable**
>
> 258.4 The right of a person who is entitled under subsection (1) to have insurance money applied upon the person's judgment or claim is not prejudice by,
>
> (a) an assignment, waiver, surrender, cancellation or discharge of the contract, or of any interest therein or of the proceeds thereof, made by the insured after the happening of the event giving rise to a claim under the contract;
>
> (b) any act or default of the insured before or after that event in contravention of this Part or of the terms of the contract…;
> and nothing mentioned in clause (a) (b) or (c) is available to the insurer as a defence in an action brought under subsection (1).[86]

91. However, under section 258 (11), RSA may raise <u>any defence</u> it is entitled to raise against Devecseri for the part of the claim which exceeds the statutory minimum liability limits. This is similar to the language in section 132:

> **Defence where excess limits**
>
> (11) Where one or more contracts provide for coverage in excess of the limits mentioned in section 251, except as provided in subsection (12), the insurer may,
>
> (a) with respect to the coverage in excess of those limits; and
>
> (b) as against a claimant,
>
> avail itself of <u>any defence that it is entitled to set up against the insured</u>, despite subsection (4). [87]

92. The statutory obligation of a motor vehicle insurer exposed to the $200,000 minimum limits is reasonably offset by 258 (11), which allows the insurer to advance any defence it is entitled to set up against the insured for any excess claim. "Any defence" should be read in the entire context of the legislation and given a grammatical and ordinary sense reading

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[86] *Insurance Act*, section 258.4.
[87] *Insurance Act*, section 258 (11). [Emphasis added]

harmoniously with the scheme of the Act. This is the recognized approach for statutory interpretation.[88]

93. What the *Insurance Act* has provided with the Absolute Liability provisions is a source of recovery for victims of motorists, at least to the extent of minimum limits in the province of Ontario ($200,000). There is, however, an appropriate balancing. Insurers that may not even have received a single premium must still respond when there is evidence of a motor vehicle policy even if at inception the policy was secured by fraud or misrepresentation. Moreover, even an act or default subsequent to inception of the policy on the part of the insured does not negate the Absolute Liability obligation.[89]

94. Recognizing that obligation, the intention of the legislation is clear that the insurer thereafter may raise "*any defence that it is entitled to set up against the insured*", such as consumption of alcohol before operation of a motorcycle in breach of Statutory Condition 4 (1).[90]

95. Bradfield as a Plaintiff by Crossclaim was never an insured of RSA. He is best described as a "person" making him at least a potential claimant under Section 258 (1).[91]

96. To the extent that the Appellant suggests that there can be a distinction between Devecseri and Bradfield, the legislation does not provide such a distinction for any coverage over the Statutory minimum limits of $200,000. RSA is entitled by statute to raise "any defence" that it would have as against Devecseri when dealing with any excess claim of Bradfield.

97. In this case, Devecseri admittedly breached the statutory conditions of the policy – he was not authorized by law to drive. RSA was entitled to rely on this breach to take an off-

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[88] *Bell ExpressVu Limited v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para 26.
[89] *Winch v. Keogh* (2006), 214 O.A.C. 23, at paras 13 and 14; *Walker v. Allstate Insurance Co. of Canada* (1989), 67 O.R. (2d) 733 (CA), at paras 5, 7 and 11; *Campanaro v. Kim*, (1998), 41 OR (3d) 545 (CA), at para 66 .
[90] OAP 1: Ontario Automobile Policy Owner's Policy, Section 8, Statutory Condition 4 (1); see also *Logel (Litigation Administrator of) v. Wawanesa Mutual Insurance Company*, [2008] O.J. No. 3717, at paras 4 and 6.
[91] *Insurance Act*, section 258 (1).

coverage position. Bradfield conceded that Devecseri breached the terms of the policy, but relied on the argument of estoppel to seek recovery.

The Estoppel Test

98. As stated by this Court in *Maracle v. Travelers Indemnity Co. of Canada*,[92] the principle of promissory estoppel is well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance that was intended to affect their legal relationship and to be acted on.

99. The principle underlying the doctrine of promissory estoppel is that a party should not be allowed to resile from a choice when it would be unfair to the other party to do so. Like waiver, estoppel requires "knowledge" of the policy breach. Determining whether a party is estopped is fact specific.[93]

100. The essential elements of estoppel in the insurance context are:

(1) there must be knowledge on the part of the insurer of the facts which indicate a lack of coverage; and

(2) there must be a course of conduct by the insurer upon which the insured relied to its detriment.[94]

101. The test for estoppel is conjunctive. Both elements must be met for estoppel to be found.

Knowledge of the Breach

102. This Court recognized over 100 years ago in *Western Can. Accident & Guaranty Insurance Co. v. Parrot* [95] that an insurer may be estopped when it elects to defend or to continue to defend an insured after learning of a policy breach. In that case, the insurer carried on with

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[92] *Maracle v. Travelers Indemnity Co. of Canada*, [1991] 2 SCR 50, at para 2.
[93] C.A. Decision, at para 31.
[94] *Rosenblood Estate v. Law Society of Upper Canada* (1989), 37 C.C.L.I. 142 (Ont. H.C.), appeal dismissed, [1992] O.J. No. 3030 (Ont. C.A.), at para 61.
[95] *Western Can. Accident & Guaranty Insurance Co. v. Parrot* (1921), 61 S.C.R. 595, at paras 43, 49.

the defence after it had acquired "full knowledge of the breach." Knowledge on the part of the insurer and failure on the insurer to appreciate the knowledge is fundamental.

103. The Appellant does not cite any case law in support of its argument that knowledge can be imputed to an insurer or that anything less than full and actual knowledge can be relied upon for a finding that an insurer is estopped from relying upon a policy breach.

104. The case law throughout the provinces in dealing with estoppel in the context of insurance contracts recognizes that knowledge is critical in determining whether an insurer is estopped from relying upon a policy breach. In liability insurance, the insurer is deemed to have affirmed an insurance contract only where it either accepts the defence or continues a defence on behalf of the insured after sufficient facts suggest or support that the insured has breached the conditions of the policy.[96]

105. In reaching its decision that RSA was not estopped from asserting a breach of the policy, the Court of Appeal for Ontario relied upon *Rosenblood Estate v. Law Society of Upper Canada*. In *Rosenblood*,[97] the estate of a deceased solicitor sued on a policy of professional liability insurance. The solicitor practiced real estate law and was involved in a scam against a credit union. The solicitor died one year after the scam and six months after his estate notified the Law Society of the credit union's claim. The insurer, through the Law Society and its lawyer, had actual knowledge of facts giving rise to a policy exclusion and chose to defend the action. Two years later, the Law Society advised the Estate that it was denying coverage. The Court found that the Law Society appreciated or should have appreciated the significance of these facts.

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[96] *Rosenblood Estate v Law Society of Upper Canada*, (1989), 37 C.C.L.I. 142 (Ont. H.C), at para. 61; *Pembridge Insurance Co. v. Parlee*, 2005 NBCA 49, at para 12; *Snair v. Halifax Insurance Nationale-Nederlanden North America Corp.*, [1995] N.S.J. No. 424, at para 60; *Gilewich v 3812511 Manitoba Ltd*., [2013] 2 W.W.R. 835, at para 42.

[97] *Rosenblood Estate v. Law Society of Upper Canada* (1989), 37 C.C.L.I. 142 (Ont. H.C.), at paras 2-6, 13, 24, 27, 61.

106. The Court in *Rosenblood* held, "…the insurer through the Law Society and its solicitor had knowledge of facts giving rise to exclusions of coverage and appreciated or should have appreciated the significance of these facts."[98]

107. The insurer in *Rosenblood* should have appreciated the significance of the information in its possession that constituted a policy exclusion. Despite this information, it elected to defend the claim. The Court also found that the insured relied to its detriment on the insurer's agreement to defend the claim.[99]

108. Unlike the insurer in *Rosenblood*, RSA did not have any knowledge to support a lack of coverage. The police report made no mention of drinking and Bradfield and Latanski did not advise Eddy about drinking after the accident. Devecseri's mother told defence counsel that her son did not drink alcohol.

109. Actual knowledge is critical as events in litigation are fluid and can be ever changing. On a liability claim, unlike a property loss claim, the insurer's response is triggered merely by the claim. For the purposes of triggering the duty to defend, the insurer is obliged to accept the facts as pleaded as true, whether they are or not, unless those pleaded facts clearly bring the claim outside of coverage.[100]

110. In *Rosenblood*, the very nature of the claim was inconsistent with the policy coverage. The same would have been true in *The Commonwell Mutual Insurance Group v. Campbell*, 2019 ONCA 668. In that decision, which is clearly distinguishable on its facts, the insurer knew from the outset of the nature of the incident and that Mr. Campbell was riding without a license a dirt bike that was not registered for street use. [101] The insurer would have known the relevant coverages and exclusions in its policy language involving a home insurance policy under which it defended. Those defending insurers at all times had actual knowledge.

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[98] *Ibid.*, at para 61.
[99] *Ibid.*, at paras 62-65.
[100] *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801at paras 11, 13, 14, 17 and 21; *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49 at para 28.
[101] *The Commonwell Mutual Insurance Group v. Campbell*, 2019 ONCA 668, at paras 1-4.

111. The facts in the within Appeal are different than the facts in *Rosenblood* and *Commonwell*. RSA did not have any knowledge of the facts on which it later based its off-coverage position until the Examination for Discovery of Latanski. RSA did not fail to appreciate facts in its possession like the insurer in *Commonwell.*

112. The Bradfield and Caton pleadings were, as recognized by all parties, "boilerplate" motor vehicle Statements of Claim and a thorough police investigation disclosed no evidence of alcohol consumption. Devecseri had a license. He had coverage. This was not a situation of "questionable coverage" at the outset of the claim.

113. In this type of standard insurance litigation, on those known facts, reservation of rights letters and Non-Waiver Agreements or steps taken to be added as a Statutory Third Party under the *Insurance Act* have no place.

114. RSA never intended by conduct to affect legal relations with either Devecseri or Bradfield. RSA did not have knowledge of the policy violation when it initially defended the action but moved quickly to discontinue its defence of Devecseri after learning that there had been a breach of a condition of the policy. It would be manifestly unfair for RSA to lose rights it was unaware it could assert.

Liability Investigation – a duty only owed to the insured

115. The Appellant alleges that if an insurer does not discover the defect (meaning actions leading to the breach by the insured) prior to entering a defence, there can be imputed knowledge by failing to properly investigate.

116. Bradfield survived the accident and must have known about the drinking, but denied it. Devecseri could not tell RSA about the drinking because he was killed at the scene.

117. The Bradfield Section 258 action was not advanced before Sosna, J. as a negligence based argument in relation to RSA's investigation. No standard of care was presented and, therefore, no breach of that standard of care was established. The Appellant references case law concerning good faith and appropriate investigations in response to direct claims by insureds for losses such as property losses (i.e. fire) or disability benefits (LTD). The

obligations discussed in *Whiten v. Pilot* and *Fidler v. Sun Life* concern the insurers' direct assessment and handling of claims that had already crystalized and which were the subject matter of the policy coverage.[102]

118. An insurer responding to a fire loss, a property loss or a disability claim has a duty to undertake a fair evaluation of the insured's claim when responding to the loss. It needs to proceed fairly with its insured to respond to the coverages that existed.

119. There is a significant distinction, however, with respect to duties under liability coverage. The insurer, particularly under motor vehicle litigation, is obliged to defend the insured against claims advanced by others. Both the timing and the nature of the investigative activity are uniquely different. Knowing that Devecseri was licensed, should RSA be looking for a policy breach so as to avoid its duty to its insured? At Trial, State Farm agreed that they do not open up a claim file looking to find a reason to deny the claim.[103] All reasonable indications were that alcohol was not a factor. There was a comprehensive police investigation with no evidence of alcohol consumption on the part of Devecseri.

120. RSA by conduct never affected the legal relations of either Devecseri, Bradfield or even Caton. It acted appropriately in disclosing the policy that "may respond" and it defended on the basis of the knowledge that it had. RSA should be permitted to advance its section 258 (11) defences under the circumstances. RSA acted promptly and gave notification to involved parties after information came to light which later developed into a clear policy breach.

121. The policy breach and resulting off-coverage position taken by RSA was actually seen as a potential benefit to the injured parties, Bradfield and Caton in their capacity as Plaintiffs, as they both had underinsured coverage.[104] If Devecseri was found 100% at fault, they each would have access to an additional $800,000 under their own policies rather than having to share *pro rata* under the single policy of Devecseri which would have responded if there

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[102] *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, at paras 1 and 32; *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, at paras 1, 3 and 5.
[103] AR, Vol. XII p. 62.
[104] AR, Vol. III, p. 16, and AR, Vol XIII, p. 21.

had been no breach of the policy by Devecseri. However, because the jury found Bradfield 10% liable, Bradfield's insurer under joint and several liability, became liable (to the limits of Bradfield's policy) for the full Judgment amount and seeks to transfer liability to RSA under the construct of estoppel.

122. RSA owed Devecseri's estate a duty to investigate the liability claim in a balanced and reasonable manner. RSA appointed an independent adjuster and provided that adjuster with a list of non-mandatory suggestions to assist in his investigation. This list included the suggestion of obtaining the Coroner's Report, but Eddy had nothing to go on to support obtaining same – there was no evidence of drinking. All indications were that there was simply no evidence of drinking by the participants and that speed and reckless operation of the motorcycle on Devecseri's part was to blame.

There was no Detrimental Reliance

123. The second element of estoppel requires detrimental reliance.

124. There was no evidence that any of the steps taken by RSA to defend the case operated to prejudice any party. There is no direct evidence from Bradfield or State Farm to support a finding of detrimental reliance. Rather, both the litigation administrator for Devecseri's estate and Caton's counsel testified at Trial that there would have been no difference in the defence of the action whether RSA added itself as a statutory third party or was a defendant in the action.[105]

125. The facts of this case do not support detrimental reliance as the insured was deceased and his estate was not active in the litigation: the litigation administrator had no knowledge or awareness of the file, and took on the role only as a favour to plaintiff counsel. The Appellant correctly notes that the litigation administrator was utterly uninvolved after service.

126. The Appellant argues that "detrimental reliance by parties claiming against an insured, once there has been significant or meaningful progress in the litigation" should be

[105] C.A. Decision, at para 49.

assumed.[106] This assumption is unreasonable particularly when breaches by an insured can occur at any stage of the litigation right through to Trial. As discussed earlier, what if the policy breach by the insured has misled the insurer in the defence? What if the policy breach involved non co-operation during the course of the litigation?

127. Unlike the situation in *Logel (Litigation Administrator of) v. Wawanesa Mutual Insurance Company*,[107] RSA acted promptly when the evidence of Devecseri's policy breach on authority to drive came to its attention. In *Logel*, the deceased driver's Coroner's Report had come to the attention of the insurer about 1 ½ years after the accident and well after the police report had been secured. The defence filed by the insurer on behalf of *Logel*, was filed approximately six months after the police investigation and the Coroner's Report were in the insurer's hands. The case proceeded on for more than three more years, including settlement discussions and the dismissal of the action against two parties until the off coverage position was taken. The Trial Court and subsequently the Ontario Court of Appeal[108] recognized that in that context, prejudice was recognized. The insurer was too late.

128. Bradfield could not have a better position than Devecseri in a section 258 action beyond the absolute liability policy limits. TLABC argues that he should. TLABC refers[109] to closing submissions of counsel for Bradfield in this section 258 action in an attempt to prove detrimental reliance on the part of Bradfield. However, the closing submissions of counsel are not evidence. Moreover, these submissions are taken out of context and are misleading.

129. Bradfield's counsel knew about the off-coverage position in July 2009, nearly three years before the Caton action proceeded to Trial. If the coverage dispute was so important to

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[106] Appellant's Factum, at para 138.
[107] *Logel (Litigation Administrator of) v. Wawanesa Mutual Insurance Company*, [2008] O.J. No. 3717, at paras 11, 13 and 14.
[108] *Logel Estate v. Wawanesa Mutual Insurance Company*, 2009 ONCA 252, at paras 1-7.
[109] Appellant's Factum at para 131.

Bradfield, why did counsel wait until the eve of the Caton action to bring a coverage motion?

130. Further, the cost decision of Justice MacDougall[110] correctly sums up Bradfield's litigation strategy: the Caton action was always about whether Bradfield was even 1% liable for the collision. Bradfield went to trial on liability and lost. The jury found that Bradfield and Devecseri were engaged in a joint venture with a consistent pattern all day, including excessive speed and dangerous driving[111]

131. The Appellant's suggestion that the parties, in particular Bradfield / State Farm, acted upon an assurance of full coverage is inconsistent with their own actions. As Plaintiff, Bradfield accepted the RSA off-coverage position and received $600,000 from his OPCF 44 insurer, State Farm. That same insurer (through Bradfield) then argued that RSA is estopped from taking that same off-coverage position, notwithstanding that State Farm had accepted RSA's off-coverage position as evidenced by its payment of OPCF 44 coverage to Bradfield.

132. TLABC also argues that "once litigation has made significant progress"[112] the insurer should be estopped from taking an off-coverage position. However, this case was in its relative infancy when RSA discovered the facts constituting the policy breach by Devecseri. Bradfield delivered his Statement of Defence in March 2009, the discoveries were in June 2009 and no settlement discussions had taken place.

133. When the facts of this case are applied to the test for estoppel, it is evident that estoppel cannot be made out:

> (1) there is no evidence that the RSA had any knowledge to support a denial of coverage until discoveries were conducted and it moved promptly thereafter to alert all parties to its off-coverage position; and

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[110] *Caton v. Devesceri*, 2012 ONSC 4640 at para 10.
[111] AR, Vol. IV, p. 58.
[112] Appellant's Factum, at para 51.

(2) there is no evidence that any party acted differently in the litigation to their prejudice prior to the off-coverage position being advanced.

134. Accordingly, the Court of Appeal for Ontario was correct in deciding that RSA was not estopped from asserting a breach of the insurance policy. This Appeal should, therefore, be dismissed if this Court elects to decide the appeal on the merits, notwithstanding that it is moot.

PART IV – SUBMISSIONS ON COSTS

135. If RSA is successful on this Appeal, TLABC should pay RSA's costs of this Appeal and of the motion for TLABC to be substituted as the Appellant.

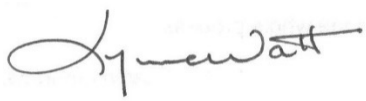
PART V – ORDER SOUGHT

136. The appropriate Order is to dismiss this Appeal as being moot or, in the alternative, to dismiss this Appeal and reaffirm the decision of the Court of Appeal for Ontario.

PART VI – CONFIDENTIALITY

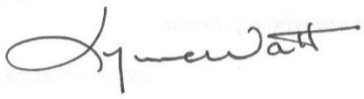
137. There is no sealing of confidentiality order, publication ban, or classification of information in the Court's file as confidential, or other restriction on public access to information in that file.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of February, 2021.



for:

David A. Tompkins



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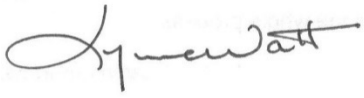

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Mark A. Borgo

PART VI – TABLE OF AUTHORITIES & STATUTORY PROVISIONS

Case Law:	Paragraph References
Bell ExpressVu Limited v. Rex, [2002] 2 S.C.R. 559, 2002 SCC 42	92
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