

CITATION: Anjum v. John Doe and State Farm, 2016 ONSC 7784
COURT FILE NO.: CV-13-490598
DATE: 20161212

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
ANJUM ANJUM and MUSART HAYEE)
) *Ryan Breedan and Joseph L. Romano, for*
Plaintiffs) *the Plaintiffs*
)
– and –)
)
JOHN DOE AND STATE FARM) *Ari Krajden, for the Defendant State Farm*
MUTUAL AUTOMOBILE INSURANCE) *Mutual Automobile Insurance Company*
COMPANY)
)
Defendants)
)
)
)
) **HEARD:** November 16, 17 and 18, 2016

P. J. CAVANAGH J.

REASONS FOR JUDGMENT

[1] The Defendant State Farm Mutual Automobile Insurance Company (“State Farm”) brings this motion for summary judgment seeking judgment dismissing the Plaintiffs’ action.

[2] For the reasons that follow:

- a. State Farm’s motion for summary judgment is dismissed; and
- b. Partial summary judgment is granted in favour of the Plaintiffs declaring that (i) the motor vehicle accident that occurred early in the morning of October 16, 2011 involving a vehicle driven by the Plaintiff Anjum Anjum (“Mr. Anjum”) that is the subject of this action was caused by the negligence of an unidentified driver driving an unidentified motor vehicle, and (ii) the Plaintiffs have satisfied the evidentiary requirements of the OPCF-44 Family Protection Endorsement of a policy of insurance number 156361-C2260 which had been issued to the owner of the vehicle, Jahanzaab Khawaja (“Mr. Khawaja”), under which Mr. Anjum is an “insured person”.

Nature of the Action

[3] The Plaintiffs claim damages and declaratory relief. The relief sought relates to injuries that Mr. Anjum claims he suffered because of a motor vehicle collision that occurred early in the morning on October 16, 2011. His wife Musart Hayee brings this action pursuant to the provisions of the *Family Law Act*, R.S.O. 1990, c F.3, as amended, for pecuniary and non-pecuniary losses that she claims resulted from the injuries which Mr. Anjum sustained from the collision.

[4] The Plaintiffs claim that Mr. Anjum has suffered and continues to suffer from permanent, serious, and catastrophic injuries.

[5] The Plaintiffs allege that the Defendant John Doe is an unidentified driver of an unidentified vehicle, who cut off Mr. Anjum causing Mr. Anjum to lose control of his vehicle and drive off the road into a ditch on the eastbound ramp of Ontario Provincial Highway 403 at the exit of Mavis Road, in the City of Mississauga. The Plaintiffs claim that the collision and resultant injuries were caused by the negligence of the Defendant John Doe.

[6] At the time of the collision, State Farm insured the motor vehicle that was being operated by Mr. Anjum under a policy of automobile insurance (the “Policy”), which had been issued to the owner of the vehicle, Mr. Khawaja. Mr. Khawaja is Mr. Anjum’s son. Mr. Anjum claims that he is an “insured person” under the Policy which contains standard Unidentified/Uninsured Automobile Coverage.

[7] In addition to damages, Mr. Anjum claims (i) a declaration that the Policy was a valid and enforceable policy of insurance on October 16, 2011, (ii) a declaration that he is entitled to insurance coverage pursuant to the Unidentified/Uninsured Automobile Coverage provisions of the Policy, and (iii) a declaration that he is entitled to receive from State Farm all sums which he is legally entitled to recover as a result of the injuries he sustained in the collision pursuant to the Unidentified/Uninsured Automobile Coverage provisions of the Policy.

[8] State Farm specifically denies that the accident occurred as a result of the actions of an unidentified motorist. State Farm states that the accident occurred entirely as a result of the negligence of Mr. Anjum.

[9] State Farm also asserts that Mr. Anjum was contributorily negligent in his failure to properly utilize and fasten the safety equipment with which his vehicle was equipped including seatbelts, cross-belts, and head restraints contrary to Section 106 of the *Highway Traffic Act* R.S.O. 1990, Chapter I.8 and amendments thereto.

[10] State Farm denies that the Plaintiffs are entitled to the relief, as claimed, and asks that the action be dismissed with costs.

[11] State Farm delivered a Jury Notice requiring that the issues in the action be tried and the damages be assessed by a jury.

Court Direction Allowing State Farm’s Motion for Summary Judgment to Proceed

[12] State Farm brought a motion for summary judgment seeking (i) judgment dismissing the Plaintiffs’ action or, in the alternative, (ii) a finding that there is no “other material evidence” as defined by section 1.5(D) of the OPCF-44R Endorsement of the Policy and judgment that State Farm is not liable to respond to a claim for unidentified motorist coverage.

[13] The grounds for the motion were that there was no serious issue requiring a trial on the issues of (i) whether the Plaintiffs’ damages were caused by the involvement of an unidentified motorist, (ii) whether the Plaintiffs’ damages were caused by the negligence of an unidentified motorist, (iii) whether there is physical evidence indicating the involvement of an unidentified automobile; (iv) whether there is evidence from an independent witness indicating the involvement of an unidentified automobile; and (v) whether there is an “inadequately insured motorist” as is required to trigger OPCF-44R coverage under the Policy.

[14] This matter came before Myers J. in Civil Practice Court on July 3, 2015 to schedule State Farm’s motion for summary judgment. At that time, the Plaintiffs’ counsel had either just delivered or advised that he would shortly be delivering expert evidence to show that the accident mechanics were consistent with the involvement of a second vehicle. State Farm had not yet determined whether it would respond with competing expert evidence of its own. Myers J. raised the concern that if the parties did adduce competing expert evidence, perhaps the motion would best be heard with the cross-examinations of the experts conducted in open court. He directed that the parties re-attend at a case conference by telephone once they were further along the schedule and could better discuss logistics for the motion.

[15] On August 19, 2015, a case conference was held by telephone with counsel for the parties before Myers J. During the case conference, State Farm’s counsel advised that they intended to produce two experts’ reports for the motion. The lawyers for the Plaintiffs and for State Farm agreed that *viva voce* evidence would be required to resolve the summary judgment issue. Counsel for State Farm did not expressly seek a mini-trial or any relief other than the directions for hearing of the motion for summary judgment. Counsel for the Plaintiffs submitted that if oral evidence was to be heard, the Plaintiffs were entitled to a full jury trial. Counsel for the Plaintiffs submitted that the case was not appropriate for summary judgment and that the Court should dismiss State Farm’s motion with costs and send the action to trial.

[16] A written endorsement was issued by Myers J. on September 3, 2015 directing that State Farm’s motion for summary judgment be heard with *viva voce* evidence and in accordance with the other process and scheduling directions set out in the final section of his endorsement. Myers J. addressed whether summary judgment under Rule 20 would be a bifurcation of issues in a proceeding contemplated under Rule 6.1.01 of the *Rules of Civil Procedure*, R.R.O. 1990 Reg. 149 and concluded that it would not be a bifurcation. Myers J. noted that a motion for summary judgment is an alternative process that is provided for by the Rules at which a judge will decide if a summary disposition of the issue of liability is appropriate, fair, and just. Myers J. wrote that if the judge hearing this motion is not prepared to resolve the matter summarily, then she will decide how to deal with the issues under Rule 20.05: *Anjum et al. v. Doe et al.*, 2015 ONSC 5501, at paras. 5-8.

[17] State Farm's motion for summary judgment was scheduled to be heard over three days in July or August 2016. In accordance with the direction of Myers J., Mr. Anjum was to give oral testimony at the hearing limited to the issue of the cause of the accident and to be cross-examined. *Viva voce* evidence of two experts from each side, with cross-examination, was also to take place at the hearing of the motion.

[18] Shortly before the hearing of State Farm's motion for summary judgment, the parties obtained an audio recording of a 911 call reporting on the accident involving the vehicle driven by Mr. Anjum. This audio recording disclosed the identity of the person making the call, Nichole Rossi ("Ms. Rossi"), who had witnessed the accident. Because of the discovery of this witness, State Farm's motion for summary judgment was adjourned so that Ms. Rossi's evidence could be obtained. The motion was later rescheduled, and was heard before me on November 16, 17 and 18, 2016.

Whether Summary Judgment is Appropriate Under Rule 20.04(2)(b)

[19] At the hearing of this motion, both counsel for State Farm and counsel for the Plaintiffs agreed that there were two issues for determination on the motion for summary judgment: (i) whether an unidentified vehicle caused or contributed to the motor vehicle accident involving Mr. Anjum on October 16, 2016, and (ii) whether Mr. Anjum had satisfied the evidentiary requirements of the OPCF-44 Family Protection Endorsement of the Policy.

[20] It was clear that determination of these issues would require findings of whether evidence given by several witnesses, including Mr. Anjum, Mr. Khawaja, Ms. Rossi, and Ontario Provincial Police Constable Melissa Pirie (who investigated the accident and interviewed Mr. Anjum), was credible and reliable. An assessment of the weight to be given to evidence given by four experts concerning how the accident occurred would also be needed. Both State Farm and the Plaintiffs agreed to have these issues, which would decide the issue of liability, determined by me on this motion for summary judgment.

[21] Rule 20.04(1)(b) of the *Rules of Civil Procedure* provides that the court shall grant summary judgment if "the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment". The parties have so agreed but, nevertheless, I must be satisfied that it is appropriate to decide these issues by summary judgement.

[22] The evidence presented consisted of affidavits, documentary evidence and *viva voce* evidence. The affidavit and documentary evidence included, among other things, the relevant records of the police investigation of the accident, the clinical notes of medical professionals who examined Mr. Anjum following the accident, a transcript of the audio recording of the 911 call reporting the accident (that was played in Court), and State Farm's file notes.

[23] Four experts, two for each side, gave evidence through affidavits of their opinions and conclusions as expressed in their reports, and each was also examined in chief and cross-examined in the witness box.

[24] There were certainly issues concerning the credibility and reliability of witnesses that needed to be decided on this motion, but where such issues arose in relation to a witness, the witness was cross-examined in the witness box, just as he or she would have been at a conventional trial.

[25] The summary judgment motion proceeded substantially in accordance with the procedures directed by Myers J. in his September 3, 2015 Endorsement. These procedures reflect the culture shift that the Supreme Court of Canada has held is needed to create an environment promoting timely and affordable access to the civil justice system: *Hryniak v. Maudlin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 2.

[26] By having the issue of liability decided through a summary judgement motion involving both affidavit evidence and *viva voce* evidence over a three-day hearing, the parties may now be able to resolve issues relating to damages, and avoid a lengthy trial. If they are not able to do so, the issues to be decided by a jury at the trial will be limited to those involving damages, and the trial will be shorter because of the decision on the issue of liability.

[27] For these reasons, I am satisfied that it is appropriate to decide the issues the parties have asked the court to determine on this summary judgment motion.

Summary of Evidence Concerning the Accident

[28] To obtain a judgment against State Farm, Mr. Anjum has the burden of proving that his damages were caused or contributed to by the negligence of the driver of an unidentified vehicle. Mr. Anjum also has the burden of establishing that he has satisfied the evidentiary requirements of the OPCF-44 Family Protection Endorsement of the Policy.

[29] The following is a summary of the evidence given at the hearing of this motion. I have summarized this evidence in some detail because there are significant credibility issues that must be addressed in relation to this evidence, and a full appreciation of it will facilitate a better understanding of my reasons for the findings I have made.

[30] I start with the evidence of lay witnesses called by the Plaintiffs, followed by the lay witness called by State Farm, the recording of the 911 call, the medical records, and the expert evidence.

Anjum Anjum

[31] Mr. Anjum was born in Pakistan, but left in 1992. He first spent approximately 10 years in the United States and has spent approximately 14 years in Canada. His native language is Urdu, but he has the ability to speak and understand everyday English. Although Mr. Anjum was examined and cross-examined using the assistance of an interpreter, his counsel submitted in closing submissions that he does not suggest that Mr. Anjum could not speak and understand English well enough at the time of the accident that his exchanges with the police and with medical practitioners about the accident are not reliable.

[32] Mr. Anjum testified that he first spoke with a lawyer about his case in December 2011 and that this is when he learned that the way the accident occurred may have an impact on his entitlement.

[33] Mr. Anjum testified that the accident occurred early in the morning on October 16, 2011 on the exit ramp from Highway 403 to Mavis Road. He was coming from a friend's house at Winston Churchill and Highway 403. He was visiting his friend because the friend was going back to Pakistan, and Mr. Anjum wanted to give him items to take to Mr. Anjum's relatives back home. Mr. Anjum said that he arrived at his friend's house at approximately 11:00 p.m. to 12:00 a.m. and that he left the house around 2:00 a.m. He was returning to his home.

[34] Mr. Anjum testified that he would normally go to bed at 1 a.m. or 2 a.m. He said that he was not tired at the time of the accident, that he had not taken alcohol, drugs or prescription medication. He said that he was not feeling ill, he was not using a cell phone, and he was not distracted.

[35] Mr. Anjum testified that he remembered the accident. He remembered that when he was on the highway he turned towards the ramp between Mavis and Highway 403 where there is an exit named Center View Drive. He said that when he reached that location, there was a car in front of him that was turning towards this exit. This car was indicating that it was turning right, but the driver suddenly changed his mind and came in front of his car. Mr. Anjum testified that he recalled that the car in front of him was beige. In order to protect himself, he hit the brake and moved towards the left. At that time, he lost his control and was constantly hitting the brake in different directions. He entered into the ditch, first making a right and then making a left in the ditch.

[36] Mr. Anjum said that before he applied the break he was driving between 60 to 70 kph. He did not remember how fast he was going when his car went into the ditch.

[37] Mr. Anjum testified that he was injured in the accident. His backbone was broken and his head was injured. He testified that, after that, he does not remember anything.

[38] Mr. Anjum did not remember in his testimony at the hearing of the motion whether he spoke to ambulance attendants or with police at the scene of the accident. He did not remember speaking with the investigating officer, Constable Pirie, at the hospital. Mr. Anjum was shown the Vehicle Collision Statement Form that was completed by Constable Pirie, and he testified that he does not remember seeing it.

[39] Mr. Anjum testified that shortly after the accident he was in great pain. He testified that, right now, he does not remember speaking with any of the doctors at the hospital about the accident. He said that he talked about the incident with several people, but he does not remember the discussions. Mr. Anjum testified that he told the doctors about the beige car, but he cannot think why they did not mention the beige car in their notes.

[40] In cross-examination, Mr. Anjum testified that when the paramedics arrived, he thinks that he was still inside the car. He acknowledged, however, that he does not remember discussions with the paramedics.

[41] Mr. Anjum was presented with the Ambulance Call Report. This report records information that, as it was put to Mr. Anjum, could only have come from him including a description of the “Mechanism of injury/direction of force” which does not refer to the involvement of another vehicle, and information that “pt. states he was thrown / ejected from the vehicle”. Mr. Anjum testified that he does not remember paramedics being at the accident scene and he does not remember what he may have said to the paramedics following the accident. When pressed, he maintained that, as he was giving evidence in the witness box, he had no memory of speaking to a police officer at the scene of the accident or at the hospital.

[42] Mr. Anjum was presented with other records including the collision field notes of Sgt. Robertson, a police officer who was at the accident scene, and the Vehicle Collision Statement Form prepared by Constable Pirie. The notes recorded statements made by Mr. Anjum, including a statement recorded by Sgt. Robertson that “Dr advises that he just ran off roadway”, and a statement recorded by Constable Pirie in response to her question of whether Mr. Anjum knows what happened, that “I brake and turn left”. Mr. Anjum testified that he has no memory of his discussions with these police officers, and that his first recollection of seeing Constable Pirie was when she testified at the hearing of this motion.

[43] Mr. Anjum was presented with answers given on his examination for discovery held in October 2014 at which he gave answers to questions asked of him that were responsive, and showed that when he gave these answers, he had a recollection of his discussions with the police officers and the medical practitioners in some level of detail including, for example, a recollection of telling a police officer that he saw skid marks on the road. Mr. Anjum testified that his answers given when he was examined for discovery were true and based on his memory at that time.

[44] Mr. Anjum was questioned about the affidavit that was filed in evidence on this motion. In that affidavit, Mr. Anjum gave evidence that he believes he told all medical professionals and even the police about how the collision occurred, and that he does not know why this information is not included in their records.

[45] Mr. Anjum was asked about his discussions with doctors and nurses at Trillium Hospital on the night of the accident. He testified that he does not remember these discussions. Mr. Anjum was presented with medical records, and testified that he does not recall discussions recorded in these records. He was presented with the clinical note of a Dr. Channan of his consultation on October 16, 2011. The note describes the accident as one where Mr. Anjum was “exiting the highway, lost control, drove off the road and down into and then up the embankment and stopped on the on ramp to the highway”. This note records Mr. Anjum as agreeing with the “history as presented”. There is no reference in the note to the involvement of another motorist.

[46] Mr. Anjum was cross-examined about his evidence in chief concerning steering right, and then left, in the ditch, and he responded that he lost control, again pressed the brake, and went in the ditch. Mr. Anjum said that he had lost control of his car when it went into the ditch, and that the direction of his car did not change after it entered the ditch. Mr. Anjum said that his car was pointed away from the road when it came to rest, and he did not turn around to look behind him.

He said he was facing the highway opposite to the road that he come off from, facing north. He agreed that he knew this direction from looking at the police report.

[47] Mr. Anjum in cross-examination was presented with clinical notes from Credit Valley Hospital, including the Emergency Treatment Record, the clinical note of a Dr. Parul Khanna, and the clinical note of a Dr. Yael Friedman. He testified that he does not remember the discussions with medical personnel at this hospital. These records do not refer to the involvement of another motorist. He was shown his evidence on his examination for discovery in 2014 which was different, in that Mr. Anjum was able then to recall these interactions with medical personnel at this hospital, including that a beige car cut him off. He said that his answers on his examination for discovery in 2014 were what he remembered then.

[48] Mr. Anjum was also shown records from the Hamilton Health Sciences Centre, including the clinical notes dictated by a resident and the handwritten notes of a Dr. John Sadler. Dr. Sadler's note does not refer to the involvement of another motorist. Mr. Anjum did not remember his examination by Dr. Sadler before he underwent surgery.

[49] Mr. Anjum also did not remember discussions with Dr. Desmond Kwok at Hamilton Health Sciences whose clinical note refers to a "single car accident".

[50] Mr. Anjum was also asked about the clinical note taken by Dr. Nina Yashpal at Credit Valley Hospital dated November 8, 2011, 23 days after the accident. This note records that "[h]e mentioned the details of this event where he was trying to avoid a car that was driving in the opposite direction and had veered into the ditch." Mr. Anjum testified that he does not remember speaking to Dr. Yashpal.

[51] Mr. Anjum was cross-examined about when he first spoke with a lawyer about the accident. He said this was in December 2011, when his son introduced him to lawyers from the Oatley Vigmond firm. This evidence was different than in his affidavit, which was that he did not have any legal representation in this matter before February 22, 2012, when he retained the Romano Law Firm to represent him. He testified that the lawyers came to see him at the hospital, but he does not remember which hospital. He was asked about his time at Hamilton Health Sciences for 13-14 days, and whether he spoke with a lawyer there. He said he does not remember whether his family members spoke with a lawyer. He was asked whether anyone gave him brochures for a law firm, and he did not remember. Mr. Anjum did not remember any personal injury lawyers visiting him while he was at Hamilton Health Sciences.

[52] Mr. Anjum was asked about the Family Protection Endorsement in his automobile insurance policy. He said that he never read that, and he does not know how to read that endorsement. Mr. Anjum testified that his oldest son, Mr. Khawaja, handled insurance matters for the family, and that he did not ever mention insurance coverage for an unidentified car involved in an accident. Mr. Anjum testified that only after his hospitalization, when he started to have rehabilitation, did he come to know of insurance coverage for an accident caused by an unidentified motorist.

Jahanzaab Khawaja

[53] Jahanzaab Khawaja is the son of Mr. Anjum, and he was called to testify for the Plaintiffs. He provided an affidavit. He testified that he first learned of the accident on the morning of October 16, 2016 at around 4 o'clock in the morning. He was informed of the accident by his mother. He visited his father at the hospital, arriving at around 4:30 to 4:45 a.m. in the morning. He spoke with his father at the hospital.

[54] Mr. Khawaja testified that Mr. Anjum told him that he was going off the highway using the off-ramp to Mavis Drive when a vehicle cut him off and to avoid a collision he swerved to the left and his car went into a ditch. Mr. Khawaja testified that Mr. Anjum told him that the other car was trying to go to the City Centre fork and, at the last second, came in front of him.

[55] Mr. Khawaja testified that he called his insurance company on Sunday or the following day. Mr. Khawaja was shown the Accident Benefits application form from State Farm with his handwriting. The form was signed by Mr. Anjum, as applicant. Mr. Khawaja testified that he completed this form on October 25, 2011. The form contains, in handwriting, a brief description of the accident that reads "A car cut me off and I made a left turn while applying the brakes. Lower back spin (sic) was injured". Mr. Khawaja testified that he wrote this information in the form and that he received this information from his father.

[56] Mr. Khawaja testified that when he spoke with his father or completed the accident benefits form, he was not aware that the circumstances of the accident would have any bearing on any entitlements that his father might have under his insurance policy. Mr. Khawaja testified that the only reason that he got this insurance policy is because he is a Big Brother and there is a requirement of this program that his insurance policy must cover \$2 million of liability. He did not know what other coverage was available to him under the policy.

[57] On cross-examination, Mr. Khawaja agreed that he was living with his father at the time of the accident and that he was about 23 years old. He had a close relationship with his father.

[58] Mr. Khawaja testified that when he called State Farm, he basically told them the same information that his father had told him about the accident. He said that a car had cut his father off.

[59] Mr. Khawaja testified that he did not know that he had insurance coverage for unidentified motorist. He did not know what the terms and conditions of the policy were.

[60] On cross-examination, Mr. Khawaja testified that he did not personally speak with a lawyer until recently when he was affirming his affidavit for this motion. He never met with a lawyer at Hamilton Health Sciences when his father was an in-patient there in 2011.

[61] With respect to the accident benefits form, Mr. Khawaja testified that he handed the form to his father when it was completed, and that he does not know when it was submitted to State Farm. The letter to State Farm sending the accident benefits form was dated December 8, 2011. Mr. Khawaja did not know why there was a delay in submitting this form.

[62] Mr. Khawaja was shown the State Farm file notes with respect to this claim, and he agreed that the first description in the file notes of anything having to do with a second car being involved in the accident was on November 1, 2011.

Nichole Rossi

[63] Nichole Rossi (“Ms. Rossi”) was called to testify by the Plaintiffs. She testified that she lives in Milton and works at a bar as a server and at a Montessori school as a supply teacher and after-school attendant.

[64] She testified that she witnessed the accident in the early morning of October 16, 2001. She affirmed an affidavit on October 25, 2016 that was delivered on this motion.

[65] Ms. Rossi testified that she was a passenger in a vehicle at the time of the accident and that the vehicle in which she was a passenger was on the left, a little bit behind the cars that were ahead of her on the Mavis Drive ramp from Highway 403. The vehicle in which she was a passenger was in the left lane.

[66] Ms. Rossi testified that she was coming from a club – Rehab – in Oakville. She lived near the Mavis Drive exit from Highway 403, and was being dropped off after leaving the club. The driver was an acquaintance of a friend of hers. The driver’s name is Victoria. Ms. Rossi referred to her as “Tor”. Ms. Rossi testified that she does not know her last name.

[67] Ms. Rossi testified that at the Rehab club she was with a group of 20 to 25 people. She said that they had two to three bottles “between all of us”.

[68] Ms. Rossi described the car she was in as being in the left lane, with a middle car in front of her and another car in front of that vehicle going to exit the off-ramp. She testified that the front car decided not to exit, going to the middle lane and that she then saw the car in front of her flying by, almost hitting the car in which she was a passenger, and that it then flew into the ditch. She repeated that there were two cars in front of her and that the front car was trying to go right, but it went left and would have got in the middle car’s way, causing the middle car to go into her lane. The middle car crashed. Ms. Rossi did not remember whether the first vehicle, the front one, was a car or a truck. She said that she was pretty sure that the second vehicle was a car.

[69] Ms. Rossi testified that the first car cut the second car off and that the first car kept driving and did not stop. Then she saw the second car flying “right in front of me”. The girl who was driving stopped suddenly, and the second car went right in front of them and went into the ditch. Ms. Rossi testified that they did not stop. She said that the girl who was driving had to go to work the next day, and they figured that the 911 call would be enough. She was not interviewed by the police at the time of the accident.

[70] Ms. Rossi was asked in her evidence in chief about two telephone conversations with persons from the law firm representing State Farm. She did not remember very much about the first call. On the second call, in mid-October, she was asked about the accident and she said that she didn’t remember. She said that she had been drinking and that her seat was reclined. Ms. Rossi said that she used the word “drunk” to describe her state.

[71] Ms. Rossi testified that after the second call with a lawyer from the firm representing State Farm she went back to the exit where the accident had taken place. She looked at Google maps. She said that she listened to the 911 recording over and over. She testified that after doing so, she remembered the third car. She said “that’s just what I remembered”. Ms. Rossi testified that she has no doubt about what happened.

[72] On cross-examination, Ms. Rossi testified that she arrived at the club, Rehab, probably around 11 o’clock. She had not been drinking before arriving at the club. She travelled to the club by bus and she knew that she would not drive home. She left at approximately 1:30 a.m., close to last call. Ms. Rossi testified that the group had bottle service and that the promoter of the club bought the bottles of vodka. Ms. Rossi said that the group had 2 to 3 bottles which were regular sized bottles of 26 ounces. There were 20 or 25 people. Everyone was drinking. Ms. Rossi was pouring her own drinks, but could not remember how many drinks she consumed.

[73] Ms. Rossi agreed on cross-examination that she was intoxicated, but not noxious, dizzy, or sick. She would not have felt comfortable driving. She did not take any drugs or prescription medicine.

[74] Ms. Rossi testified that her seat was a little reclined. She said that she reclined the seat because she is more comfortable in this position and has back problems. She testified that this did not prevent her from seeing in front of her, and that she had no limitation on her vision. She was not using her cell phone or checking for texts. She was pretty sure that she was having a conversation with the driver, Victoria, who was asking her where to get off to take her home.

[75] Ms. Rossi agreed that in the 911 call she did not tell the 911 operator that another car had cut off the driver of the car that crashed into the ditch. She said “they didn’t ask me”. She explained that she was concerned about getting emergency assistance for the injured driver right away.

[76] Ms. Rossi was asked, on cross-examination, about the statements made by Katelyn Norris, a law clerk in the office of the lawyers for State Farm, in her affidavit concerning a telephone conversation that Ms. Norris had with Ms. Rossi on August 12, 2016. Ms. Rossi did not disagree that she made the statements recorded in Ms. Norris’ affidavit about the call. She said that she was put off guard by this call, and did not remember the accident at first. Ms. Rossi agreed that she told Ms. Norris that she had been drinking that night, and that she did not remember anything about the circumstances of the accident.

[77] Mr. Rossi was also questioned about her telephone discussion on October 18, 2016 with Matthew Owen, a lawyer in the office of State Farm’s counsel. She agreed that she had made the statements attributed to her in Mr. Owen’s affidavit. These statements included that she assumed she had been drinking “a lot” because they had bottle service, and that she did not remember the circumstances of the accident, which, she said, was true at that time.

[78] She agreed that she told Mr. Owen that her seat was reclined, and that she did not know exactly what was happening at that moment in front of her or around her. She told Mr. Owen that she had only two clear memories of the accident, the first being of the car she was in braking

suddenly and the second of the Anjum vehicle flying in front of them and into the ditch. She agreed that Mr. Owen played the 911 call for her, and asked whether this refreshed her memory, and she told him that it did not.

[79] Ms. Rossi testified that the Anjum vehicle was in front of her and in the lane beside her. She acknowledged that she told Mr. Owen that she was unable to say whether there was any other traffic on the exit ramp, and that she had no memory of another vehicle being involved in the accident which, she said, was true at that time.

[80] Ms. Rossi testified that the steps to refresh her recollections, going to the scene of the accident, looking at Google maps and playing the 911 tape, were taken after her telephone call with Mr. Owen, because she wanted to remember what had happened, and it was bothering her.

Ontario Provincial Police Constable Melissa Pirie

[81] State Farm called Constable Melissa Pirie as a witness. Constable Pirie testified that on October 16, 2011 at approximately 2:04 a.m. she received a radio call asking her to investigate a single motor vehicle accident. She arrived at the scene at approximately 2:14 a.m. There, she observed a single motor vehicle – a grey Mazda - and a single male outside of the vehicle. There were paramedics attending to him, and a police sergeant was also on the scene. Constable Pirie was at the scene for approximately 30 minutes. She would have inspected the scene, looked for skid marks, investigated damage to the vehicle and ensured that the vehicle was taken by a tow truck. She then went to the Trillium Health Centre where she interviewed Mr. Anjum. She testified that she spent approximately one half hour with him.

[82] The notes of her interview with Mr. Anjum taken by Constable Pirie are found in a Vehicle Collision Statement Form. On the first page of this form, under the heading “CAUTION”, is a series of four cautions that Constable Pirie testified she would have read to Mr. Anjum verbatim, to warn him of the importance of giving truthful answers to her questions.

[83] Constable Pirie testified that Mr. Anjum was giving answers in English, that she could understand his answers, and that he was coherent and responsive to her questions.

[84] Page 2 of the Vehicle Collision Statement Form records additional information in the handwriting of Constable Pirie including the date and time of the occurrence, the location of the occurrence, weather conditions, road conditions, traffic conditions, visibility, approximate speed at the time of impact, which lane he was in and whether he was changing lanes. The handwritten answer to the question about Anjum’s speed at the time of impact was 55-60 km/hr. and the answers recorded that he was in the left lane prior to and at the time of the collision and he was not changing lanes. The form records that Anjum answered “yes” to whether he was wearing a seatbelt and whether airbags deployed. He answered “no” to whether he had consumed alcohol in the past 24 hours. There was no answer recorded in the form to the question of how much sleep Mr. Anjum had in the past 24 hours.

[85] On page 3 of the Vehicle Collision Statement Form there are two sets of questions and answers in the handwriting of Constable Pirie under the heading “Can you describe from the beginning, with what highway you are travelling on and direction, your involvement which will

assist with the investigation?” The handwritten questions and answers were recorded by Constable Pirie in the Statement Form in the following words:

Q Where were you coming from?

A Winston Churchill – my friends house

Q Do you know what happened?

A “I brake and turn left”

Constable Pirie testified that the answer to the first question was not recorded verbatim, but that the answer to the second question was verbatim. Constable Pirie testified that Mr. Anjum did not say anything about skid marks.

[86] Constable Pirie was asked whether Mr. Anjum had reviewed the Vehicle Collision Statement Form. She did not have a specific recollection of whether he had done so, but she testified that she would usually ask the witness to review this form.

[87] Constable Pirie was also asked about the Motor Vehicle Accident Report that she prepared. This Accident Report shows Mr. Anjum as Driver 1 with nothing filled in for Driver 2. In the section for Investigating Officer’s Description of Accident & Diagram, Constable Pirie wrote “V1 LOSES CONTROL, POSSIBLE FATIGUE” and “V1 COLLIDES WITH WOODEN TRAFFIC SIGN AND LANDING IN LEFT DITCH”. The handwritten diagram to the right of these words shows a vehicle colliding with the wooden sign at approximately a 45-degree angle, with the vehicle coming to rest approximately perpendicular to the roadway. She testified that the diagram was not drawn to scale and that no measurements were taken. She testified that the vehicle came to rest approximately one car length from the road. She testified that she did not perform any analysis on the angle of the car as shown in her diagram.

[88] On cross-examination, Constable Pirie agreed that at the accident scene she tried to determine where the vehicle had come from and how it left the roadway, and that she recorded the conclusion she reached in the Accident Report. She testified that the report was prepared after she spoke to Mr. Anjum at Trillium Health Centre. Constable Pirie agreed that the vehicle ended up about one car length from the roadway and about one car length east of the road sign, perpendicular to the roadway, in the ditch.

[89] Constable Pirie agreed that she had completed the Vehicle Collision Statement Form accurately and fully, that she wrote all the questions that she had asked Mr. Anjum, and that she would have written down anything of relevance and anything that Mr. Anjum had said.

[90] With respect to Mr. Anjum’s answer “I brake and turn left” given in response to the question of what happened, Constable Pirie agreed that the accident took place in the middle of the exit ramp, and that there was nowhere to turn at this location. She agreed that she did not ask Mr. Anjum why he had braked and turned left, and that she accepted that he turned into the ditch.

[91] Constable Pirie agreed that what Mr. Anjum told her about what happened was consistent with the information that she had obtained at the scene. She agreed that the diagram she prepared on the Accident Report was consistent with her observations at the scene, including observations

of damage to the vehicle, signs of entry to the ditch, damage to the sign, and the final resting position of the vehicle. She agreed that the diagram showing the vehicle turning into the ditch was based upon the totality of all of the information that was available to her. She could not say whether Mr. Anjum had braked or not, and confirmed that there were no skid marks at the scene.

[92] Constable Pirie agreed that her normal practice was to have the witness sign the interview form and that she could not say for certain whether Mr. Anjum had reviewed the form. Constable Pirie confirmed that she had not interviewed any eyewitness to the accident, and that she had not been aware that there was an eyewitness.

Audio Recording and Transcript of 911 Call

[93] Counsel for State Farm introduced the audio recording of the telephone call that was made by Ms. Rossi to the 911 emergency number immediately following the accident. Counsel also prepared and put into evidence a transcript of the 911 call. Both State Farm and the Plaintiffs rely upon this audio recording.

[94] On the audio recording of the 911 call, Ms. Rossi first said “Hi I just saw a car flying off of uh going on to the ramp onto Mavis he was on the Hwy 403”. On four other occasions during this call, Ms. Rossi used the words “flew” or “flying” to describe the movement of the car driven by Mr. Anjum. For example, she said that she saw a car “flying off” the ramp onto Mavis “right in front of us”. She said that he “just flew across the ramp”, and that he “just flew off the ramp right in front of us”.

[95] Ms. Rossi was asked by the 911 operator whether she knew if the driver is trapped in the vehicle, and whether the vehicle was upside down currently. She responded “no it’s straight up but he’s just sitting there and a car just stopped right in front of him”.

[96] Ms. Rossi was asked by the 911 operator how the driver’s driving was before the accident. She responded “[I]t was fine. He just randomly just like ... we saw a car just flew right in front like we almost even hit him and he just flew right in front of us and went right into the ditch”.

[97] There were several exchanges between Ms. Rossi and the 911 operator about whether the car in which she was a passenger was driving eastbound or westbound and she was confused about the direction. She responded that she was coming from Rehab, a club in Oakville.

[98] Ms. Rossi did not say on the 911 call that there was another vehicle involved in the accident.

Paramedic and Medical Records

[99] State Farm introduced, through the affidavit of Debbie Hejno, a bodily injury claims adjuster employed by State Farm, documentary evidence in the form of medical records in relation to examinations of Mr. Anjum by paramedics and medical practitioners over the first 14 days following the accident.

[100] These notes included:

- a. The Ambulance Call Report that indicates that Mr. Anjum was not able to recall the events that led to the accident and that do not record any mention of him having been cut off by an unidentified motorist.
- b. The Emergency Adult Triage Assessment Form prepared at Trillium Health Centre which states that Mr. Anjum was unable to recall the events of the accident.
- c. The clinical notes of Dr. Channan of his consultation with Mr. Anjum only two hours after the accident, in which he describes Mr. Anjum as losing control of his vehicle and driving off the road. He says that Mr. Anjum self-extricated. There is no mention of an unidentified vehicle. Dr. Channan wrote that Mr. Anjum agreed with this description of the accident.
- d. The Emergency Record at Credit Valley Hospital's Emergency Department that states "Restrained drive off road into ditch / rolled...". There is no mention of an unidentified vehicle.
- e. Consultation report of Dr. Parul Khanna at Credit Valley Hospital in which the accident is described as Mr. Anjum losing control of his vehicle and driving off the road. There is no mention of an unidentified vehicle.
- f. Notes taken by Dr. Yael Friedman from his interview of Mr. Anjum at Credit Valley Hospital. Dr. Friedman described the accident as having occurred when Mr. Anjum lost control of his car and stopped on an on-ramp.
- g. The clinical note made by a resident at Hamilton Health Sciences and the handwritten clinical note of Dr. John Sadler which references a single vehicle accident where Mr. Anjum lost control of his vehicle, but does not mention the involvement of an unidentified motorist.
- h. The clinical notes of Dr. Kwok at Hamilton General Hospital in which he described a single motor vehicle accident but does not mention the involvement of an unidentified driver.
- i. The consultation record of Dr. Nina Yashpal dated November 8, 2011 in which she indicates that Mr. Anjum told her the accident occurred when he tried to avoid a car that was driving in the opposite direction, causing him to veer into a ditch.

None of the paramedics or other medical practitioners whose notes were put into evidence was called to testify. I do not regard this as unusual, since such records are ordinarily admissible to prove the statements recorded in them, and I draw no inference from the fact that these persons did not give *viva voce* evidence at the hearing of this motion.

[101] In his testimony, Mr. Anjum said that he could not remember his discussions with the paramedics or the medical practitioners or ambulance attendants whose records were put into evidence. This was so notwithstanding that, when he was examined for discovery, Mr. Anjum did recall these interactions, and answered questions relating to them.

Accident Reconstruction Expert Evidence

[102] Mr. Scott Walters is a forensic engineer who provided affidavit and *viva voce* evidence on behalf of the Plaintiffs. He prepared an accident reconstruction report. Mr. Walters' conclusion was that the likely cause of the accident was Mr. Anjum's braking and steering the vehicle into the ditch.

[103] He supported this conclusion by his observations of the damage to the vehicle that is not consistent with the vehicle being driven at 100 km/hr., the posted speed limit, or at 60 km/hr., the advisory speed limit for the exit ramp. In his opinion, the vehicle damage is consistent with a lower impact speed with the bottom of the ditch. Mr. Walters' conclusion was that Mr. Anjum was required to make left and right steering manoeuvres, requiring steering inputs, to reach the ultimate location where the vehicle came to rest at the bottom of the ditch, approximately perpendicular to the roadway surface.

[104] Mr. Walters relied upon the damage photographs of the vehicle which show some collision damage to the lower surface of the vehicle, and little damage to the leading edge of the hood. He concluded from these photos that the vehicle experienced a frontal type collision relatively uniformly distributed across its front end towards the bottom half, and that the severity of the collision was approximately 25-35 km/hr.

[105] Mr. Walters opinion was that it is very unlikely that Mr. Anjum could have manoeuvred along the roadway with no or uncontrolled steering inputs and that, had Mr. Anjum been asleep while travelling on the off-ramp, he would have driven straight ahead and exited the roadway likely at the speed he was travelling on Highway 403 before the actual incident area. Mr. Walters' evidence was that steering inputs were likely required to negotiate the ramp in order for the vehicle to end up perpendicular to the roadway at the bottom of the ditch.

[106] Mr. David Porter is a forensic engineer who gave evidence on behalf of State Farm. He disagreed with many aspects of the report of Mr. Walters, or felt that his opinions required further clarification. With respect to the pre-impact speed, Mr. Porter questioned whether the crash tests upon which Mr. Walters relied were relevant. In his view, it is impossible to approximate the speed of the vehicle driven by Mr. Anjum based upon the damage sustained to the vehicle, because it is unknown how much energy was absorbed by the soft shoulder when the vehicle left the roadway.

[107] Mr. Porter also testified that, in his view, the available physical evidence is insufficient to determine the pre-impact motion and path of the involved vehicle. He questioned whether the resting position of the vehicle was accurately shown on the Motor Vehicle Accident Report prepared by Constable Pirie because the sketch is not to scale and because the sketch cannot be used to characterize the orientation of the vehicle when it contacted the wooden sign post

without corroborating information to verify its approach path, such as skid marks, which were not documented.

[108] In Mr. Porter's opinion, whether or not the involved vehicle was orientated perpendicular to the roadway when it exited the roadway, or some lower angle, cannot be known based on the available evidence. Mr. Porter's evidence was that contact with the ditch could cause the vehicle to rotate when it came to rest and, therefore, the final resting position of the vehicle cannot be used to determine the angle of entry to the ditch. However, Mr. Porter acknowledged that, if this had occurred, one would expect additional damage at the point of impact and signs of the pivoting, which was not observed.

[109] Mr. Porter's evidence was that the cause of the collision cannot be determined to be similar or different than that expected of a drifting lane departure caused by a fatigued or asleep motorist, an active steering response or the absence of response caused by inattention or poor navigation. Mr. Porter's evidence was that physical evidence was simply insufficient for one to reach a conclusion as to the speed of the vehicle as it exited the roadway or its orientation to the roadway.

Human Factors Expert Evidence

[110] Dr. Alison Smiley is a professional ergonomist and expert in human factors aspects of highway safety, who gave expert evidence on behalf of the Plaintiffs on the human factors issues relating to the accident. Her conclusion was that some of the circumstances of the crash are consistent with a falling asleep crash, in that it occurred at 2:00 a.m., after Mr. Anjum had been awake for some time and it was a single vehicle run-off-road crash. In her opinion, though, other circumstances are not consistent with a falling asleep crash.

[111] In particular, Dr. Smiley noted that Mr. Anjum had only been driving for about 10 minutes, including four minutes on Highway 403, when the accident occurred, and it was not a particularly monotonous route. She concluded that Mr. Anjum would have had to steer actively on curves to follow the road path as he approached the point at which he left the roadway. In her view, this made it unlikely that he fell asleep and drifted off the road at a shallow angle, typical of drivers who fall asleep at the wheel, while doing so.

[112] In cross-examination, Ms. Smiley conceded that she made assumptions concerning the speed and angle at which the Anjum vehicle departed the road. Although she had expressed an opinion in her evidence in chief that the accident was caused by an unidentified motorist, she acknowledged in cross-examination that this opinion was not in her report, and that the opinion in her report was that Mr. Anjum was not asleep for an extended period of time leading up to the accident as he had to negotiate a number of turns on the ramp.

[113] Dr. Smiley acknowledged that she could not exclude the possibility that the accident was caused as a result of issues with performance, alertness or a short micro-sleep. In discussing the concept of micro-sleeps, Dr. Smiley conceded that they involve brief unintended episodes of loss of attention that can involve a blank stare or prolonged eye closure, like a long blink. The individual can fail to respond to outside information. Dr. Smiley admitted that microsleeps are

more common in individuals who are sleep deprived, especially when sleep deprivation is cumulative. At the time of the accident, the evidence indicated that Mr. Anjum had been awake for 19-21 hours.

[114] Dr. Adam Campbell is an expert in human factors involved in driver behaviour who prepared an expert report and gave affidavit and *viva voce* evidence on behalf of State Farm on the human factors issues relating to the accident. In Dr. Campbell's opinion, the subject collision cannot be determined to be similar or different than that expected of a drifting lane departure caused by a fatigued or asleep motorist, an active steering response, or the absence of response caused by inattention or poor navigation.

[115] Dr. Campbell calculated that the closest that Mr. Anjum's vehicle could have been to the wooden sign that was struck when another vehicle entered his lane was approximately 120 metres. Dr. Campbell expressed the view that, in light of typical human perception and response intervals of 1.6 seconds, and the estimated speed of the vehicle that Mr. Anjum was driving (68 kilometres per hour) he would have travelled about 30 metres before steering or hard braking could commence. There would still have been 90 metres between him and the wooden sign at that point.

[116] Dr. Campbell testified that assuming hard braking, Mr. Anjum's vehicle should have come to a complete stop in 26 metres, or 64 metres from the sign. Dr. Campbell expressed the view that only minimal intensity braking was required to avoid a collision with a lead vehicle, as it was travelling at essentially the same speed as Mr. Anjum and in the same direction. Therefore, hard braking, steering and the subsequent loss of control that Mr. Anjum has described would not likely have been necessary to avoid a collision with the alleged unidentified vehicle.

Issues to be Determined and Positions of the Parties

[117] There are two issues to be determined on this motion. First, whether the Plaintiffs have discharged their burden of proving that the accident was caused or contributed to by the negligence of an unidentified driver of an unidentified vehicle. If they have not, State Farm is not liable under the Policy. If they have discharge this burden, the second issue is whether the Plaintiffs have satisfied the evidentiary requirements of the OPCF-44 Family Protection Endorsement of the Policy.

[118] The Plaintiffs submit that the evidence overwhelmingly establishes that the accident was caused by an unidentified vehicle and that the account of Mr. Anjum is corroborated in at least two important respects by (a) the evidence of Ms. Rossi, an independent eyewitness, who confirmed that Mr. Anjum's vehicle was cut off by an unidentified vehicle, lost control, and crashed, and (b) the physical evidence that suggests that the crash occurred as a result of evasive driving.

[119] State Farm submits that the Plaintiffs have not met their burden of proof. State Farm submits that the documentary evidence weighs heavily in favour of it, and that the *viva voce* evidence of Mr. Anjum and other lay witnesses who testified in support of his claims lack

credibility, submitting that “much of this evidence seems to have been contrived a significant period of time after the accident for the purpose of making an insurance claim.” State Farm submits that the recovered recollection by Ms. Rossi of the involvement of another vehicle is unreliable, and should be given no weight. Further, State Farm submits that the Plaintiffs’ expert witnesses focused on immaterial issues, and made no definitive findings on whether or not there was an unidentified vehicle that was responsible for the accident.

Considerations in Assessing Credibility of Witnesses and Reliability of Evidence

[120] There are a number of authorities that provide guidance to trial judges on how to resolve issues of credibility and reliability of witnesses. One statement that has been cited in this court is that of O’Halloran J.A. in *R. v. Pressley* (1948), 94 CCC 29 (B.C.C.A.):

The Judge is not given a divine insight into the hearts and minds of the witnesses appearing before him. Justice does not descend automatically upon the best actor in the witness-box. The most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case.

See *Husky Injection Molding Systems Ltd. v Schad*, 2016 ONSC 2297 (CanLII), at para. 36, which also cites this passage.

[121] Another statement of the considerations that a judge should take into account in order to assess the credibility and reliability of a witness, that I have found helpful, is found in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), at paras. 9-11:

9. If a trial judge’s finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combined to produce what is called credibility, see *Raymond v. Bosanquet Tp.* (1919) 59 S.C.R. 452, at 460. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial judge and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

10. The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of

the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say “I believe him because I judge him to be telling the truth,” is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

11. The trial judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial judge with divine insight into the hearts and minds of the witnesses. And a court of appeal must be satisfied that the trial judge’s finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

Bearing in mind the guidance provided by these judicial statements, I turn to an assessment of the evidence as a whole.

Assessment of Evidence as a Whole

[122] The evidence that was tendered on the issue of whether the accident was caused by the negligence of an unidentified driver of an unidentified vehicle falls into several categories:

- a. The evidence of the 911 recording (and transcript of this recording) of Ms. Rossi’s telephone call reporting to the 911 operator immediately following the accident.
- b. The documentary evidence of the notes taken by Constable Pirie and the affidavit and *viva voce* evidence of Constable Pirie concerning her observations at the scene of the accident and her interview with Mr. Anjum soon after the accident occurred.
- c. The notes taken by various medical practitioners who spoke with Mr. Anjum soon after the accident and on the ensuing days.
- d. The affidavit and *viva voce* expert evidence of Scott Walters and David Porter who gave opinions relating to a reconstruction of the accident.
- e. The affidavit and *viva voce* expert evidence of Dr. Alison Smiley and Dr. Adam Campbell concerning their human factors assessments in relation to the accident.

- f. The affidavit and *viva voce* evidence of Ms. Rossi about how the accident happened.
- g. The affidavit and *viva voce* evidence of Mr. Anjum's son, Mr. Khawaja, about his discussions with his father following the accident, and his involvement in preparation of an accident benefits claim document that was submitted to State Farm.
- h. The affidavit and *viva voce* evidence of Mr. Anjum about his recollection of how the accident happened.

[123] I have considered the evidence as a whole in writing these reasons. I will now address each of the categories of evidence in the order set out above. This sequence is the most rational one for me to follow in order to assess the evidence as a whole and to make the necessary findings of fact, including findings of the credibility of some witnesses, and to make findings as to the reliability of the evidence.

[124] These findings have led me to conclude that the Plaintiffs have satisfied their burden of proving that the accident that led to the injuries suffered by Mr. Anjum was caused by the negligence of the unidentified driver of an unidentified vehicle. I also conclude that the evidence of Ms. Rossi qualifies as independent corroborative evidence that satisfies the evidentiary requirements of the OPCF-44 Family Protection Endorsement of the Policy.

911 Recording

[125] Both sides rely upon this evidence, and the observations of Ms. Rossi that were recorded in the 911 call were communicated to the 911 operator within seconds of the occurrence of the accident.

[126] Although Ms. Rossi testified that she had been drinking at the Rehab club before making the 911 call, and she accepted that she was intoxicated when she made the call, her statements to the 911 operator were clear about the actions of Mr. Anjum that she described. Ms. Rossi described what she had just seen, and I find that her vision was not affected by her reclining of her seat for comfort. I consider that the observations of Ms. Rossi that were recorded in the 911 call are reliable.

[127] In my view, there are four observations made by Ms. Rossi in the 911 call that are particularly significant.

[128] First, Ms. Rossi said that the car that went into the ditch (the car driven by Mr. Anjum) "flew off the ramp right in front of us". In another part of the call, she said that the car "just flew right in front of us and went right into the ditch". She used the word "flew" in other parts of the call. I attach significance to this observation because it shows that the vehicle driven by Mr. Anjum moved suddenly to the left, crossing in front of the car in which Ms. Rossi was a passenger. This sudden movement to the left of the car driven by Mr. Anjum is consistent with an active steering action.

[129] Second, the 911 recording records Ms. Rossi saying that “we almost even hit him”. I regard this as significant because it shows that the car in which Ms. Rossi was a passenger was very close behind the car driven by Mr. Anjum when it suddenly crossed in front of her. This would mean that either the car in which Ms. Rossi was a passenger suddenly accelerated, or the car driven by Mr. Anjum suddenly decelerated, with the result that the two vehicles, which had been separated by a safe distance, came so close together that they almost collided. In my view, this observation is consistent only with braking by Mr. Anjum, since there would be no reason for the car in which Ms. Rossi was a passenger to suddenly accelerate on the exit ramp, and there was no evidence of such an acceleration. To the contrary, the evidence of Mr. Owen was that Ms. Rossi told him that the car in which Ms. Rossi was a passenger braked suddenly.

[130] Third, Ms. Rossi was asked by the 911 operator “how was his [Mr. Anjum’s] driving before the accident?” and she responded “[I]t was fine”. I consider this evidence to be significant because there was no observation by Ms. Rossi that Mr. Anjum’s car was drifting out of its lane, or of any appearance of lack of attention by Mr. Anjum before the accident. This evidence is consistent with sudden braking by Mr. Anjum, and a sudden movement of Mr. Anjum’s car to the left, where the car in which Ms. Rossi was a passenger almost hit it, before it went into the ditch on the left side of the ramp.

[131] Fourth, during the entire two minute 911 call, involving many questions by the 911 operator and many answers by Ms. Rossi, Ms. Rossi never mentioned the involvement of another car as contributing in any way to the accident. According to State Farm, Ms. Rossi described on the 911 call what she saw – she saw Mr. Anjum’s car fly off the road in front of them. And, as State Farm submits, “[t]hat is all she saw”.

[132] I do not agree that Ms. Rossi’s failure to say anything on the 911 call about the involvement of another vehicle necessarily leads to the conclusion that she did not observe another vehicle. Ms. Rossi was cross-examined about why she did not say anything on the 911 call about the involvement of another vehicle, and she responded that she was not asked about this. I will address her evidence in this respect more fully when I consider her affidavit and *viva voce* evidence.

Constable Pirie’s Interview with Mr. Anjum

[133] The next category of evidence that I consider important to consider is the evidence of Constable Pirie’s interview with Mr. Anjum at the Trillium Health Centre, consisting of her notes, her affidavit, and her *viva voce* testimony. In my view, there are two significant aspects to Constable Pirie’s testimony concerning this interview and her notes.

[134] First, her evidence, corroborated by her notes, was that she asked Mr. Anjum “[d]o you know what happened?” and he responded “I brake and turn left”. This evidence is important, because this description of the actions taken by Mr. Anjum that led to the accident is consistent with the observations of Ms. Rossi as recorded in the 911 call, that Mr. Anjum’s vehicle suddenly decelerated, as a result of braking, and moved left crossing in front of and so close to the car in which Ms. Rossi was a passenger that this car almost hit the car that Mr. Anjum was driving.

[135] The second significant aspect to the evidence of Constable Pirie's interview of Mr. Anjum and her notes of this interview is that the notes do not make any reference to a statement by Mr. Anjum that his driving actions were taken as evasive manoeuvres in response to being cut off by an unidentified motorist. I accept Constable Pirie's evidence that she recorded in her notes all of the material information given by Mr. Anjum concerning how the accident happened and, therefore, I find that Mr. Anjum did not tell her that he had been cut off by another driver. Nevertheless, the fact that Mr. Anjum, on the occasion of this interview that occurred shortly after the accident, did not say that the accident was caused by the involvement of an unidentified motorist does not necessarily lead to the conclusion that no unidentified motorist was involved.

[136] Neither party submitted that Constable Pirie did not accurately record the question she asked Mr. Anjum and his answer with respect to what happened. In my view, Mr. Anjum's description of what happened as conveyed to Constable Pirie, that he braked and turned left, is reliable evidence of the driving actions taken by Mr. Anjum immediately before the car he was driving crossed suddenly in front of the car in which Ms. Rossi was a passenger, and entered the ditch. This answer was given within a very short time following the accident, and it was given following warnings by Constable Pirie of the importance of truthful answers to her questions. The actions of braking and turning left are active driving actions that are not consistent with inattention due to falling asleep, momentary loss of focus due to drowsiness, "microsleeps", or inattention for other reasons.

[137] Constable Pirie agreed in cross-examination that there was nowhere to turn at this location, and she accepted that Mr. Anjum turned into the ditch. This is important when I consider the evidence taken as a whole, because I will have to consider whether such apparently active driving actions by Mr. Anjum, sudden braking and turning left, and driving into the ditch, at a place on the exit ramp where there is nowhere to turn, in the absence of the involvement of another vehicle that caused Mr. Anjum to take actions to avoid a possible collision, can be reconciled with all of the other evidence.

Paramedic and Medical Records

[138] The records put into evidence by State Farm, viewed and considered on their own, are evidence that could support a finding that Mr. Anjum did not tell any of these various persons over 14 days following the accident that an unidentified motor vehicle was involved in the accident. The records do not, however, include a note of any direct question put to Mr. Anjum about whether an unidentified vehicle cut him off and caused the accident, or an affirmative statement from him that no other vehicle was involved.

[139] The notes, standing alone, may be evidence that would support an inference that there was no other vehicle involved, on the basis of a submission that one might reasonably have expected Mr. Anjum, when the circumstances of the accident were being discussed, to have said that he was cut off by another vehicle. But, the notes must be considered as part of an overall assessment of the evidence.

Accident Reconstruction Expert Evidence

[140] When I consider the accident reconstruction expert evidence, I do so in the context of the non-expert evidence concerning the accident. In particular, the evidence of Ms. Rossi's description of the accident in the 911 call has satisfied me that Mr. Anjum applied the brakes to his car to slow its speed and that the car in which he was driving turned suddenly to the left, requiring the driver of the car in which Ms. Rossi was a passenger to brake suddenly to avoid a collision, as Mr. Anjum's car flew across the road and into the ditch.

[141] I do not regard the accident reconstruction expert evidence of Mr. Walters, in itself, to prove the speed of Mr. Anjum's vehicle as it exited the roadway, or the orientation of the vehicle in relation to the roadway as it left the roadway. However, the evidence of braking and a sudden left turn that I accept based on the observations of Ms. Rossi as expressed to the 911 operator, which is supported by the statement made by Mr. Anjum to Constable Pirie soon after the accident, is consistent with the conclusions reached by Mr. Walters.

Human Factors Expert Evidence

[142] If I were to consider the human factors expert evidence on its own, I would conclude that the expert evidence of Dr. Smiley is not sufficient to prove that the accident was caused by the involvement of an unidentified vehicle. However, the evidence of Dr. Smiley that Mr. Anjum, as he approached the point at which his car left the roadway, would have had to steer actively on curves to follow the road path is, when considered with the evidence as a whole, consistent with sudden braking and active steering of the vehicle leftward as an evasive manoeuvre caused by a sudden movement of a car in front into his lane.

Ms. Rossi

[143] Ms. Rossi was a witness who was in a position to see the accident as it occurred. She is unrelated to the Plaintiffs. She has no stake in the outcome of this litigation and there was no evidence elicited during the hearing of this motion that would lead me to conclude that Ms. Rossi had any motive not to tell the truth.

[144] The main theory of the case advanced by State Farm, especially with respect to the evidence of Mr. Anjum and of his son, Mr. Khawaja, is that their evidence should not be accepted because it was contrived a significant period of time after the accident for the purpose of making an insurance claim. State Farm submits that the expert witnesses called by the Plaintiffs made no definitive findings on whether or not there was an unidentified vehicle that was responsible for the accident. In my view, whether the plaintiffs have discharged their burden of proving that the accident was caused by the negligence of the driver of an unidentified vehicle turns substantially on my assessment of the evidence given by Ms. Rossi in the context of all of the fact evidence and expert evidence.

[145] Ms. Rossi was questioned in cross-examination about (i) the fact that she did not tell the 911 operator that another car had cut off the car driven by Mr. Anjum, and (ii) the conflicts between the evidence given in her affidavit and on the hearing of the motion, and her statements made to Ms. Norris and Mr. Owen.

[146] She explained that she did not tell the 911 operator that another car had cut off Mr. Anjum's car because they did not ask her. She said that she was concerned about getting emergency attention for Mr. Anjum right away. I do not regard this explanation to be surprising, or not credible. Ms. Rossi had just witnessed an apparently serious automobile accident where the driver urgently needed emergency medical attention. The way in which the accident had come about was, in this context, not material to the need to summon emergency medical attention. Therefore, I do not regard the failure of Ms. Rossi to say anything to the 911 operator about the involvement of an unidentified motorist as reflecting adversely on whether her evidence is credible and reliable.

[147] Counsel for State Farm describes the recovered recollection of Ms. Rossi, "after more than 5 years of amnesia", as "miraculous", and submits that the recovered recollection is devoid of any credibility or weight. State Farm submits that this recovered recollection should attract a negative inference rather than support the Plaintiffs' case. State Farm submits that Ms. Rossi's evidence does not qualify as corroborative evidence of an independent witness.

[148] I have carefully considered the evidence given by Ms. Rossi, having particular regard to whether her evidence is in harmony "with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions", using the language quoted above from the decision of the British Columbia Court of Appeal in *Faryna*.

[149] I find that the evidence given by Ms. Rossi's in her affidavit and at the hearing of this motion is both credible and reliable. I have made this finding for several reasons:

- a. Ms. Rossi had no motive to fabricate a false description of the accident. Even counsel for State Farm, in his closing oral submissions, did not submit that Ms. Rossi was intentionally not telling the truth in her evidence under oath, but only that I should regard her evidence as unreliable, and give it no weight, given the circumstances in which her recollections were recovered.
- b. I do not accept that Ms. Rossi was too intoxicated to have observed the accident, or that she could not clearly see the road because she had reclined her seat to make it more comfortable for her. I accept Ms. Rossi's evidence that she could see the road in front her when the accident occurred. This was also clear from her exchanges with the 911 operator.
- c. The involvement of another motorist who suddenly cut off the car driven by Mr. Anjum explains what would otherwise be inexplicable driving behaviour by Mr. Anjum, suddenly braking and turning left, and flying across the ramp into the ditch. The evidence, especially the recording of the 911 call and the notes taken by Constable Pirie of Mr. Anjum's description of what happened ("I brake and turn left"), strongly supports my findings that these active braking and steering actions were taken by Mr. Anjum.

- d. Constable Pirie's evidence that there was nowhere to turn at this location on the ramp makes the active braking and steering of the vehicle by Mr. Anjum inexplicable, absent a need for a sudden and evasive manoeuvre to avoid a possible collision caused by the actions of another motorist. These actions are not consistent with an accident caused by falling asleep, drowsiness, momentary inattention, micro-sleeps, or any other theory advanced at the hearing of this motion and supported by evidence.
- e. I do not agree that because Ms. Rossi's recollection changed after she first spoke to Ms. Norris and Mr. Owen, and after she took steps to try to recall the accident more clearly, should give rise to a negative inference. The fact that Ms. Rossi testified at the hearing of this motion and explained how her recollection had changed, that she clearly remembered the third car and that, as she put it, it all came back to her, made her evidence credible and reliable. I accept that the steps that Ms. Rossi took to try better to remember what had happened did, as she testified, refresh her recollections.
- f. The evidence given by Ms. Rossi about the involvement of another vehicle is consistent with the evidence given by Mr. Khawaja and the evidence of Mr. Anjum.

Mr. Khawaja

[150] Mr. Khawaja was clear in his evidence that his father told him when they first spoke about the accident that another vehicle cut him off and that, to avoid a collision, he swerved to the left and that his car went into a ditch. The accident benefits application form that Mr. Khawaja testified he completed for his father on October 25, 2011 also states that another car cut off Mr. Anjum's vehicle.

[151] I do not regard the discrepancy between Mr. Khawaja's recollection that he described the accident to State Farm on the Sunday or Monday following the accident with the file notes of State Farm that do not disclose any communication of the involvement of an unidentified vehicle until November 1 to be sufficiently material for me to find Mr. Khawaja not to be credible or to find his evidence to be unreliable. On the whole, Mr. Khawaja's evidence was not undermined in cross-examination.

[152] In the context of all of the evidence, assessed as a whole, I find Mr. Khawaja's evidence to be credible and reliable.

Mr. Anjum

[153] Counsel for the Plaintiffs candidly acknowledged the frailties of Mr. Anjum's evidence.

[154] Mr. Anjum gave evidence that he clearly remembered the accident, and he described it consistently with the description given in the evidence of Ms. Rossi. However, Mr. Anjum's evidence that he could not recall his discussions with police officers or medical attendants or practitioners, although possible, did not seem plausible, given that he had remembered these

discussions when he was examined for discovery in 2014. In addition, the fact that the notes taken by Sgt. Robertson and Constable Pirie, and those taken by medical practitioners over the following two weeks after the accident do not refer to the involvement of an unidentified motorist would, absent other evidence, cast doubt on the evidence given by Mr. Anjum about how the accident occurred.

[155] However, the statement that Mr. Anjum made to Constable Pirie when he was first asked how the accident happened (“I brake and turn left”) is consistent with the observations of Ms. Rossi in the 911 call, in her affidavit, and in her *viva voce* evidence concerning the driving behaviour of Mr. Anjum just before his car crashed into the ditch. I am influenced in my assessment of the evidence by the fact that there would have been no reason for a driver who was awake and able to apply the brakes and actively steer a vehicle to suddenly brake and turn left at this location on the ramp and drive into the ditch. Constable Pirie, when she was asked about this in cross-examination, agreed.

[156] State Farm takes the position that whether Mr. Anjum fell asleep or not is a “phantom issue”, and that it does not need to prove that Mr. Anjum was asleep to succeed on this motion. State Farm is correct that it does not need to prove that Mr. Anjum fell asleep or, indeed, to prove anything about the cause of the accident. The burden of proof is on the Plaintiffs. Nevertheless, there was no theory advanced on behalf of State Farm, supported by evidence, that would explain why a driver would suddenly brake and turn left into a ditch, unless these actions were perceived to be needed to avoid a collision because of the actions of another motorist.

[157] I accept that, absent corroborative independent evidence proving the involvement of an unidentified vehicle, or physical evidence proving such involvement, the evidence of Mr. Anjum, standing alone, may not have been sufficient for the Plaintiffs to discharge their burden of proving that the accident was caused by the negligence of an unidentified motorist. However, Ms. Rossi’s evidence is independent, and I have found that her evidence is credible and reliable. I have also found that the evidence of Mr. Khawaja is credible and reliable. And, in the context of my assessment of all of the evidence, I find that Mr. Anjum’s evidence concerning how the accident occurred is credible and reliable.

[158] For these reasons, I have concluded that the Plaintiffs have discharged their burden of proving that the accident involving the vehicle driven by Mr. Anjum early in the morning of October 16, 2011 that led to the injuries in respect of which the Plaintiffs claim damages was caused by the negligence of an unidentified driver of an unidentified vehicle.

Whether the Plaintiffs Satisfied the Evidentiary Requirements of the OPCF-44 Family Protection Endorsement

[159] When this motion for summary judgment was first brought in 2015, the Plaintiffs and State Farm did not know that there was a witness to the accident. The identity of Ms. Rossi was only discovered when the recording of the 911 call was received by the parties earlier this year.

[160] Section 3 of the OPCF-44R Family Protection Coverage endorsement provides that the insurer shall indemnify eligible claimants for any amounts they are legally entitled to recover

from an inadequately insured motorist for compensatory damages in respect of bodily injury arising from the use of an automobile. Section 1.5 (D) of this endorsement defines an “inadequately insured motorist” as the driver of an unidentified automobile, provided that the eligible claimant’s own evidence of the involvement of such automobile must be corroborated by “other material evidence”, meaning (i) an independent witness, or (ii) physical evidence indicating the involvement of an unidentified automobile.

[161] Given the findings I have made that the evidence of Ms. Rossi is credible and reliable, her evidence is corroboration by an independent witness of the evidence of Mr. Anjum. Therefore, the Plaintiffs have satisfied the evidentiary requirements of the OPCF-44R Family Protection Coverage endorsement.

[162] I have considered the expert evidence relating to accident reconstruction as well as the expert evidence relating to human factors as they relate to this accident that was tendered on behalf of the Plaintiffs. This expert evidence, assessed alone, would not have been sufficient for the Plaintiffs to discharge their burden of proving that the accident was caused by the negligence of an unidentified motorist.

[163] The burden of satisfying the evidentiary requirement for the Family Protection Coverage endorsement is, however, lower than the burden of proving negligence on the part of the driver of an unidentified vehicle. To satisfy this evidentiary requirement, absent corroborative evidence from an independent witness, the Plaintiffs need only tender physical evidence “indicating the involvement of an unidentified automobile”. Nevertheless, given my finding that the evidence of Ms. Rossi is credible and reliable, I do not find it necessary to decide whether the expert evidence tendered on behalf of the Plaintiffs is sufficient to satisfy the requirement for physical evidence indicating the involvement of an unidentified automobile.

[164] I therefore conclude that the Plaintiffs have satisfied the evidentiary requirements of the OPCF-44 Family Protection Coverage endorsement of the Policy.

Whether Mr. Anjum was Contributorily Negligent

[165] In his closing submissions, counsel for the Plaintiffs submitted that there was no evidence of any contributory negligence on the part of Mr. Anjum. In his submission, if I were to find that there was an unidentified vehicle involved in the accident, as described in the evidence of Mr. Anjum and Ms. Rossi, it is not open to the court to apportion fault for the accident to Mr. Anjum. In his submissions, counsel for State Farm did not take issue with this submission.

[166] Having consider the evidence in its entirety, and given that I have found the evidence of Ms. Rossi and Mr. Anjum with respect to how the accident occurred to be credible and reliable, there is no evidentiary basis for finding of contributory negligence on the part of Mr. Anjum.

[167] Therefore, I conclude that the accident was caused by the negligence of the unidentified driver of the unidentified vehicle described in the evidence of Ms. Rossi and Mr. Anjum, without contributory negligence on the part of Mr. Anjum.

[168] For these reasons, State Farm's motion for summary judgment is dismissed and I grant a declaratory judgment in favour of the Plaintiffs in the terms set forth in paragraph 2 b. of these Reasons for Judgment.

Costs

[169] Counsel shall make written submissions on costs, with the Plaintiffs' submissions to be made within 20 days and State Farm's written submissions to be made within 10 days of receipt of the Plaintiffs' submissions. The submissions, excluding costs outlines, shall not exceed 5 pages, double spaced.

Mr. Justice P. J. Cavanagh

Released: December 12, 2016

CITATION: Anjum v. John Doe and State Farm, 2016 ONSC 7784
COURT FILE NO.: CV-13-490598
DATE: 20161212

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ANJUM ANJUM and MUSART HAYEE

Plaintiffs

– and –

JOHN DOE AND STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY

Defendants

REASONS FOR JUDGMENT

P. J. Cavanagh J.

Released: December 12, 2016