CITATION: Dervisholli et al. and Cervenak and State Farm, 2015 ONSC 2286
DIVISIONAL COURT FILE NO.: DC-12-427
DATE: 20150424

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Marrocco ACJ, Kent and M. Edwards JJ.

B E T W E E N :	)	
	)	
Mirjeta Dervisholli, Fatmir Dervisholli, Fatlum Dervisholli, Flamur Dervisholli and Leonora Dervisholli by their Litigation Guardian Hamide Dervisholli, the said Hamide Dervisholli	)	*Sabrina Singh*, for the Plaintiffs/Respondents
Plaintiffs/Respondents	)	
- and -	)	
Roman Cervenak	)	
Defendant/Respondent	)	
- and –	)	
State Farm Mutual Automobile Insurance Company Added by Order pursuant to Section 258(14) of the *Insurance Act* R.S.O. 1990, c.I.8 as amended	)	*Jonathan J. Barr and Benjamin J. Flanagan*, for the Statutory Third Party/Appellant
Statutory Third Party/Appellant	)	**HEARD at Hamilton:** February 24, 2015

M. EDWARDS J.:

Overview

[1] This appeal raises the issue of whether an insurer, which has issued a policy of insurance covering third party liability for the defendant's motor vehicle, may retain the same defence counsel in both the tort action and in the plaintiff's claim for accident benefits.

[2] The Insurance Bureau of Canada ("IBC"), in its Internal Bulletin 184 dated July 22, 1997 ("the Bulletin"), provides the following advice to its members:

> …Where the same insurer insures both the tortfeaser for liability coverage and the victim for accident benefits, they should set-up 'Chinese walls' so that information gathered by it regarding the accident benefits claim does not become available to the tort adjuster, unless the insured so authorizes. The tort adjuster must rely solely on the *Rules of Civil Procedure* to obtain the information on the plaintiff's medical condition or on amounts she/he has received as accident benefits.

The Bulletin has been the subject-matter of some judicial comment, and while not binding on this court, it appears to have been accepted within the insurance industry as the standard by which an insurance company should govern itself when it finds itself in the position of defending both the tort and accident benefit claim of the plaintiff. While the Bulletin refers to a "Chinese wall", I will use the more neutral terminology of a "firewall".

The Facts

[3] The plaintiff, Mirjeta Dervisholli ("the plaintiff"), alleges that she was involved in a motor vehicle collision which occurred on October 29, 2007 ("the Accident"). The plaintiff claims that she suffered injuries in the collision with the defendant, Roman Cervenak ("Cervenak"). By pure coincidence, State Farm Mutual Automobile Insurance Company ("State Farm") insured both the plaintiff's vehicle and the Cervenak vehicle pursuant to separate and distinct automobile policies.

[4] In addition to her tort claim, the plaintiff applied to State Farm for statutory accident benefits under her own policy of insurance. State Farm investigated the claim and retained the law firm of Reisler Franklin ("Reisler") to examine the plaintiff under oath pursuant to the Statutory Accident Benefits Schedule. State Farm also obtained accident reconstruction reports with respect to the accident itself. These reconstruction reports were presumably obtained given the allegation by State Farm that the accident was staged. State Farm has not to date produced any experts report that supports the allegation of a staged accident.

[5] As a result of its investigation State Farm has taken the position that the plaintiff and the defendant, Cervenak, planned and staged the collision and/or that the collision

did not occur as alleged by the plaintiff. As a result of this investigation State Farm denied coverage to the plaintiff under her policy and also denied coverage to the defendant, Cervenak, under his policy.

[6] At the time that State Farm initially retained Reisler on July 21, 2008, State Farm, without the consent of the plaintiff, provided Reisler with the plaintiff's complete accident benefits file ("AB"). State Farm paid accident benefits to the plaintiff until February 16, 2009 when benefits were terminated.

[7] A tort action was commenced by the plaintiff against the defendant, and also against State Farm pursuant to section 265 of the *Insurance Act* which provides both uninsured and underinsured coverage to the plaintiff pursuant to her own policy of insurance. The statement of claim was issued on October 15, 2009.

[8] With the denial of her ongoing claim for accident benefits, the plaintiff disputed the denial and commenced arbitration proceedings before the Financial Services Commission of Ontario ("FSCO") on October 29, 2010. State Farm retained Reisler on January 6, 2011 to defend it in the arbitration proceedings at FSCO.

[9] Reisler wrote to counsel for the plaintiff on October 13, 2010, advising that they had been retained in the tort action to represent "the interests of the defendants regarding the above-noted matter". At the time of this representation to plaintiff's counsel, there was no indication from State Farm that it would be taking an off-coverage position.

[10] On February 22, 2011, State Farm was added to this action as a statutory third party pursuant to the order of Carpenter-Gunn J. dated February 22, 2011.

[11] On February 24, 2011 and again on June 10, 2011, plaintiff's counsel received correspondence from Reisler indicating that they represented State Farm not only in its capacity as the statutory third party, but also as the underinsurer pursuant to the plaintiff's policy of insurance with State Farm. A Statement of Defence was sent to plaintiff's counsel in which Reisler purported to defend both Cervenak and State Farm. This defence was not filed with the court and as such Reisler never formally was "on the record" for both State Farm and Cervenak.

[12] On June 23, 2011, plaintiff's counsel received a Notice of Intent to Defend from a different law firm; Pavoni, Patton, DiVincenzo ("Pavoni"), which confirmed that Pavoni had been retained to represent State Farm in its capacity as the plaintiff's underinsurer.

[13] On November 17, 2011, plaintiff's counsel received a defence from Reisler, confirming that Reisler was only representing State Farm in its capacity as the statutory third party.

[14] On July 25, 2012, State Farm delivered its sworn affidavit of documents in its capacity as the statutory third party. The affidavit of documents listed documents in relation to the plaintiff's accident benefit file, as well as transcripts from the examinations under oath of not only the plaintiff, but other claimants from the same accident including

passengers who had been in the Cervenak vehicle. There is no evidence before this court that confirms these other claimants gave State Farm their consent to the release of this information from their accident benefits file.

Decision of the Motion Judge

[15] The plaintiff's motion to remove Reisler as solicitor of record for the defendant, Cervenak, came before Hambly J. on December 10, 2012. After a thorough review of the facts Hambly J. began his analysis of the law by reference to a decision of Lederer J., *Ernst and Young v. Chartis Insurance Co. of Canada*, [2012] O.J. No. 4399, dealing with the relationship between an insured and an insurer as one where an insurer owes a duty of good faith to its insured. Such a relationship is in contrast to the relationship between an insurer and a claimant against its insured where no such duty exists. This is because the claimant is a stranger to the relationship between the insurer and the insured and there is no privity of contract.

[16] Having dealt with the relationship between an insured and an insurer, Hambly J. then dealt with the Divisional Court decision of *Klingbeil (Litigation Guardian of) v. Worthington Trucking Inc.,* [1999] O.J. No. 867. Hambly J. distinguished the facts in *Klingbeil* by noting that in *Klingbeil* the plaintiff was an infant and, as such, did not have a policy of motor vehicle insurance. The plaintiff was struck by a motor vehicle when she was a pedestrian, and claimed accident benefits from the insurer of the owner of the vehicle which had struck her. The plaintiff then commenced a tort action against the owner of the motor vehicle. The action was defended by the same insurer. The same law firm represented the insurer in both the accident benefits claim and the tort action. The plaintiff brought a motion to remove the law firm and solicitors of record in the tort action. The matter came before Ferrier J., who referred to the Bulletin and removed the law firm on the basis of a conflict of interest.

[17] When the matter came before the Divisional Court, the decision of Ferrier J. was reversed on the basis of the very brief two paragraph decision of Matlow J. in *Stratton v. Senger,* [1996] O.J. No. 4774, where Matlow J. held:

> With respect, I see no "appearance of impropriety" or "possibility of unfairness" in permitting Fireman Regan to continue to act for the defendant. The plaintiffs chose to rely on the statutory scheme set out in the Insurance Act to claim accident benefits from the defendant's insurer. The insurer was not, as a result, obliged to segregate or isolate the information provided by the plaintiff in pursuit of his claim when it came to conduct the defendant's defence. It follows, as a matter of logic, that it could obtain the services of the same firm of solicitors for matters pertaining to the accident benefits claim and for the defence of this action. There would be no point in requiring the insurer to retain separate solicitors for each purpose…

[18] In coming to the decision that it did, in reliance on the aforementioned decision of Matlow J., the Divisional Court held:

> The court agrees with the disposition of this issue by Matlow J. Where the defendants rely on the statutory scheme set out in the Insurance Act to claim no-fault benefits from the defendant's insurer, the insurer ought not, as a matter of course in a subsequent tort action by the plaintiffs, be required to retain separate solicitors for the no-fault claim and the defence of the tort action.

[19] Having reviewed the decision of Ferrier J. in *Klingbeil* and the decision of the Divisional Court in *Klingbeil* which reversed the decision of Ferrier J., Hambly J. came to the following conclusion:

> What distinguishes this case from *Kingbeil* (sic) is that the plaintiff in this case has a policy of insurance with State Farm in which she claims accident benefits. Reisler Franklin represents State Farm in Hamid's claim for accident benefits against State Farm under her policy of insurance with State Farm. It also represents State Farm in Hamid's tort action against its insured, Cervenak, under his policy of insurance with State Farm. Notwithstanding that a different lawyer in the law firm acts in each matter Reisler Franklin makes no pretense of erecting a "Chinese wall" or maintaining a "code of silence" between its files in the accident benefits claim and in defending the tort action. It is openly using documents and information obtained from Hamid in the accident benefits claim in defending the tort action. In doing so it is acting contrary to its privacy notice on its public website. Reisler Franklin in ensuring that State Farm acts in good faith towards Hamid in her claim for accident benefits under her policy of insurance with State Farm conflicts with it (sic) duty to Cervenak in defending Hamid's claim against him. State Farm and hence its solicitors owes no duty to Hamid in the tort action brought by her against its insured. By acting for State Farm in both matters Reisler Franklin is acting in contravention of the principles cited in *MacDonald Estates*. It is in a clear position of conflict of interest.

The Decision of the Leave to Appeal Justice

[20] Leave to appeal was sought from the decision of Hambly J. before Arrell J., who granted State Farm leave to appeal largely because the decision of Hambly J. was in conflict with *Klingbeil*. Arrell J. came to the conclusion, based on section 270 of the *Insurance Act*, that the plaintiff in *Klingbeil* was "a named insured under the defendant's

policy with the same rights and obligations as the plaintiff in the case at bar, as a named insured under her policy with State Farm". Arrell J. came to the conclusion that:

> From a fact perspective between the case at bar and *Klingbeil*, little turns on whether the plaintiff is suing her own insurer or the defendants insurer, as the claim for AB benefits is a statutory claim and identical coverage is provided in either scenario under section 270 of the Insurance Act.

Standard of Review

[21] Both parties agree that the issue of whether Reisler is in a conflict of interest position involves the application of legal standards to a set of facts which are not in dispute. The standard of review is correctness.

[22] In their factums both parties agree that the issues in this appeal have significant precedential value, as it relates to matters important not only to the parties themselves, but which will also have a significant impact on the rights of motor vehicle accident claimants, insurance industry practices and are also a matter of public interest. In his judgment granting leave to appeal, Arrell J. also noted that the outcome of the appeal was of some significance to the personal injury bar and the insurance industry.

Position of the Plaintiff

[23] Counsel for the plaintiff notes that since the *Klingbeil* decision much has changed and, in particular, emphasis is placed on the fact that section 258.3 of the *Insurance Act* now requires a plaintiff to apply for statutory accident benefits before commencing a tort claim. Section 258.3 of the *Insurance Act* was introduced as part of the Bill 59 amendments effective November 1, 1996 and, as such, came into force and applies to motor vehicle accidents after November 1, 1996. The motor vehicle accident which was the subject matter of *Klingbeil* occurred on February 3, 1995. The plaintiff in *Klingbeil* was not required as a matter of law to apply for statutory accident benefits prior to the commencement of her tort claim.

[24] Counsel for the plaintiff emphasizes that because of the mandatory nature of section 258.3 of the *Insurance Act*, the plaintiff being obliged to apply for statutory accident benefits must, if requested, submit to independent medical examinations at the behest of her statutory accident benefits insurer, State Farm. She is also required to disclose all of her relevant health information to State Farm. This is a contractual obligation that the plaintiff has with State Farm.

[25] In addition to her obligation to submit to an independent medical examination and provide relevant health information, the plaintiff has an obligation within the context of her accident benefit claim to speak directly to the accident benefit carrier, State Farm, something which State Farm in its capacity as the insurer of Cervenak in tort action does not have the right to do.

[26] While there is no dispute that the plaintiff, in her tort action, would be obliged to produce much of what is contained in the file contents of State Farm in its capacity as accident benefit carrier, counsel for the plaintiff emphasizes that the prejudice in the production of this information flows from the fact that the documentation and information given to State Farm, in its capacity as the accident benefit carrier, were given by the plaintiff in a situation where the plaintiff had a reasonable expectation of privacy.

[27] Counsel for the plaintiff argues that merely because State Farm has added itself as a statutory third party cannot mean that State Farm can breach the privacy rights of its insured. Just because the plaintiff will have to produce the documentation contained in her accident benefit file, cannot mean that the plaintiff has waived her rights to privacy or waived her rights not to disclose to State Farm these documents in its capacity as the insurer of the tortfeasor. The obligation on the part of the plaintiff to disclose the contents of the accident benefit file is triggered by the plaintiff's obligation to produce relevant documents in accordance with the provisions of the *Rules of Civil Procedure* ("the *Rules*").

[28] Counsel for the plaintiff argues that the information which State Farm receives from its insured, in its capacity as the accident benefit carrier, clearly establishes that the information was provided in a situation where the plaintiff expected that the documentation and information provided was in a situation of confidence. As such, counsel for the plaintiff argues in reliance on the decision of Sopinka J. in *MacDonald Estate v. Martins*, [1993] S.C.R. 1235, having provided her medical and other private information to State Farm in a situation of confidence that an inference of prejudice should be inferred.

[29] Counsel for the plaintiff notes that not only did State Farm produce in its affidavit of documents relevant information from the plaintiff's accident benefit file, but also relevant information from the accident benefit files of other parties who have their own distinct accident benefit claims. Specifically, reference is made to the fact that State Farm disclosed the transcripts of the examinations under oath of the other parties involved in the alleged motor vehicle accident. Counsel for the plaintiff argues that this is a clear breach of the privacy of those other claimants.

[30] As to the application of the *Klingbeil* decision, counsel for the plaintiff argues that *Klingbeil* should, in essence, be restricted to the specific facts that were before the Divisional Court in 1999. It is suggested that both *Klingbeil* and *Stratton* carve out a distinction between the specific scenario where an applicant makes a claim for accident benefits to the tort defendants insurer from the more typical situation where an applicant claims from her own insurer, thereby allowing for an exception to the firewall principle and thus finding there was no conflict of interest in those cases. In the case at bar, the plaintiff did not apply for accident benefits from the defendant's insurer, but rather made the application to her own insurance company pursuant to her own policy of insurance.

[31] While counsel for the plaintiff argues that *Klingbeil* can be distinguished on its facts, given that the plaintiff's claim in *Klingbeil* for accident benefits was against the

defendant's insurer, nonetheless, counsel for the plaintiff argues that to maintain the distinction carved out in *Klingbeil* and *Stratton* would result in the creation of two tiers of accident benefit claimants. The first tier would be one which is afforded no privacy protection where the plaintiff applies for accident benefits under the defendant's policy. The second tier would be the tier presently before this court, where the claim for accident benefits is made by the plaintiff pursuant to her own policy and, as such, would be afforded privacy protection.

Position of State Farm

[32] The position of State Farm is relatively simple. In essence, counsel for State Farm argues that the motions judge, Hambly J., did not have a proper basis to distinguish *Klingbeil*, i.e. a distinguishing factor between an accident benefit claim by a named insured versus a deemed insured.

[33] As well, counsel for State Farm argues that there is no prejudice in Reisler continuing to act for State Farm in its capacity as both the insurer of the tortfeasor as well as providing accident benefits to the plaintiff. In that regard, it is argued that anything that is contained in the plaintiff's accident benefit file, to which State Farm would have access, would be producible by the plaintiff in the tort action. As such, there is no risk of any prejudice in allowing Reisler to continue to act, as Reisler would not be giving State Farm anything that State Farm did not already have.

[34] It is conceded in the factum filed by counsel for State Farm on this appeal that the direction to the insurance industry, which is clearly spelled out in the Bulletin, is respected by insurers in terms of how an insurer manages the conflict between its role as accident benefit carrier and its duty to defend a tortfeasor. It is worth setting forth State Farm's position, as set forth in paragraph 52 of its factum which reads as follows:

> Typically, insurers maintain a "firewall" between the evidence obtained from a plaintiff's accident benefits claim and evidence obtained in the course of defending a tortfeasor in a civil action. When an insurer retains counsel to defend a tortfeasor, the insurer does not provide defence counsel with the evidence from the plaintiff's accident benefits file. There is a very good reason for that: the tortfeasor does not have the right to obtain evidence directly from the plaintiff's accident benefits insurer. Rather, the tortfeasor must use the mechanisms in the *Rules* to obtain the evidence in the possession of a non-party, including the plaintiff's insurer(s). If the tortfeasor *did* obtain the documents directly from the plaintiff's accident benefits insurer, the tortfeasor would be in breach of the *Rules of Civil Procedure*, and the insurance company would be in breach of the plaintiff's privacy rights.

[35] Having recognized its obligation to comply with the direction set forth in the Bulletin, State Farm then suggests that it has no obligation to maintain a firewall where defence counsel acts for the insurer and not the tortfeasor. This is because State Farm argues there is no risk that evidence from the plaintiff's accident benefit claim will be provided to the tort defendant, except as required by the *Rules of Civil* Procedure. State Farm argues that its obligation to comply with the *Rules* ensures respect for the plaintiff's privacy rights.

[36] Finally, State Farm argues there is no reason why State Farm, in its capacity as a statutory third party, should be required to maintain a firewall with State Farm acting in its capacity as the accident benefit insurer. This is because State Farm is one company defending itself against claims both in tort and accident benefits made by the plaintiff. By analogy, State Farm suggests that if the situation was different and State Farm was an individual being sued by the plaintiff in two different proceedings, it would be absurd to suggest that State Farm would have to retain different counsel in each context.

Analysis

[37] What is lost in State Farm's argument before this court is that State Farm is not any ordinary individual. It is an insurance company, which in the context of this litigation occupies two unique roles with distinct duties. The first is its obligation to defend the defendant, Cervenak, in the tort action. State Farm has taken an off-coverage position, as is its right, and added itself as a statutory third party utilizing the services of Reisler to defend it in that capacity. Its other role is that of the accident benefit insurer of the plaintiff. In its capacity as the accident benefit insurer, State Farm owes the plaintiff a duty of good faith arising out of its fiduciary obligations, see *Beasley and Scott v. Barrand,* [2010] O.J. No. 1466 at paragraph 34.

[38] When the plaintiff submitted to an examination under oath and complied with her obligations to make disclosure of all relevant health information to State Farm, she did so pursuant to her obligation under section 33 (1 and 1.1) of the Statutory Accident Benefits Schedule – Accidents on or After November 1, 1996 O. Reg. 403/96 s.33 ("the Regulation").

[39] In the context of her claim for accident benefits, when the plaintiff attended an independent medical examination at the request of State Farm she did so pursuant to her obligation under section 42(1) of the Regulation, which allows an insurer like State Farm to require its insured (the plaintiff) to be examined by a health professional "as often as is reasonably necessary".

[40] The implication of section 258.3 of the *Insurance Act*, which requires a tort plaintiff to apply for statutory accident benefits before initiating a tort claim, are far-reaching. By the time the tort action has been initiated the plaintiff will have been obliged to apply for statutory accident benefits, and with that application the plaintiff may also have been obliged to submit to an examination under oath, attend various independent medical examinations and disclose all relevant health information.

[41] Apart from its fiduciary obligation, the statutory accident benefit insurer also has an obligation to ensure that the information supplied by its insured is kept private. While decided in the context of a claim arising out of the unauthorized access by a bank employee to the banking records of a customer, the decision of the Court of Appeal in *Jones v. Tsige*, [2012] O.J. No. 148, is a significant advancement in the law insofar as whether this court should follow the decision of the Divisional Court in *Klingbeil*.

[42] In *Jones*, the plaintiff discovered that the defendant had been surreptitiously looking at her banking records and had done so without her authorization more than 174 times over four years. After a thorough review of the jurisprudence and statute law across the country, Sharpe J.A. accepted that the court should recognize the existence of a right of action for intrusion upon seclusion, or what has often been described as the tort of breach of privacy.

[43] In recognizing the tort of breach of privacy, Sharpe J.A. stated at paragraph 66:

> The case law, while certainly far from conclusive, supports the existence of such a cause of action. Privacy has long been recognized as an important underlying and animating value of various traditional causes of action to protect personal and territorial privacy. *Charter* jurisprudence recognizes privacy as a fundamental value in our law and specifically identifies, as worthy of protection, a right to informational privacy that is distinct from personal and territorial privacy. The right to informational privacy closely tracks the same interest that would be protected by a cause of action for intrusion upon seclusion.

[44] As well, the comments of Sharpe J.A. at paragraph 72 are worthy of repetition in the context of the motion before this court:

> These elements make it clear that recognizing this cause of action will not open the floodgates. A claim for intrusion upon seclusion will arise only for deliberate and significant invasions of personal privacy. Claims from individuals who are sensitive or unusually concerned about their privacy are excluded; it is only intrusions into matters such as one's financial or health records, sexual practices and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive.

[45] The plaintiff in the action before this court was mandated by section 258.3 to apply for statutory accident benefits before she could commence her tort action. The plaintiff in *Klingbeil* had no such obligation under the provisions of the *Insurance Act* then in force ("Bill 164"). The plaintiff was contractually obliged as part of her

application for statutory accident benefits to submit to an examination under oath, disclose her relevant medical history and submit to an independent medical examination as often as reasonably required by State Farm. Before the plaintiff even commenced her tort action, State Farm would therefore have been in possession of a significant body of highly confidential information to which the plaintiff had a privacy interest, and which State Farm was obliged as a fiduciary to maintain confidential.

[46] The duty of an insurer acting in a dual capacity as both the accident benefit insurer and the tort insurer has been the subject of some judicial comment besides what is found in the decision of the Divisional Court in *Klingbeil*.

[47] In *Anand v. Belanger*, 2010 ONSC 1635, Stinson J. was dealing with a motion by the plaintiff who had settled her claim for statutory accident benefits with State Farm prior to the trial of the tort claim. The plaintiff sought a ruling that State Farm could not dispute the plaintiff's injuries and disabilities had been caused by the subject motor vehicle accident. State Farm in *Anand* was not only the accident benefit insurer but also the uninsured carrier in the tort action.

[48] While the issue before Stinson J. was not the same issue that is before this court, his comments at paragraphs 32 and 33 are important to note:

> I am also mindful of the potential impact on the practices in the insurance industry that would result from acceding to the plaintiff's submissions. At present, the practice in the industry is to maintain a so-called "firewall" between the SABs department and the tort liability department of an insurance company, where that insurer has provided coverage to both an injured party and an at-fault driver. The file contents, negotiations and settlement strategy relating to the SABs claim by the injured party are not disclosed to those who are defending the tort claim, save in accordance with the usual practice by way of discovery in the tort proceeding. This is so notwithstanding the same corporate entity or "legal person" is in possession of both files. Quite apart from privacy concerns, this is a recognition of the differing responsibilities and obligations of the insurer providing SABs coverage to its customers on a no fault basis, and its rights and obligations when providing a defence to its customers on a no fault basis, and its rights and obligations when providing a defence to its customers in a tort proceeding where the normal adversarial rule is applied.
>
> The evidence before me establishes that State Farm adheres to the foregoing firewall principle in cases such as the present one, where it finds itself involved not just as SABs provider, but also in a tort proceeding as a party defendant pursuant to

> the uninsured motorist coverage. The plaintiffs' submission that a concession for SABs purposes equates to a concession for tort purposes would lead to the erosion of this firewall, to the detriment of the integrity of the overall system.

[49] A more recent decision touching on the firewall principle is a decision of Master Muir, *De Sousa v. Aviva Insurance Co. of Canada*, 2013 ONSC 185, where Master Muir dealt with a motion brought by an insurer to set aside the plaintiff's notice of examination because the notice sought to produce the adjustor from the insurance company who had adjusted the plaintiff's accident benefit claim. The tortfeasor pled a limitation defence, to which the plaintiff argued that the insurer was well aware of the plaintiff's medical condition because the same insurer was adjusting the plaintiff's accident benefit claim. The plaintiff's argument essentially amounted to the same argument made before this court, i.e. State Farm is one company and therefore must know what it has in its possession regardless of whether the claimant is the plaintiff in the tort action or the claimant for statutory accident benefits. Master Muir rejected this type of argument and held that the firewall could only be breached with the plaintiff's consent. In coming to this conclusion, Master Muir stated at paragraph nine:

> In my view, it would not be appropriate, in the circumstances of this action, to deny the plaintiff his right to examine a representative of his choosing. Bulletin 184 of the Insurance Bureau of Canada sets out the requirement for the firewall described above. However, Bulletin 184 states that the firewall should be set up so that "information gathered by [the insurer] regarding the accident benefits claim does not become available to the tort adjuster, *unless the insured so authorizes*" [emphasis added]. It is also clear from the decisions in *Klingbeil* at paragraph 30 and *McLennon* at paragraph 31. The purpose of the firewall is so that an insurer is not advantaged by the fact that it is responding to both claims. See *McLennon* at paragraph 35. The consent of the insured obviates this concern.

[50] Another decision dealing in part with the possible conflict of interest of an accident benefit adjuster allowing information to find its way into the hands of the tort adjuster is that of J.P. Moore J. in *Song v. Hong*, [2008] O.J. No. 772, where at paragraphs 64 and 65 Moore J. stated:

> There are good reasons for this distinction. To begin with, an accident benefits claimant is an insured person under the coverage bound by the insurer and, as such, the claimant is owed a duty of good faith in the handling of the claim. As well, the insurer comes into possession of personal, medical and other information during the claim handling process and it is obliged to keep that information private and confidential.

> On behalf of vehicle owners and drivers named as defendants in a tort case, such as this one, the insurer's contractual obligation is to provide defence and indemnity in accordance with the policy provisions. Those defendants do not owe a duty of good faith to the plaintiff; in fact those defendants may (and have here) set their position in litigation adverse to the claims made by the plaintiff. In the context of the tort claim, there is no direct, contractual or other dealing between the plaintiff and the insurer. A conflict of interest situation could well arise for an insurer that allows information from an accident benefits file to bleed through to a tort file, and visa (sic) versa.

[51] The issue argued before this court was also addressed at FSCO in the context of the plaintiff's accident benefit claim with State Farm. The arbitrator was required to answer the question of whether State Farm could retain the same law firm, i.e. Reisler, to defend it in both the tort proceedings and the arbitration proceedings for statutory accident benefits.

[52] Where the applicant for statutory accident benefits and the plaintiff in the tort action are one and the same person, i.e. Ms. Dervisholli, the arbitrator ruled in favour of State Farm. In doing so, the arbitrator relied on *Klingbeil* and *Stratton*, both of which had been followed at the FSCO appeal level, see *Ramrattan and Motor Vehicle Accident Claim Fund FSCO P12-00003* April 27, 2012.

[53] Arbitrator Susan Sapin concluded that *Klingbeil* was the most relevant case – a decision that she correctly found was binding on her. In following the *Klingbeil* decision, Arbitrator Sapin noted at page five of her reasons that:

> Insurance companies segregate their accident benefits and indemnity files, as a matter of corporate policy and industry practice, to comply with the obligation of utmost good faith enforced by the courts, and to protect the privacy of their insureds. This is the origin of the so-called "Chinese Wall" between the two types of files, so that information (usually medical) obtained in the accident benefits claim is not made available to the tort adjuster, unless the insured person authorizes it or the law requires it.

[54] Arbitrator Sapin rejected the plaintiff's arguments that *Klingbeil* should be distinguished on its facts, because the plaintiff in *Klingbeil* was uninsured and had applied to the defendant's insurer, Lincoln, for statutory accident benefits, whereas Ms. Dervisholli had applied for SABs under her own policy of insurance with State Farm. Arbitrator Sapin also followed the reasoning in *Stratton*.

[55] It is important to note that the report of *Stratton* makes reference to a Court File – 95-CU-87367. This court file makes clear that the underlying claim in that action was in relation to a motor vehicle accident which occurred prior to November 1, 1996. As such, as in *Klingbeil*, *Stratton* involved a plaintiff who did not have to comply with the obligations the plaintiff before this court did have to comply with, i.e. to apply for statutory accident benefits prior to the commencement of the tort action.

[56] This court has the opportunity to clarify the duties of an insurer like State Farm, which has the dual responsibility to provide both third party liability tort coverage as well as pay statutory accident benefits to a plaintiff. Whether or not an insurer is named as a defendant, or has itself added as a statutory third party where that insurer also has the contractual obligation to pay statutory accident benefits, such a situation triggers privacy concerns on the part of the claimant seeking payment of statutory accident benefits. In this situation, if it was not already made clear by the Bulletin, the insurer with those dual responsibilities has an obligation to set up a firewall that prevents, without the consent of the insured/plaintiff, any dialogue or any transfer of the plaintiff/claimant's confidential accident benefit file to the tort adjuster.

[57] It does not matter that State Farm, with its responsibility to provide third party coverage and/or having added itself as a statutory third party, will ultimately come into possession of much of what is contained in the plaintiff's accident benefit file because of the disclosure obligations that the plaintiff has under the *Rules*. While this argument might have some preliminary appeal, in that State Farm and by implication the Reisler Law Firm will come into possession of most of the documentation found in the plaintiff's accident benefit file during the course of the tort proceedings, it fails to recognize that such information only comes into State Farm's possession with the consent of the plaintiff. State Farm does not have an automatic right to that information. The plaintiff has a privacy interest in the confidential health information supplied to State Farm, and it is only with the consent of the plaintiff, or by order of the court, that such information can be communicated to State Farm in its capacity as the statutory third party, or as the insurer obliged to provide coverage to the defendant, Cervenak.

[58] State Farm had an obligation to maintain the confidentiality of the plaintiff's accident benefit file. State Farm may very well be one distinct corporate entity and, as such, has possession of both information found within the accident benefit file and the tort file under one roof. Nonetheless, the insurance industry has recognized and implemented the principle of a firewall between the accident benefit department and the tort department within an insurance company. While the bodily injury adjuster for State Farm might very well be tempted to take a surreptitious look at the accident benefit file, such conduct is not condoned within the insurance industry, as reflected in the Bulletin. State Farm should not have retained Reisler to defend itself both with respect to the claims by the plaintiff for statutory accident benefits as well as in the plaintiff's tort action. The failure to separate the interests of State Farm on the tort and accident benefit side, by retaining the same law firm and disclosing confidential information to that law firm, resulted in a disqualifying conflict of interest as set forth in *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235.

[59] State Farm retained Reisler to defend the interests of State Farm as the statutory third party, and as is made clear by the affidavit of documents prepared by State Farm, essentially also provided unfettered access to the plaintiff's accident benefit file together with information from other claimant accident file contents. Without the plaintiff's consent to, or court order, the transmission of this information to Reisler, State Farm allowed an unauthorized intrusion into the plaintiff's privacy interests which are contrary to the good faith obligation of utmost trust and fair dealing which State Farm owed to the plaintiff.

[60] None of the information that the plaintiff provided to State Farm, in the context of her accident benefit file, was provided to State Farm in its capacity as the statutory third party. State Farm was the plaintiff's insurer, and any information that the plaintiff provided to State Farm in that capacity was supplied in confidence and with the expectation that her right of privacy would be respected.

[61] The only basis upon which State Farm was entitled to access the plaintiff's accident benefit file contents was with the consent of the plaintiff or by court order. That consent was never sought, nor was it ever provided. By disclosing this information to Reisler without the consent of the plaintiff, State Farm placed Reisler in an irreconcilable position of conflict, and the only appropriate remedy is to remove Reisler as the solicitor of record for State Farm in these proceedings.

[62] In the result, the appeal by State Farm of the order of Hambly J. is dismissed with costs. If the parties cannot agree upon the costs of this appeal, written submissions limited to three pages in length may be submitted to this court no later than May 15, 2015. If submissions are not received within that time frame this court will assume that the issue of costs has been resolved between the parties.

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MARROCCO ACJ.

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KENT J.

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M. EDWARDS J.

Released: April 24, 2015

CITATION: Dervisholli et al. and Cervenak and State Farm, 2015 ONSC 2286
DIVISIONAL COURT FILE NO.: DC-12-427
DATE: Final Draft

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Marrocco ACJ, Kent and M. Edwards JJ.

B E T W E E N :

Mirjeta Dervisholli, Fatmir Dervisholli, Fatlum Dervisholli, Flamur Dervisholli and Leonora Dervisholli by their Litigation Guardian Hamide Dervisholli, the said Hamide Dervisholli

Plaintiffs/Respondents

- and –

Roman Cervenak and State Farm Mutual Automobile Insurance Company

Defendants

- and –

State Farm Mutual Automobile Insurance Company Added by Order pursuant to Section 258(14) of the *Insurance Act* R.S.O. 1190, c.I.8 as amended

Statutory Third Party

REASONS FOR DECISION

M. EDWARDS J.