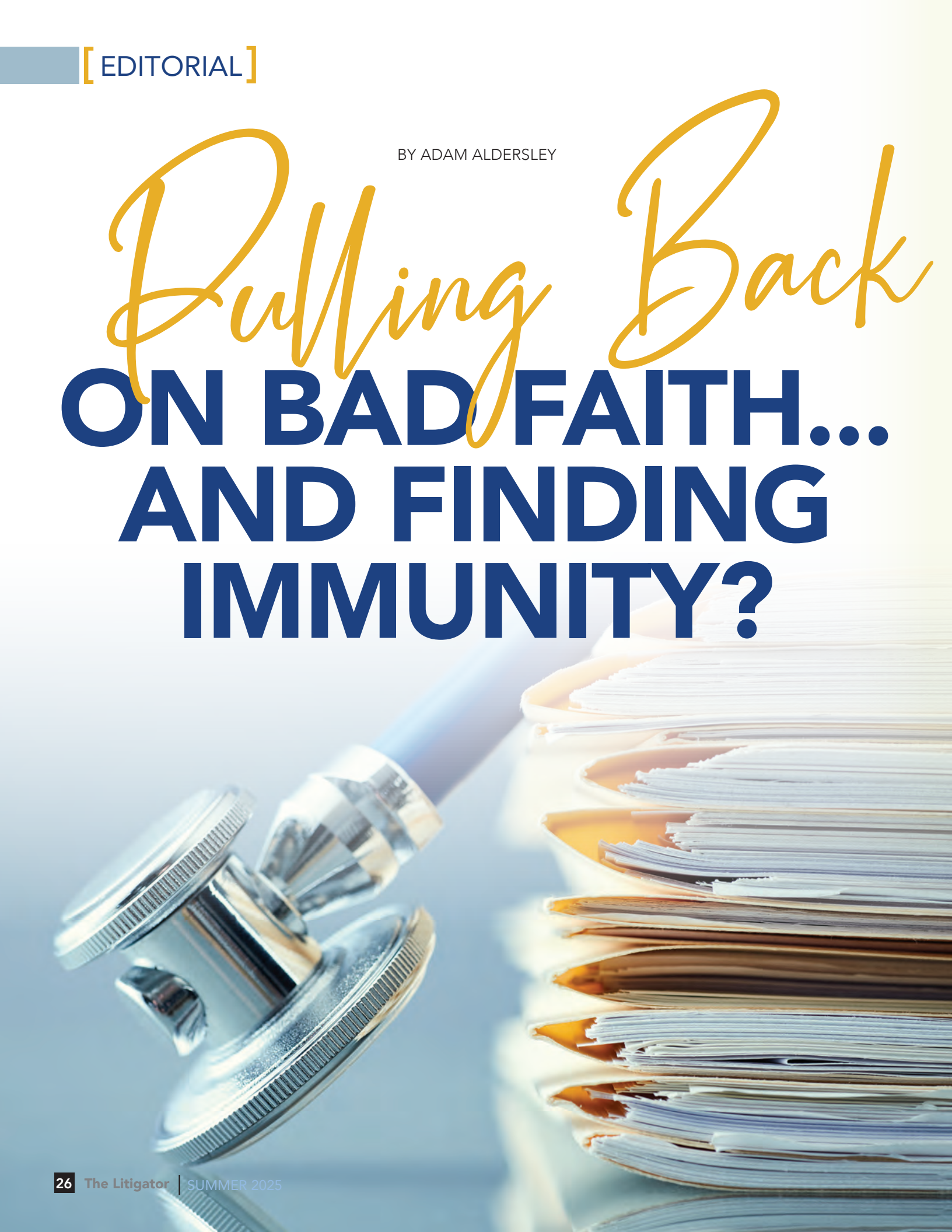
BY ADAM ALDERSLEY

Pulling Back ON BAD FAITH... AND FINDING IMMUNITY?



the Curtain

It has been over 20 years since the Court of Appeal recognized in *Khazzaka v. Commercial Union Assurance Co. of Canada,*[1] that an insurer's duty of good faith and fair dealing to its insured included a duty to oversee the conduct of the agents it retains from the beginning of the process of adjusting the claim throughout the conduct of any subsequent litigation, to ensure that the insured is treated fairly. The agents themselves owe no such duty of good faith.[2] Seventeen years later, in *Stegenga v. Economical Mutual Insurance Company,*[3] the Court of Appeal's interpretation of the Ontario legislature's intent in amending the *Insurance Act* to grant jurisdiction to the Licence Appeal Tribunal appears to have effectively granted insurers, and possibly even their agents, immunity for unfair practices by those agents in the context of statutory accident benefits.

Since *Khazzaka,* an ever-growing body of jurisprudence has pulled back the curtain on medical assessment companies being retained as agents by insurance companies to facilitate medical assessments who, under the guise of "quality control", change reports and/or manipulate experts to change their opinion in favor of the insurer.[4] As recently as December 20, 2024, the Divisional Court released a decision in *Plante v. Economical Insurance Company,*[5] finding that Dynamic Functional Solutions ("DFS") exceeded its role in arranging medical assessments:

> "This court is not blind to the ever increasing use of medical assessment companies like DFS in disputes before the LAT and in personal injury litigation in general. These companies provide ready access to experts in multiple disciplines. The experts engaged whether for one side or the other are to provide their opinions to the ultimate trier of fact uninfluenced by the party retaining them. The opinions must be independent, fair and objective. If the opinions do not reach this minimal level of scrutiny they are of no use to the trier of fact and should not become evidence. The facts of this case demonstrate that DFS failed to understand its role."

This isn't the first time that DFS' conduct has been criticized by the courts. The Court in *Higashi v. Chiarot,*[6] noted that DFS exceeded its role in that case as well:

> "As a part of quality control with DFS, Mr. Jung provided a draft report of his report to DFS for their review. The purpose of the DFS review was only to correct typographical errors and formatting. However, during the cross-examination, it was shown that DFS went beyond correcting spelling mistakes. DFS made recommendations to Mr. Jung to amend the substance of his report. For example, in his draft report, Mr. Jung had originally concluded that Melonie demonstrated the ability to perform work activities in the medium to heavy category. After DFS's recommendation, Mr. Jung changed his opinion to the heavy category. Mr. Jung testified that, upon reflection, his initial assessment of medium to heavy category was more appropriate. While I accept Mr. Jung's explanations regarding the changes he made to his report, I am unable to rely upon his conclusions."

Despite the strong judicial criticism in both *Higashi* and *Plante,* DFS has never faced any consequence for their conduct.

The magnitude of this problem cannot be understated. Many, if not most, medical assessment companies refuse to provide their files prior to a hearing and, as a result, compromised expert reports are only being discovered at the hearings themselves. The conduct of DFS only came to light in both *Higashi* and *Plante* when counsel for the Plaintiff/Applicant subpoenaed DFS to produce the file at trial and at a LAT hearing, respectively. Since less than 5% of files ever make it to trial, this calls into question the fairness of any settlements reached before getting close to trial in cases where medical

assessment companies have been used to arrange IMEs. This danger was specifically highlighted by the Court in the context of ghostwritten reports, in *Kushnir v. Macari:*[7]

> "The real danger is what about the cases that were settled based on the expert's opinion as stated in the report without ever going to trial? The parties, counsel or the court at a pre-trial would never know if it was solely written by the author of the report, or not."

It also calls into question virtually every decision made by the LAT as a result of a written hearing where assessment companies refuse to produce their file and there are no opportunities to issue a subpoena to obtain the third-party file or cross-examine the experts. In this context, the reliability of the expert report is crucial to securing a just resolution of the dispute.

New evidence has come to light confirming what the aforementioned jurisprudence suggests; companies using the practice of engaging 'quality control' to affect the substantive opinion of the assessor are rife across the medical assessment industry. Dr. Kenneth Suddaby, a psychiatrist that began doing IME reports in the mid-1990s, gave sworn evidence in 2020, in a lawsuit where he and a few other medical assessors were sued along with Riverfront Medical Services for allegedly manipulating reports related to a series of OCF-18s for home modifications.[8] He testified under oath that around 2015, he was doing almost exclusively third party assessment work.[9] He further testified that he had worked with an extensive list of medical assessment companies, including Work Wise, Capital Vocational Specialists, CVE Inc., Riverfront Medical Services, Focus Assessments, Lifemark, North York, DFS and others.[10]

Under oath, Dr. Suddaby was asked about a draft report he had authored in which he declined to provide an opinion on whether or not he believed an OCF-18 was reasonable and necessary. He refused to answer a series of referral questions, stating that "I will be able to draw conclusions with respect to the questions once I have updated documents from Dr. Marshall, Dr. Pelletier and a neuropsychological evaluation."[11] He agreed during the examination for discovery that he was unable to form an opinion at the time because he required further information.[12] Dr. Suddaby testified that he received a draft report from the Medical Director of Riverfront, Dr. Sheldon Levy, in which Dr. Levy answers the questions that Dr. Suddaby could not, and Dr. Suddaby adopted Dr. Levy's report as his own. Here is the exchange as found in the court file:

387. Q. - - - you indicated you could not give an opinion. That was your position. You spoke to Dr. Levy. You maintain that position. We had the e-mail where you had a conversation. "As I said to Dr. Levy, I cannot give you an opinion without following additional information." Right?

A. Right.

388. Q. So you told Riverfront that by e-mail; correct?

A. Correct.

389. Q. You told Dr. Levy that in a telephone conversation that you had with him; correct?

A. Correct.

390. Q. Then Dr. Levy sends you a report, answers the question that you say you cannot answer. Then you change your opinion to adopt his?

A. Correct.

Dr. Levy had never been named in a (then) Section 42 notice to the insured. He had never met or examined the insured. Dr. Suddaby testified that he did not know how long Dr. Levy had been a member of the College of Physicians and Surgeons, or whether he was a practicing physician, or where or what he practiced.[13] Rather, Dr. Suddaby testified that he "wasn't influenced by Dr. Levy's experience background."[14] Dr. Levy suggested a change and, without any of the additional information Dr. Suddaby stated he required to form an opinion, Dr. Suddaby adopted what Dr. Levy wrote, simply stating that "it became my opinion."[15]

Neither Dr. Suddaby's original opinion, nor Dr. Levy's role in forming Dr. Suddaby's adopted opinion, were disclosed to either the insurer or the insured. This fact was not revealed until less than 3 months before the insured's tort trial, following a 30.10 production motion brought in November of 2014.[16] Crucially, the Court's fears were on point; the insured had already settled her action against her insurer, who had initially hired Riverfront to retain Dr. Suddaby, by the time this information came to light.

However, Dr. Suddaby's evidence goes well beyond simply commenting on what happened in this particular case. He repeatedly comments on medical assessment industry practice. When asked whether he ever obtained the insured's consent to speak with Dr. Levy, he responded that it was "common practice throughout the industry in a multidisciplinary assessment, to have discussions with individuals within the IME company that are giving feedback or quality assurance feedback."[17] Asked what he meant by "quality assurance", Dr. Suddaby noted grammar, format, spelling, and "suggestions from time to time on the content consistency."[18] When asked to clarify, he stated that he would "take in any information that suggested deficiencies or enhancements to my reports."[19] The following exchange is particularly enlightening:

467. Q. Right. So it is standard process for Riverfront to make recommendations to its assessors on substantive portions of their reports?

A. It's not uncommon across the field in different IME companies to make suggestions, sometimes to substantive portions of the report, which are for my consideration. Which I appreciate, because sometimes things are picked up that I didn't think of or I didn't miss or there's information from another assessor. So I think that's an important and normal part of the quality control process. And the - - -

468. Q. You believe this quality control process, as you've just defined it, is something that's going on throughout your entire independent assessment career?

A. Yes, yes. It's routine that I've received reports with comments or suggestions. And it's routine that I consider them and then make a decision. Sometimes the comments are inappropriate and I discard them.

469. Q. It's common not to disclose that these conversations and discussions are taking place?

A. That's right. It's common to produce a final report and not to routinely produce the, you know, the draft reports or the quality assurance communications that lead up to that. That's common - - or standard, I would say.

470. Q. It's also common not to disclose who is involved in the quality assurance communications?

A. In my final report? No.

471. Q. That applies even if the quality assurance communications results in a diametrically different opinion that what the originally[sic] draft was?

A. Well, anybody can make any suggestion they want. And I consider it and make my own final, independent opinion. So I'm not in a position to evaluate skill sets and careers and backgrounds of everybody in the quality control function within the IME companies. So when a suggestion is made, I give it consideration. And then I make a decision.

472. Q. When you adopt that consideration, you don't disclose who the originating thought came from?

A. No, that's not standard practice that I am aware of.

473. Q. So, until someone has an opportunity to examine you either in a courtroom or in a setting such as this, there would be no indication to those individuals receiving the report as to who was making the suggestions and what their involvements were - - -

A. That's correct.

474. Q. - - - on the face of the reports?

A. That's correct. That's standard process.

In concluding this line of questioning, Dr. Suddaby was asked whether his evidence regarding quality control communications and industry protocol was applicable to all assessment companies he has worked with, or strictly to Riverfront in this case. His response: "All assessment companies."[20]

The timing of Dr. Suddaby's evidence, obtained in January of 2020, was unfortunate, as it was only

6 months after the Court of Appeal released its decision in *Stegenga,* which may have extinguished an insured's ability to seek justice for the conduct of a medical assessment company in the *SABS* context. In *Stegenga,* the Court of Appeal examined the statutory intent of the Ontario legislature's grant of jurisdiction to the LAT, and the corresponding removal of the Superior Court's jurisdiction, with specific reference to section 280 of the *Insurance Act.* The Court of Appeal concluded that the words "disputes in respect of an insured's entitlement" to statutory accident benefits were to be interpreted broadly, concluding that *"all disagreements between the insurer and insured"* regarding *SABS* benefits, including *"the conduct and process of the insurer"* in providing them, falls within the jurisdiction of the LAT. The Court of Appeal further concluded that the lack of remedial powers provided to the LAT for breach of the duty of good faith is not a relevant consideration. Given the breadth of this interpretation, an insurer failing to properly oversee the conduct of a medical assessment company in breach of its duty of good faith to the insured as set out in *Khazzaka* would almost certainly fall within the ambit of the conduct and process of the insurer in administering the claim. As a result, insurers are now effectively immune from such failures, unless one can successfully convince the LAT that such conduct warrants an order for a special award for unreasonably withheld or delayed payments under section 10 of the *Automobile Insurance* regulation. No such remedy exists in the context of Catastrophic Impairment disputes. Of course, such conduct of medical assessment companies was never before the Court of Appeal in *Stegenga*. This appears to be an unfortunate unintended consequence of their decision.

While a bad faith claim in the context of the *SABS* is no longer possible, it remains to be seen whether an insured retains the right to sue medical assessment companies directly in tort for fraud, passing off, or intentional interference with contractual relations. These are not disputes between the insured and the insurer, but rather, between the insured and a third party. The LAT was never intended for and does not appear to accept applications for disputes against third parties regardless of their involvement in the adjusting process. While this may be sufficient to distinguish *Stegenga,* the issue has yet to come before the Court in the almost 5 years since that decision was released.

Even if a lawsuit against a third-party medical assessment company is permitted, there are significant barriers to proceeding with such a claim. First, evidence obtained through compulsory disclosure at the LAT or in Superior Court is protected by the Deemed and/or Implied Undertaking rules. Careful consideration on how to proceed with the lawsuit will be required to ensure that any documents intended to be relied upon fall within one of the exceptions to those rules. It is important to consider whether the evidence you wish to rely upon has been filed in a motion before the Superior Court, which is why the aforementioned transcript of the Examination for Discovery of Dr. Suddaby falls within the exceptions.[21] You may also bring a motion for an order that the Deemed Undertaking

When faced with a request

FOR A DEFENSE OR INSURER MEDICAL EXAMINATION NOTICE, MAKE SURE TO NEGOTIATE REASONABLE TERMS FOR YOUR CLIENT TO CONSENT TO SAME, INCLUDING A TERM WHICH EXPLICITLY LIMITS THE ASSESSMENT COMPANY TO MAKING ONLY GRAMMATICAL, SYNTAX AND FORMATTING CHANGES TO THE REPORT, AND EXPLICITLY EXCLUDING SUBSTANTIVE CHANGES TO THE OPINIONS THEREIN.

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rule doesn't apply under Rule 30.1.01(8) if you can establish that the interests of justice in granting such an order outweigh any prejudice that would result to the party who disclosed the evidence. Failure to properly consider the Deemed/Implied Undertaking rules prior to commencing an action could have deleterious consequences on the prospects for success of your lawsuit.[22]

Moreover, careful consideration will be required to identify the damages being claimed in such a lawsuit. While punitive and aggravated damages will almost certainly be a part of any such claim, the ability to claim other damages for injury and/or contractual benefits may be compromised by *res judicata* resulting from findings made following the tort and/or LAT proceedings that preceded this new lawsuit.

Given the pervasive nature of the conduct as established by case law and the sworn testimony of Dr. Suddaby, lawyers should exercise extreme caution on any file where a party is arranging medical assessments through third parties. When faced with a request for a defense or insurer medical examination notice, make sure to negotiate reasonable terms for your client to consent to same, including a term which explicitly limits the assessment company to making only grammatical, syntax and formatting changes to the report, and explicitly excluding substantive changes to the opinions therein. At LAT Case Conferences, secure an order for the complete file of the medical assessment company, including internal notes and correspondence with the assessors. In the matter of *Franche v. Wawanesa,* Adjudicator Craig Mazerolle characterized such requests as "commonplace at the Tribunal".[23] When the assessment company fails to produce the documents, be prepared to issue a subpoena requiring it to bring the documents to the hearing (assuming the LAT allows you to issue a summons in the first place). Be vigilant by requiring these things on every file.

It is also incumbent upon OTLA and plaintiff's lawyers alike to fight fastidiously to end these practices. We should be broadcasting that this conduct is being perpetrated as widely as Dr. Suddaby has asserted. We cannot let insurers turn a blind eye to any unfair conduct by their agents. Finally, we must advocate for the return of a mechanism to hold insurers accountable for the conduct of their agents, as the Court of Appeal intended in *Khazzaka.* And we must vociferously put this issue before the legislature and insist upon regulation for an industry which in certain respects has clearly run amok.

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NOTES

[1] *Khazzaka v. Commercial Union Assurance Co. Of Canada,* [2002] O.J. No. 3110.

[2] Although it is not specifically addressed by the Court of Appeal in *Khazzaka,* the tortious conduct of agents retained by insurance companies may be independently actionable, depending on the circumstances of the case.

[3] *Stegenga v. Economical Mutual Insurance Company,* 2019 ONCA 615.

[4] *MacDonald v. Sun Life Assurance Company,* 2006 CanLII 41669 (ON SC), M.C. v. K.E., O.T., 2013 CanLII 55435 (ON HPARB), *Burwash v. Williams,* 2014 ONSC 6828, *El-Khodr v. Lackie,* 2015 ONSC 4766, *Adel Harb v. Allstate Insurance Company of Canada,* 2018 ONFSCDRS 71, *Roy v. TD Insurance,* 2020 ONSC 3886, *Higashi v. Chiarot,* 2021 ONSC 8201, *Graul v. Kansal,* 2022 ONSC 1958, *Stewart v. Lattanzio,* 2022 ONSC 1770.

[5] *Plante v. Economical Insurance Company,* 2024 ONSC 7171.

[6] *Higashi v. Chiarot,* 2021 ONSC 8201.

[7] *Kushnir v. Macari,* 2017 ONSC 307.

[8] The transcript of the Examination for Discovery of Dr. Kenneth Suddaby is a public record, having been filed at the Ottawa Courthouse as evidence on a motion before the Ontario Superior Court of Justice, in the matter of *Burwash v. Levy et al.,* bearing Court File Number 15-65254.

[9] Transcript of the Examination for Discovery of Dr. Kenneth Suddaby, *Burwash v. Levy et al.,* Court File Number 15-65254, page 11, Q. 34.

[10] Transcript of the Examination for Discovery of Dr. Kenneth Suddaby, *Burwash v. Levy et al.,* Court File Number 15-65254, pages 15-16, Q. 52.

[11] Transcript of the Examination for Discovery of Dr. Kenneth Suddaby, *Burwash v. Levy et al.,* Court File Number 15-65254, pages 80-81, Questions 313-316.

[12] Transcript of the Examination for Discovery of Dr. Kenneth Suddaby, *Burwash v. Levy et al.,* Court File Number 15-65254, page 81, Q. 317.

[13] Transcript of the Examination for Discovery of Dr. Kenneth Suddaby, *Burwash v. Levy et al.,* Court File Number 15-65254, pages 95-96, Questions 379-382.

[14] Transcript of the Examination for Discovery of Dr. Kenneth Suddaby, *Burwash v. Levy et al.,* Court File Number 15-65254, page 96, Questions 383.

[15] Transcript of the Examination for Discovery of Dr. Kenneth Suddaby, *Burwash v. Levy et al.,* Court File Number 15-65254, page 96, Questions 383.

[16] *Burwash v. Williams,* 2014 ONSC 6828.

[17] Transcript of the Examination for Discovery of Dr. Kenneth Suddaby, *Burwash v. Levy et al.,* Court File Number 15-65254, page 91-92, Question 363.

[18] Transcript of the Examination for Discovery of Dr. Kenneth Suddaby, *Burwash v. Levy et al.,* Court File Number 15-65254, pages 20-21, Questions 73-74.

[19] Transcript of the Examination for Discovery of Dr. Kenneth Suddaby, *Burwash v. Levy et al.,* Court File Number 15-65254, page 21, Question 75.

[20] Transcript of the Examination for Discovery of Dr. Kenneth Suddaby, *Burwash v. Levy et al.,* Court File Number 15-65254, pages 119-120, Question 475.

[21] Rule 30.1.01(5)(a) of the *Rules of Civil Procedure.*

[22] *Burwash v. Levy et al.,* 2018 ONSC 682.

[23] *Franche v. Wawanesa Mutual Insurance Company,* Tribunal File Number: 21-000723/AABS, Motion Order of Adjudicator Craig Mazerolle, September 9, 2021.