IN THE HIGH COURT OF JUSTICE

OF EDO STATE OF NIGERIA

IN THE BENIN JUDICIAL DIVISION

HOLDEN AT BENIN CITY

BEFORE HIS LORDSHIP, HON.JUSTICE P.A. AKHIHIERO

ON MONDAY

THE 20TH DAY OF JANUARY, 2025.

BETWEEN: ***SUIT NO. B/73/2017***

ISAAC IZOGIE IMASUAGBON -------------------------------CLIAMANT

AND

1. DANGOTE CEMENT PLC
2. DANGOTE CEMENT WORKS LTD ***------DEFENDANTS***
3. DANGOTE CEMENT TRANSPORT LTD

AND

LEADWAY ASSURANCE COMPANY LTD --------------------THIRD PARTY

JUDGMENT

By his Amended Statement of Claim dated 4th of August and filed on the 5th of August, 2022 the Claimant claims against the Defendants as follows:

1) AN ORDER compelling the Defendants to pay the Claimant the sum of Three Hundred Thousand United States Dollars ($300,000) and Five

Thousand Three Hundred and Eighty Pounds (£5,380) being part of the cost incurred by the Claimant on treatments;

2) ***AN ORDER compelling the Defendants to pay the Claimant the sum of N2,000,000,000 (Two Billion Naira) being general damages for the psychological trauma, loss of business and income caused as a result of the accident, which was as a result of the reckless driving of the Defendant's truck driver;***
3) ***AN ORDER compelling the Defendants to pay the Claimant 10% monthly interest of the Judgement until fully liquidated;***
4) ***AN ORDER compelling the Defendants to pay the Claimant the sum of N15, 000,000 (Fifteen Million Naira) being the cost of prosecuting this suit;***
5) ***AND FOR SUCH OTHER ORDERS as this Honourable Court will deem for to make in the Circumstances of this case.***

At the hearing, the Claimant testified and called one witness. He adopted his witness statements on oath and tendered the following documents: four pictures and a certificate of compliance which were admitted as Exhibits A1 – A5; a certified true copy of a Police Report which was admitted as Exhibit B; a bundle of medical bills marked as Exhibit C; Certificate of Compliance Exhibit C1, and two letters marked as Exhibits D1 and D2 respectively.

Thereafter, one Inspector Akinmoju Ajibola testified as CW1 and tendered two documents which were admitted as Exhibits E1 and E2.

The Claimant closed his case and the 1st Defendant opened its defence and called one Mohamed Adegbyega who testified as DW1. He adopted his witness statement on oath and tendered one document which was admitted as Exhibit F.

The 1st Defendant closed its case, and the 2nd and 3rd Defendants never put up any appearance or defence to this suit. The Third Party opened their case by calling one Richard Akpotebu who testified as DW2. The DW2 tendered two documents which were admitted as Exhibits G and G1. Thereafter, The Third Party closed its case and the case was adjourned for final addresses.

The Claimant's case as can be gleaned from the evidence which he adduced at the trial is that on the 14th of November, 2013, while traveling with his brother Mr. Kenneth Imasuagbon along the Uromi/Agbor public Highway in a Range Rover

Armored Jeep with Registration Number BJ 998 GWA, they had an accident with the Defendant's Truck with Registration Number KBT 99 XA.

The Claimant alleged that before the accident, the Defendant's truck which was driving at a very high speed, recklessly and dangerously left its lane and ran into the Mercedes Benz S550 with Registration Number BJ 900 GWA and the Range Rover Armored Jeep with Registration Number BJ 998 GWA in which the Claimant and his brother were traveling.

He said that the accident caused serious damages to the Mercedes Benz S550 and the Range Rover Armored car and the occupants of the two cars sustained serious life threatening injuries.

He tendered four pictures and a certificate of compliance which were admitted as Exhibits A1 – A5**.**

The Claimant alleged that the driver of the Defendant's truck was on an official assignment for the Defendants at the time the accident occurred.

He alleged that the accident was reported to the police and was investigated by the Igueben Divisional Police Station. The police investigation report dated the 14th of June, 2014 wherein the Defendant Truck Driver was indicted for being responsible for the accident was admitted as Exhibit B.

The Claimant alleged that immediately after the accident, he was first rushed to the University of Benin Teaching Hospital (UBTH) for treatment but he was later transferred to another Hospital in the United Kingdom for further treatment because the injuries were too serious for the UBTH to handle.

He alleged that in the United Kingdom, he received treatment at Wexham Park Hospital where he spent the sum of Five Thousand Three Hundred and Eighty Pounds (£5,380) for his medical bills. The Claimant tendered a bundle of medical bills which were admitted in evidence as Exhibit C while the certificate of compliance was admitted as Exhibit C1.

The Claimant alleged that he was subsequently transferred to another hospital in the United States of America where he received further treatments. He alleged that he

spent about the sum of Three Hundred Thousand United Dollars ($300,000) for the said treatments.

The Claimant mentioned some of the health facilities that treated him in the United States as: Emory Healthcare; Emory Clinic; Emory Univ. Hospital; Emory Johns Creek Hospital; MRI Imaging Specialist; First Foundation Medical; Georgia Spinal Health Clinic; and Resurgens Orthopaedics. Copies of the Medical Bills, receipts, vouchers, statements of accounts and medical reports are contained in Exhibit C.

The Claimant alleged that the accident seriously affected his spinal cord and as such he has been unable to take up any job, business or means of livelihood. He said that he has lost over Two Billion Naira as a result of the accident and is unable to care for the several persons who are dependent on him.

In defence of this suit, the 1st Defendant called one Mohamed Adegboyega, the Fleet Manager to Dangote Cement Transport who testified as DW1. He tendered the Insurance Policy Document which was admitted as Exhibit F.

In his evidence in defence of this suit, the sole witness for the 1st Defendant stated that the driver of the 1st Defendant was not reckless or negligent before the accident occurred.

He said that the 1st Defendant's truck was insured by the Third Party in this suit and that the Third Party reached out to the Claimant after the accident occurred.

He stated that the Claimant is not entitled to the Claims in this suit.

In defence of this suit, the Third Party called one Richard Akpotebu, a Marketing Executive with Leadway Assurance Company Limited who testified as the D.W.2. He tendered two Dangote Cement Transport Company identity cards which were admitted in evidence as Exhibits G and G1.

In his evidence, the witness stated that the Defendant informed the Third Party about the accident when it occurred. He alleged that the accident was not caused by the negligence of the 1st Defendant's driver. He also alleged that neither the Claimant nor any other person suffered any life threatening injuries as alleged by the Claimant.

He said that the medical treatments received by the Claimant in the foreign hospitals were in respect of his pre-existing medical condition and that the bills were settled by some other insurance companies.

He also alleged that contrary to the terms of the insurance policy between the 1st Defendant and the Third Party, the 1st Defendant failed to forward the court processes in respect of this suit to them. He maintained that for this reason, the Third Party is not liable to the Claimant or the 1st Defendant for any claim whatsoever.

Under cross examination, he said that he was not at the scene of the accident but they were later informed of the accident. He said that he was not aware whether the 3rd Party conducted any investigation about what caused the accident.

Upon the close of evidence, the learned counsel for the parties as represented filed their final written addresses which they adopted as their final arguments in support of their respective cases.

In his final written address, the learned counsel for the 1st Defendant, ***David Nkire Esq.*** formulated two issues for determination as follows:

1) ***Whether the claimant has proved his case to be entitled to the reliefs sought;***
2) ***Whether the Claimant has been able to establish vicarious liability of the 1st Defendant; and***
3) ***Whether the 1st Defendant can set off the liability by virtue of the insurance policy.***

Thereafter, he argued the three issues seriatim.

ISSUE 1:

Whether the claimant has proved his case to be entitled to the reliefs sought.

Arguing this first issue, learned counsel submitted that it is trite law that he who asserts must prove and he referred the Court to ***Sections 131 and 132 of the Evidence Act, CAP E14 Laws of the Federation, 2011 (as amended).*** He posited that the mere occurrence of an accident is not proof of negligence and referred to the cases of ***ALHAJI KABIRI ABUBAKAR & ANOR. vs. JOHN JOSEPH (2008) LPELR-48 (SC) and B.J. NGALARI vs. MOTHERCART LTD. (1999) 13 NWLR (Pt.636)) 626***.

He maintained that in the instant case, the Claimant's driver who was called as the first witness, under cross-examination gave a ridiculous testimony of how the 1st Defendant's truck which was coming from the opposite lane left its lane and hit the Claimant's vehicle which he was driving from behind. He posited that it will be hard to fathom how a vehicle coming from an opposite lane will be able to hit an oncoming vehicle from behind.

Furthermore, learned counsel posited that the Claimant's second witness who is a police officer tendered a police investigation report of the accident which he admitted was incomplete and inconclusive after it was established that the vehicle inspection officer did not inspect the truck that was allegedly involved in the accident.

He submitted that the Court cannot attach any probative value to the incomplete report and he relied on the case of ***AGBI V OGBEN (2005) 8 NWLR (part 926.)*** where it was held that ***"the police final report was not properly tendered in evidence".***

He urged the Court to hold that the Claimant has failed to prove the negligence of the Defendants in this case.

CLAIMS AS TO DAMAGES

On the claims for damages, learned counsel submitted that it is trite law that a party relying on special damages must specifically plead and prove same and he relied on the following cases: ***UNION BANK OF NIGERIA PLC v. CLEMENT NWANKWO & ANOR (2019) LPELR-46418 (SC);*** and ***ALIYU v. BULAKI (2019) LPELR-46513 (CA).***

He posited that in the instant case, the Claimant tendered copies of medical bills, receipts, vouchers and statement of accounts from different hospitals in the United States of America and the United Kingdom. That during cross-examination, it was revealed that some of the medical bills tendered in evidence were for treatment of an underlying medical condition (lumber spondylosis) which is unrelated to the accident.

He said that the Claimant's medical history which was also tendered in evidence revealed the existence of the said ailment and that the Claimant had been treating the ailment long before the occurrence of the accident.

Furthermore, he submitted that EXHIBIT C being relied upon by the Claimant is at variance with his oral evidence with regards to the payments of the medical bills and he referred to pages 2, 3, 4 and 5 of documents from Resurgence Orthopaedics. He also referred to "PAYMENT QUERY FOR IZOGIE IMASUAGBON" which listed out payments made by HUMANA HMO. He pointed out that two of the payments listed therein were denied by ***HUMANA*** while the rest of the medical bills were paid by ***HUMANA***. He said that it is settled law that a party cannot be compensated twice for the same injury and he relied on the Case of ***U.T.C NIG. PLC VS PHILLIPS (2012) 6 NWLR (Part 1295)***.

He maintained that the Claimant has failed to justify the Claims for specific damages of the sum of Three Hundred Thousand Dollars ($300,000) and Five Thousand Three Hundred and Eighty Pounds (£5,380) being part of the cost allegedly incurred by the Claimant on treatments.

CLAIMS FOR GENERAL DAMAGES

On the Claimant's claim for the sum of N2,000,000,000 (Two Billion Naira) as general damages for the psychological trauma, loss of business and income, learned counsel submitted that general damages are such that the law presumes to be the natural or probable consequences of the Defendant's acts. He said that general damages need not be proved by evidence and he cited the case of ***MONOTECHNICS PSAMS LTD. V. H.M.C.S. LTD.[2024]6NWLR (PART 1933).***

He submitted that the Claimant has not proved his claim for general damages, having failed to join the driver who is the primary tortfeasor in this suit.

ISSUE 2:

Whether the Claimant has been able to establish vicarious liability of the 1st Defendant.

Counsel submitted that the Claimant has failed to establish that the 1st Defendant is vicariously liable to the Claimant in this suit. He posited that the gamut of the Claimant's claim against the Defendants is founded on vicarious liability because he is attributing negligence to the driver of the truck who allegedly fled from the scene immediately after the accident.

He submitted that in order to succeed in his plea of vicarious liability, the Claimant must establish that the negligence occurred while the servant was acting in the course of his employment to the master and he cited the case of ***YAHAYA V OPARINDE (1997) 10 NWLR (PART 523).***

He maintained that in the instant case, the Claimant has not been able to establish any relationship between the 1st Defendant who is the owner of the truck and the driver. He said that the certified copies of the identity cards recovered from the scene of the accident which were tendered in evidence by the Third party reveals that the Identity cards belong to an employee of the 2nd and 3rd Defendant. He submitted that it is trite law that to prove vicarious liability, the first step is to establish a master and servant relationship which is lacking in the instant case.

Secondly, he posited that the Claimant failed to make the driver of the truck a party to the suit and this is fatal to the suit. He relied on the cases of ***IYERE vs. BENDEL FEEDS AND FLOUR MILLS LTD (2001) FWLR (Pt.37) 1166 at 1178*** and ***CHUKWU vs. SOLEL BONEH (NIG.) LTD (1993) 3 NWLR (Pt.280) 246 at 251***.

ISSUE 3:

Whether the Third Party can be made liable in the Third Party proceedings by virtue of the insurance policy it entered into with the 1st Defendant.

Learned counsel submitted that the Third Party is obligated by contract and by statute to assume liability in any valid insurance claim. He referred to the case of ***University of Nigeria, Nsukka v. Turner (1965) L.L.R. 33***.

He posited that in the instant case, it is uncontroverted that the vehicle involved in the accident that eventually metamorphosed into this suit was insured by the 1st Defendant with the third party and he relied on the insurance policy tendered in evidence by the 1st Defendant in this Suit.

He submitted that the third party's contention in its pleadings that it was not informed of the accident in time is lame and cannot stand in the eyes of the law.

He submitted that there is nowhere in the insurance policy where failure to report the accident in time is classified as a fundamental breach of the policy. Furthermore, he maintained that the third party did no place any particulars before this Court to show

the time limit for the third party to be notified of the accident, the exact time it was notified and the whether the 1st defendant was out of time. He referred the Court to the case of ***U.N.I.C LTD. V FADCO INDUSTRIES (NIG.) LTD. [2000] 4NWLR (part 653)***.

He submitted that the fundamental purpose of an insurance contract is to give cover for an insurance risk and he cited the case of ***AJAOKUTA STEEL COMPANY LIMITED & 2ORS VS CORPORATE INSURERS LIMITED [2004] 16 NWLR (Part 899) p. 399 para, D*** and the provisions of ***section 50(1) of the Insurance Act, No. 2 of 1997***.

Counsel posited that the receipt of an insurance premium is a condition precedent to a valid contract of insurance and that there can be no cover in respect of an insurance risk unless the premium was paid in advance. He relied on the following cases: ***Irukwu v. TMIB (1997) 12 NWLR (Pt.531) 113; Alao v. ACB (1998) 3 NWLR (Pt.542) 339 (Pp. 392, paras. D-E; 399, para. C; 401-402, paras. H-B)***.He said that is why it is a criminal offence for a vehicle to ply Nigerian roads without at least a Third Party Insurance cover.

He urged the Court not to allow the Third party to shy away from their responsibility.

He submitted that the need to make the third party a party to proceedings under a third party notice is the overriding need for the third party to be bound by the ultimate result of the action and the questions to be settled**.** He referred the Court to the following cases: ***Peenock Investments Ltd. v. Hotel Presidential Ltd. (1982) 12 S.C.1; Green v. Green (1987) 3 NWLR (Pt.61) 480; Odu'a Investment Co. Ltd. v. Talabi (1991)1 NWLR (Pt.170) 761; Governor of Oyo State v. Folayan (1995) 8 NWLR (Pt.413) 292.***

In conclusion, learned counsel submitted that the 1st Defendant has shown that the Claimant has failed to prove his case of vicarious liability against the Defendants. He maintained that the 1st Defendant has established that it had a valid insurance policy with the third party to enable it set off any liability that may arise as a result of an accident involving the 1st Defendant’s truck.

He therefore urged the Court to dismiss the Claimant's claim or in the alternative, to make the Third party liable for any liability that may have arisen against the Defendants as a result of the accident.

In his written address, the learned counsel for the Third Party, ***O.O. Erhahon Esq.*** formulated four issues for determination which he argued seriatim.

ISSUE 1:

WHETHER THE FAILURE OF THE CLAIMANT TO PROVE THE LEGAL STATUS OF THE 2ND AND 3RD DEFENDANTS IS NOT FATAL TO HIS CASE.

Opening his arguments on this first issue, learned counsel posited that the 2nd and 3rd Defendants, pursuant to an application by the Claimant, were joined as parties to this Suit.

He maintained that in paragraphs 6-11 of his Amended Statement of Claim, the Claimant averred that the 1st, 2nd and 3rd Defendants are sister companies belonging to the same group and that they have common staff.

He said that the 1st Defendant in paragraphs 2 – 4 of its Amended Statement of Defence stoutly denied the averments in paragraphs 6 - 11 of the Claimant's Amended Statement of Claim and stated that the 2nd and 3rd Defendants are strangers to the 1st Defendant and are not sister companies.

He maintained that from the foregoing, issues were joined on the legal status of the 2nd and 3rd Defendants hence the burden was on the Claimant to prove his averments in paragraphs 6 – 11 of his Amended Statement of Claim by producing the certificate of Incorporation of the 2nd and 3rd Defendants, which they failed to so do.

He referred the Court to the case of ***KEYSTONE BANK LTD V. ABDULGAFARU YUSUF & CO. LTD (2021) LPELR-55646(CA) (Pp. 61 paras. A)*** where the Court held that ***"the corporate status of an incorporated body is established by the production of its Certificate of Incorporation".*** He also relied on the case of ***NNPC v LUTIN INV. LTD & ANOR (2006) LPELR-2024 (SC) (PP. 22 PARAS. E-E)***.

He said that the Third Party through its witness tendered a certified true copy each of the two identity cards (Exhibit G and G1) said to be that of the driver of the truck recovered from the scene of accident. He said that the Identity Cards tendered were

not issued by the 1st Defendant but by the 2nd and 3rd Defendants who are not juristic/legal entities and are therefore non-existent.

He submitted that the Claimant's failure to prove that the driver of the truck involved in the accident was a servant of the 1st Defendant herein is fatal to his case.

He submitted that the liability of the master is dependent on the servant's liability for the tort and the fact that the servant acted in the course of his employment and he referred to the following cases: ***Ifeanyi Chukwu (Osondu) Company Limited v. Soleh Boneh (Nig.) Ltd. (2000) 5 NWLR (Pt. 656) 322;*** and ***Jarmakani Transport Ltd. v. Madam Wulemotu Abeke (1963) LPELR - 25398 (SC); (1963) 1 SCNLR 350.***

ISSUE 2:

Whether the Claimant has proved his case and is entitled to the reliefs sought.

Learned counsel submitted that in a civil suit, a Claimant must prove his case on a balance of probabilities or preponderance of evidence but where the commission of a crime is part of the Claimant's case; ***section 135 of the Evidence Act*** imposes on the Claimant a burden of proof beyond reasonable doubt. He relied on the cases of ***ANYANWU v PDP (2020) 3 NWLR (Part 1710) 134;*** and ***MOHAMMED v WAMMAKO (2018) 7 NWLR (Part 1619) 573***.

He posited that the allegation of "dangerous and reckless driving at high speed" is an allegation of crime and the burden of proof on the Claimant is beyond reasonable doubts as required by ***section 135 of the Evidence Act***.

He submitted that the Claimant failed to adduce any evidence stating, *inter alia*, the condition of the road, the weather condition, volume of traffic at the time of the accident and the speed limit of the road to help the Court in reaching a verdict that the driver drove at high speed in a reckless manner.

Furthermore, he posited that the Claimant also failed to adduce any evidence in proof of the allegation of negligence.

He referred the Court to the case of ***NGILARI VS. MOTHERCAT LTD (supra)*** where the Supreme Court held that: ***"Mere occurrence of accident is not proof of negligence."***

He posited that negligence is a question of fact, and it is the duty of he who asserts to prove it. He said that the Claimant in Paragraph 15 of his amended Statement of Claim stated that the Defendant recklessly and dangerously left its lane while moving at a high speed. He referred to the case of ***ADETOUN v. LAFARGE AFRICA PLC & ANOR (2018) LPELR-44733(CA)*** and submitted that the Claimant has not cleared the doubt as to whether the accident was caused by an occurrence out of the control of the driver, for example a break failure or as a result of road damage. He said that the evidence of all the Claimant's witnesses merely proves that an accident occurred without more. He said that there is no evidence of how the accident happened.

He posited that the Police Investigation Report and the Vehicle Investigation Report are bereft of the details that formed the opinion contained therein. He said that neither of the Reports contained any sketch map or report on the Truck. He again relied on the case of ***ADETOUN v. LAFARGE AFRICA PLC & ANOR (supra).***

Finally on the probative value of the Police Investigation Report, learned counsel submitted that the said EXHIBITS E1 AND E2 have no probative value whatsoever and amount to documentary hearsay. He said that the said Exhibits were tendered in evidence solely for the purpose of stating that the Defendant's driver drove dangerously and recklessly without giving details of the witnesses.

He concluded that since the Claimant has failed to prove the liability of the driver, the Defendants on record cannot be held vicariously liable.

ISSUE 3:

Whether the Claimant, from the facts and documentary evidence before the Court, has proved the damages sought.

He submitted that claims for special damages must be well pleaded and proved with exactitude and he relied on the cases of ***UNION BANK OF NIGERIA PLC v. CLEMENT NWANKWO & ANOR (2019) LPELR-46418 (SC):*** and ***ALIYU v. BULAKI (2019) LPELR-46513 (CA).***

Counsel addressed the Court on the copies of the medical bills, receipts, vouchers and statement of accounts from different hospitals in the United States of America and the United Kingdom which were admitted in evidence and marked as EXHIBIT C.

He submitted that the said EXHIBIT C is at variance with the oral evidence of the Claimant with regards to the payments of the medical bills. He referred to pages 2, 3, 4 and 5 of the documents from Resurgence Orthopaedics and a document titled: “PAYMENT QUERY FOR IZOGIE IMASUAGBON” which listed out payments made by HUMANA HMO.

He posited that only two of the payments listed therein were denied by ***HUMANA***. He said that the rest of the medical bills were paid by ***HUMANA***.

Furthermore, learned counsel referred the Court to pages 4 – 7 of the document titled: “Clinical Visit Summary” contained in EXHIBIT C which revealed that the Claimant was receiving medical treatment from First Foundation Medical Clinic months before the accident. He said that this shows a pre-existing medical condition prior to the accident which payments were also captured in EXHIBIT C.

He maintained that not all payments were as a direct result of the accident, thus the Claimant’s claim for medical bills falls short of the legal requirement of proof.

He submitted that the Claimant’s failure to adduce credible evidence to justify his claim for the sum of “Three Hundred Thousand United States Dollars ($300,000) and Five Thousand Three Hundred and Eighty Pounds (£5,380) being part of the cost incurred by the Claimant on treatments” is fatal to his case and the said claim should be dismissed. He relied on the case of ***UNION BANK OF NIGERIA PLC v. CLEMENT NWANKWO & ANOR (supra).***

On the Claimant’s claim for general damages, counsel posited that Claimant mentioned that he owned several companies but did not tender any document in proof of his ownership of the companies neither did he tender any document stating the losses he incurred in respect of the said companies in the course of receiving medical attention as a result of the accident.

On the claims for Legal Fees, he maintained that the Courts have decided that Solicitors fees are classified as a form of special damages which must be pleaded and strictly proved. He referred to the case of ***Divine Ideas Ltd. v. Umoru (2007) ALL FWLR (Pt. 380) 1468 at 1509 Paras. A - D (CA)***.

He maintained that the Claimant has failed to meet the legal requirement of providing facts in his pleadings and evidence to prove the sum claimed as legal fees.

He said that it is insufficient for the Claimant to assert that claim that he paid the sum of N15, 000,000.00 (Fifteen Million Naira Only) as legal fees.

He urged the Court to resolve issue three in favour of the Third Party.

ISSUE 4:

Whether the failure of the 1st Defendant to adhere to the terms of the insurance policy by neglecting to inform the Third Party/Applicant of the institution of this action constitutes a fundamental breach which in its own entitles the Third Party to repudiate the contract.

Learned counsel posited that the terms of the insurance contract stipulated that in the event of the institution of action in respect of an alleged offence or act relating to the subject of indemnity from a third party, the 1st Defendant shall give notice to the Company being Leadway Assurance Company Limited, the Third Party in the instant suit, immediately upon receipt of any court process or upon his knowledge of any impending action.

He referred the Court to the provisions of ***Section 5-Clauses 1 and 6*** of the Insurance Policy in this regard.

He posited that the action of the 1st Defendant is with blatant disregard to the terms of the contract between it and the Third party herein.

He said that for the purpose of this Suit, the 1st Defendant is the "Plaintiff/Claimant" in a Third Party proceeding and he cannot succeed in an action he has totally disregarded and he relied on the case of ***Yadis Nigeria Limited V. Great Nigeria Insurance Company Limited (2007) LPELR-3507(SC).***

He posited that by ignoring the terms of the contract and entering appearance in the matter without informing the Third Party, the 1st Defendant displayed its intention to abandon the contract and defend itself in the suit thereby making it justifiable for the Third Party to repudiate the contract. He relied on the case of ***Achonu V. Okuwobi (2017) LPELR-42102 (SC).***

He submitted that the Third Party is entitled to repudiate the contract since the 1st Defendant has deliberately breached the terms of the contract and placed the Third

Party at a disadvantage and irreparable damaged the Third Party's chances of adequately defending itself in this issue.

He therefore urged the Court to resolve issue three in favour of the Third Party.

In conclusion, he urged the Court to dismiss the case of the Claimant as contained in the Amended Statement of Claim.

In his final written address, the learned counsel for the Claimant, ***M.O. Igiede Esq.*** formulated three issues for determination which he argued seriatim.

<u>ISSUE ONE</u>:

WHETHER BY VIRTUE OF THE DEFENDANT JOINING LEADWAY ASSURANCE COMPANY LTD AS A THIRD PARTY IN THIS CASE, LEADWAY ASSURANCE COMPANY LTD HAS TRANSLATED TO BECOME A DEFENDANT TO THE MAIN CLAIM BROUGHT BY THE CLAIMANT IN THIS CASE?

Arguing this first issue, the learned counsel submitted that the mere fact that the Defendant applied and joined Leadway Assurance Company Ltd as a third party in this case does not make Leadway Assurance Company Ltd to become a Defendant in this suit.

He submitted that if a Claimant desires to obtain judgment against a third party, he must apply to add him as a defendant, and if the third party intends to defend or counter-claim against the Claimant, he must apply to be added as a Defendant. He said that the Third Party is only entitled to admit or contest the claim against him by the Defendant. He referred the Court to the cases of ***SOYINKA V. ONI & ORS (2011) LPELR-4096(CA)*** and ***ONIKOYI & ORS v. ONIKOYI & ORS (2018) LPELR-43680(CA).***

Again, he referred the Court to the case of ***OKONKWO v. MODE (NIG) LTD & ANOR (2002) LPELR-10981(CA)*** where the Court of Appeal explained the object of third party proceedings

He posited that from the totality of the authorities referred to, it is clear that the Third Party is only a defendant to the Defendant in the main case and has no business in defending the main claim brought by the Claimant as was done in this instant case.

He urged the Court to expunge all the proceedings relating to the Third Party defending the main Claim.

He maintained that in the instant suit, the Third Party never asked for leave to defend the Claimant's case or for an order to be joined as a defendant to enable it defend this suit.

Furthermore, he submitted that there is no *privity* of contract between the Claimant and the Third Party and he relied on the cases of ***UBN LTD v. EDIONSERI (1988) LPELR-3384(SC)*** and ***BANK OF IRELAND v. UBN LTD & ANOR (1998) LPELR-744(SC)***

He therefore urged the Court to resolve issue one in favour of the Claimant.

***ISSUE TWO*:**

WHETHER THE DEFENDANT IS RESPONSIBLE FOR THE ACCIDENT.

Counsel submitted that the Claimant has proved that the Defendant was responsible and liable for the accident that occurred on the 14th of November, 2013 which resulted in the Claimant sustaining some life threatening injuries.

He posited that at the trial, the Claimant was able to prove the following:

1) That on the 14th of November, 2013, while traveling with his brother Mr. Kenneth Imasuagbon along the Uromi/Agbor public Highway, the Claimant was involved in an accident with the Defendant's Truck with Registration Number KBT 99 XA;
2) That the Defendant's truck was on high speed when it recklessly and dangerously left its lane and ran into the Mercedes Benz S550 and a Range Rover Armored car in which the Claimant and his brother Mr. Kenneth Imasuagbon were traveling, thereby causing serious damages to the Mercedes Benz S550 and the Range Rover Armored car and serious and grievous life threatening injuries to the Claimant and other occupants of the Mercedes Benz S550 and a Range Rover Armored car. The pictures of all the Vehicles after the Accident were tendered and admitted and marked Exhibits A1, A2, A3, A4 and A5;

3) The Claimant and his Elder Brother Mr. Kenneth Imasuagbon were in the Range Rover Armored car (Jeep) which was being driven at the time of the accident by one Thomas Okejeizor (also known as Simon), a driver with a valid Driver's License at the time of the accident;
4) The Claimant sustained serious and life threatening injuries as a result of the accident caused by the dangerous and reckless driving of the Defendant's driver who was on official assignment for the Defendant at that material time; and
5) The accident was investigated by the Igueben Divisional Police Station and the police investigation reports were admitted and marked Exhibits E1 and E2 wherein the 1st Defendant's Truck Driver was indicted for being responsible for the accident.

He maintained that the Claimant has proved his claim that the Defendant was responsible for the accident and is entitled to the reliefs in the writ of summons and statement of claim.

He submitted that from the evidence, the truck that was involved in the accident is one of the trucks in the Defendant's fleet. He said that the Driver of the Truck was one of the staff under the control of the DW1 the Defendant's Fleet manager and on the 14th of November, 2013, the Driver was driving the truck on the instruction of the Defendant while in the course of his employment. Consequently, the Defendant is vicariously liable for the accident and he relied on the cases of ***IFEANYI CHUKWU (OSONDU) CO. LTD v. SOLEH BONEH (NIG) LTD (2000) LPELR-1432(SC)*** and ***IYERE v. BENDEL FEED AND FLOUR MILL LTD (2008) LPELR-1578 (SC)***.

Counsel posited that the 1st Defendant who employed the driver, stated clearly through its Fleet Manager who testified as DW1 that the Truck Driver was the Defendant's Driver, under his control and authority and was on the Defendant's assignment on the said 14th November, 2013. He said that the Truck Driver came back to inform the Fleet manager of the accident before absconding.

He therefore urged the Court to reject the submissions of the Third party that the Driver was not a staff of the 1st Defendant.

Counsel submitted that it is trite law that facts which are admitted need no further proof and he cited the cases of ***DIN v. AFRICAN NEWSPAPERS OF (NIG) LTD (1990) LPELR-947(SC); JITTE & ANOR v. OKPULOR (2015) LPELR-25983(SC);*** and ***AJIBULU v. AJAYI (2013) LPELR-21860(SC).***

He urged the Court to resolve Issue Two in favour of the Claimant.

Counsel submitted that since the Claimant has discharged his onus of proving the negligence of the Defendant's Driver, the burden has shifted to the Defendant who did not offer any explanation or defence. He referred the Court to the case of ***IBEKENDU v. IKE (1993) LPELR-1390 (SC).***

ISSUE THREE:

WHETHER THE CLAIMANT IS ENTITLED TO THE RELIEFS AS CLAIMED.

Counsel posited that the Claimant has proved that he was in the Range Rover Armored Jeep which was damaged as a result of the accident caused by the Defendant and that he sustained serious life threatening injuries which caused him to spend so much of resources on medical treatment as reflected in the exhibits tendered.

He said that there is evidence that the Claimant's spinal cord was seriously affected by the accident and that he has lost all his business and means of livelihood, resulting in the cancelation of some contracts as shown in Exhibits D1 and D2.

He posited that the principle of law is that the party who is primarily liable in negligence for an accident bears the responsibility for it and he relied on the cases of ***FRANCIS IWENJIWE & ORS. v. CHUKUKA O. NWABUOKEI (1978) LPELR-1564(SC);*** and ***ADENUGBA V. OKELOLA (2007) LPELR-8290(CA)***.

On the issue of special damages, counsel submitted that they were properly pleaded and established by evidence. He relied on the cases of ***NICON HOTELS LTD. V. N.D.C LTD (2007) 13 NWLR Pt 1050 pp. 72 – 273 paras. G-A*** and ***N.B.C. PLC V. BORGUNDU (1999) 2 NWLR Pt 591 Pg. 430 paras. B-C***

He further submitted that the Claimant is also entitled to the cost of this suit and he relied on the case of ***FIRST BANK v. ORONSAYE (2019) LPELR-47205 (CA) Per HELEN MORONKEJI OGUNWUMIJU, J.C.A (Pp. 22, paras. F-E).***

In conclusion, he urged the Court to grant the reliefs of the Claimant.

Upon receipt of the Final Written Address of the Third Party and the Claimant, the learned counsel for the 1st Defendant filed a Reply on Point Of Law.

In his Reply on Points of Law, he submitted that the Claimant's argument that the third party is trying to become a Defendant in the main case is misconceived and misleading. He tried to distinguish the case of **SOYINKA V. ONI & ORS** cited by the Claimant from the present one. He said that in that case, the third party applied to be a Defendant and also to counter-claim and the Court held that he cannot be a Defendant in a case where he was already a third party.

He maintained that the third party is at liberty to defend his case if it feels that the Claimant is not entitled to indemnity and in doing so, the third party is entitled to lead evidence, cross-examine witnesses, and make legal submissions in defense of the case despite being sued as a third party. He said that this does not translate to the third party being a defendant in the main suit.

Furthermore, he submitted that the 1st Defendant never admitted all the facts alleged by the Claimant under cross-examination. He said that the only admission made by the witness from the excerpt of the cross-examination was that there was an accident involving the 1st Defendant's truck.

REPLY ON POINT OF LAW TO THE THIRD PARTY'S FINAL WRITTEN ADDRESS

In response to paragraphs 6.1 -6.9 of the Third Party's final written address, learned counsel submitted that assuming but not conceding that the 1st Defendant is in breach of any clause of the insurance contract between it and the Third Party, ***Section 55 of the Insurance Act 2003*** provides thus ,;

*Section 55**- Only breach of material and relevant terms to give rise to a right:***

(1) In a contract of insurance, a breach of term whether called a warranty or a condition shall not give rise to any right by or afford a defence to the insured unless the term is material and relevant to the risk or loss insured against.

(2) Notwithstanding any provision in any written law or enactment to the contrary, where there is a breach of a term of a contract of insurance, the insurer shall not be entitled to repudiate the whole or any part of the contract or a claim brought on the grounds of the breach unless-

(a) the breach amounts to a fraud; or

(b) it is a breach of fundamental term of the contract.

(3) <u>Where there is a breach of a material term of a contract of insurance and the insured makes a claim against the insurer and the insurer is not entitled to repudiate the whole or any part of the contract, the insurer shall be liable to indemnify the insured only to the extent of the loss which would have been suffered if there was no breach of the term.</u>

(4) Nothing in this section shall prevent the insurer from repudiating a contract of insurance on the ground of a breach of a material term before the occurrence of the risk or loss insured against.

(5) In subsection (2) of this section, "fundamental term" means a warranty, condition or other term of an insurance contract which a prudent insurer will regard as material and relevant in accepting to underwrite a risk and in fixing the amount of premium.*"*

He submitted that the above section of the Insurance Act has clearly illustrated the only instance where the insurer who is the third party in this case can repudiate the insurance contract particularly on breach of material term. He said that ***Section 55(4) of the Act*** says that repudiation of the contract on grounds of breach of material fact can only be done by the insurer before the occurrence of the risk or loss insured against. He said that in this instance, the risk or loss has already occurred therefore the Third Party is still liable to indemnify the 1st Defendant.

Learned counsel referred to the provisions of ***Section 69(1) (b) of the Insurance Act 2003*** that, where a judgment is obtained against an insured by a third party claimant, the insurer shall pay the amount of the judgment to the third party entitled to the benefit of such judgment within 30 days, notwithstanding that the insurer may be entitled to avoid or cancel the policy.

He submitted that ***Section 69(1)(b) of the Insurance Act 2003*** is similar to ***section 10(1) of the Motor Vehicle (Third Party Insurance) Act 1950*** and both sections impose a statutory duty on an insurer to settle the amount of any judgment obtained by a third party claimant against an insured. He said that by provision, an insurer cannot place a maximum limit of liability for death or personal injury to third parties. Rather, the insurer must settle the claim for the full amount of the judgment obtained against the insured. He referred to the case of ***PEREIRA V MOTOR & GENERAL INSURANCE (1971) NNLR 118*****,** where the High Court held that ***section 10(1) of the Motor Vehicle (Third Party Insurance) Act 1950*** imposed a statutory duty and not a contractual liability on the insurer to settle the judgment obtained against the insured.

He submitted that the Third Party is under a statutory duty imposed on it by the Insurance Act to settle the amount in the event that judgment is obtained against the 1st Defendant and he urged the Court to so hold.

The learned counsel to the Third Party also filed a Reply on Points of Law to the Claimant's final address.

In his Reply on Points of Law, he urged the Court to discountenance all the arguments contained in the said Claimant's Final Written Address and to dismiss the Claim before the Court.

He posited that the authorities cited by the Claimant in his Final Written Address, to wit: ***SOYINKA v ONI (2011) LPELR-4096 (CA); ONIKOYI & ORS v ONIKOYI & ORS (2018) LPELR – 43680 (CA); OKONKWO v MODE (NIG) LTD & ANOR (2002) LPELR 10981 (CA); FAMUYIWA v FOLAWIYO & ORS (1972) LPELR 1242*** were all decided based on the clear and unambiguous provisions of ***Order 9 Rules 18, 19, 20, 21, 22, 23 and 24 of the Federal High Court Rules 2009.***

He submitted that the provisions of the ***Federal High Court Rules*** do not apply to the Edo State High Court as there are ample provisions for Third Party Proceedings in the ***Edo State High Court (Civil Procedure) 2018 Rules***.

He said that going by the principles of stare decisis and the exception thereto, the authorities relied upon by the Claimant are distinguishable from and inapplicable to this case in the light of the clear provisions of the ***Edo State High Court (Civil***

Procedures) Rules. He referred the Court to the case of ***AKEREDOLU v. ABRAHAM & ORS (2018) 1 LPELR-44067(SC)***.

He referred to ***Order 13 Rules 22 and 23 of the Edo State High Court (Civil Procedure) Rules, 2018,*** and submitted that the clear, unambiguous and the literal interpretation of same is that the Third Party to an action is entitled to enter appearance in the Suit and file pleadings in response to the processes served on him. He pointed out that the Rules of this Honourable Court states literally that if the Third Party defaults in filing pleadings after being served with the Order of Court and all the processes in the Suit then he shall be deemed to have admitted the validity of the Claim and shall be bound by the judgment.

He submitted that there is no provision, in the ***Edo State High Court (Civil Procedure) Rules 2018***, for the Third Party to apply for and obtain the leave of Court to defend this action, as erroneously canvassed by the Claimant.

He urged the Court on the strength of the foregoing submissions, to distinguish this case from the plethora of cases cited by the Claimant in his Final Written Address and to hold that they are not applicable to this case.

Furthermore, learned counsel submitted that the Third Party having taken part in the proceedings of this instant suit, the Court cannot close its eyes to the third party's processes or to discountenance the steps taken by the third party in this Suit and he referred to the cases of ***UYAEMENAM NWORA & ORS v. NWEKE NWABUNZE & ORS (2011) LPELR-23008 (SC)*** and ***CLETUS OKWUCHUKWU ICHE v. THE STATE (2013) LPELR-22035(CA)***.

I am of the view that the Issues for Determination in this suit are as follows:

1) ***Whether the Defendants are liable for the alleged accident involving the Claimant;***
2) ***Whether the Claimant is entitled to the reliefs claimed in this suit; and***
3) ***Whether the Third Party is under a legal obligation to indemnify the 1st Defendant under the Insurance Policy.***

I will proceed to resolve the three issues seriatim.

ISSUE 1:

Whether the Defendants are liable for the alleged accident involving the Claimant?

It is settled law that in civil cases, the burden of proof is on the party who asserts a fact to prove the fact. The burden of proof of negligence is upon the Claimant who alleged negligence. This is because negligence is a question of fact, not law, and it is the duty of the party who asserts it to prove same. By virtue of ***Section 135(1) of the Evidence Act, 2011*** whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. See: ***NB PLC V. AUDU (2009) LPELR-8863(CA) (PP. 27 PARAS. C); ABUBAKAR & ANOR V. JOSEPH & ANOR (2008) LPELR-48(SC) (PP. 31-32 PARAS. F).***

From the totality of the evidence adduced at this trial, the substratum of this suit is on the tort of negligence.

In the case of ***OKWEJIMINOR V GBAKEJI & ANOR (2008) LPELR-2537(SC),*** the apex Court while expositing on negligence referred to the old English case of ***Blyth v. Birmingham Waterworks Co. (1856) 11 EXCH. 781 at 784***, where the English Court defined negligence as: ***"… the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."***

Again in the old English case of ***Lochgelly Iron and Coal Co. v. M'mullan (1934) A.C. 1 at P. 25***, Lord Wright exposited as follows: ***"In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission. It properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owed."*** This latter definition spells out for us the three basic components of the tort of negligence, to wit: ***[a] duty of care [b] breach of the duty of care; and [c] damage caused by the breach.***

In every case of negligence, the burden is on the Claimant to plead and lead evidence to prove these three basic components of the tort of negligence.

Once a Claimant fails to establish by credible evidence all or any of these three key ingredients of the tort of negligence, such a claim must fail. See ***B. J. Ngilari V.***

Mothercat Ltd (1999) 13 NWLR (Pt. 636) 626. See also Oyidiobu V. Okechukwu (1972) 5 SC 191; Orhue V. NEPA (1998) 7 NWLR (Pt. 557) 187.

In the instant case it is expedient to examine the evidence adduced by the Claimant to determine whether he has established these three salient ingredients.

First on the issue of duty of care. The apex Court has given a guide on how to determine the duty of care in the case of ***I.M.N.L. v. NWACHUKWU (2004) LPELR-15269(SC)*** thus: ***"The recent decision of the House of Lords has summed up the law admirably in Ann v. Merton London Borough Council (1978) AC 728 where Lord Wilberforce stated as follows:- "Through the trilogy in this house; Donoghue v. Stevenson (1932) AC 562, Hedley Byrne & Co. Ltd. v. Heller Partners Ltd. (1964) AC 465 and Dorset Yacht Co. Ltd. v. Home Office (1970) AC 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. First one has to ask as between the alleged wrong doer and the person who has suffered damage if there is a sufficient relationship of proximity or neighbourhood such that in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter in which case a prima facie duty of care arises ..." Per MUSDAPHER, J.S.C See also AGBONMAGBE V CFAO (1996) 1 ALL NLR 140 at 145; MAKWE V NWUKOR (2001) 7 NSCQR 435 and FIRST BANK OF NIGERIA PLC V ASSOCIATED MOTORS CO. LTD (1998) 10 NWLR (Pt.750) 441 at 464.***

Going by the proximity test as suggested by the apex Court, I must determine whether the relationship between the parties herein is such that the driver of the truck could reasonably have contemplated that any act of carelessness on his part may likely cause damage to the Claimant.

In the determination of the issue of negligence, I will first consider the status of the driver of the Dangote Cement Truck with Registration Number KBT 99 XA. From the totality of evidence adduced at the trial it is an undisputed fact that the alleged truck was driven by one Abubakar Saidu, a staff of Dangote Cement Transport Company. The certified copies of two staff identity cards of the driver were tendered without any objection and admitted in evidence as Exhibits “G” and “G1”.

At the trial, one Muhammed Adesiyan Adegboyega, who is presently the Fleet Manager of Dangote Cement Transport admitted that he is the Fleet manager of the 1st Defendant and that he is aware of the accident involving the said Defendant's truck. He however said that he is not aware of the whereabouts of the driver of the said truck.

The evidence before the Court is that the driver of the Dangote Cement truck absconded after the accident and has not been seen ever since. Incidentally, the Defendants did not proffer any explanation for the absence of the said driver. In this suit, the Claimant has maintained that the Defendants are vicariously liable for the acts of the absconding driver.

Furthermore, the liability of the master is dependent on the Claimant being able to establish the servant's liability for the tort. It is only when it is established that a tort has been committed, who committed it and that the tortfeasor is an employee or agent of a principal and that the tort was committed in the course of his employment that the issue of vicarious liability can arise. So unless the servant is liable, the master cannot be liable for his acts. See the case of ***FIRST BANK V. AZIFUAKU (2016) LPELR-40173(CA) (PP. 23-24 PARAS. A).***

From the foregoing, the first thing to determine is whether the driver of the truck is liable for negligence.

The generally accepted principle of negligence is that a person owes a duty of care to his "neighbour" who would be directly affected by his act or omission. The word "care" means serious attention or heed. Under the law of negligence or of obligation, it means the conduct demanded of a person in a given situation. Typically, this involves a person, giving attention both to possible dangers, mistakes and pitfalls and ways of minimizing those risks. See: ***Nigerian Ports Plc Vs Beecham Pharmaceutical PTE Ltd (2013) 3 NWLR (Pt 1333) 454, Kabo Air Ltd Vs Mohammed (2015) 5 NWLR (Pt 1451) 38.***

There is a legal duty owed to take reasonable care to avoid acts or omissions which can be reasonably foreseen as likely injure a neighbour. Who then in law can be described as the neighbour of a Claimant in a claim for negligence? In the Holy Bible, the parable of the Good Samaritan aptly demonstrates who is a neighbour! However, in legal parlance, as far back as 1932, in England, ***Lord Atkin*** had

provided an answer as to who in law can be described as a neighbour to a Claimant in a claim for negligence. In the classical case of ***Donoghue V. Stevenson (1932) AC @ P. 580*** he stated thus: ***"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who then is my neighbor? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."*** See also the English case of ***Anns V. Merton London Borough Council (1977) 2 All ER 492 @ 498;*** and the Nigerian case of ***Abusomwan V. Mercantile Bank of Nig Ltd (1987) 3 NWLR (Pt. 60) 180 @ 198***, where the court held that the doctrine of proximity is the foundation of duty of care in the tort of negligence.

The question to ask on the "neighbour" and "duty of care" principle is whether between the Driver of the truck and the Claimant, there is sufficient relationship of proximity or neighbourhood such that in the reasonable contemplation of the former, carelessness on his part may likely cause damage to the latter? See the cases of ***Abusomwan Vs Mercantile Bank of Nigeria (supra) and Anya Vs Imo Concorde Hotels Ltd (2002) 18 NWLR (Pt 799) 377.***

A person driving a vehicle on the high way owes a duty of care to other road users just like they also owe the same duty to him. See the cases of ***HAMZA VS KURE (2010) 42 NSC QR 592*** and ***REYNOLDS CONSTRUCTION CO. LTD V. ODIGIE (2018) LPELR-44776(CA) (PP. 27-30 PARAS. E).***

Upon the above authorities, I hold that the 1st Defendant's driver owed the Claimant a duty of care under the particular circumstances of this case.

Having determined the existence of duty of care between the 1st Defendant's driver and the Claimant, the next relevant consideration is whether there was a breach of the duty of care. Although negligence is a question of fact, each case must be decided in the light of its own facts and circumstances; the established principle of law is that the degree of care which the duty involves must be proportional to the degree of risk involved if the duty of care should not be fulfilled. See the cases of ***North Western Utilities Ltd V. London Guarantee & Accident Co. Ltd (1936) AC 108;***and ***U.T.B (Nig.) V. Ozoemena (2007) 3 NWLR (Pt. 1022) 488.*** The test is that of a reasonable

man guided upon those considerations which ordinarily regulate the conduct of human affairs.

The uncontested facts between the parties in this suit are that the Driver of the Dangote Truck was driving on the same road with the Claimant at the time of the accident. The uncontroverted evidence of the Claimant is that while traveling with his brother Mr. Kenneth Imasuagbon along the Uromi/Agbor public Highway in a Range Rover Armored Jeep, the Defendant's driver, who was driving at a very high speed, recklessly and dangerously left his lane and ran into the Mercedes Benz S550 with Registration Number BJ 900 GWA and the Range Rover Armored Jeep in which the Claimant and his brother were traveling.

The Claimant alleged that the accident caused serious damages to the Mercedes Benz S550 and the Range Rover Armored car and the occupants of the two cars sustained serious life threatening injuries. He tendered four pictures and a certificate of compliance which were admitted as Exhibits A1 – A5**,** to corroborate his story.

Curiously, the Driver never showed up in Court to contradict the Claimant's evidence. The 1st Defendant's lawyer tried to shake the evidence of the Claimant with some rigorous cross-examination but the Claimant maintained his story that the truck driver, who was coming from the opposite direction, left his side of the road and collided with them on their own side of the road. The truck driver never came to the Court to contradict the assertion of the Claimant.

The established legal position is that the onus of proving negligence is on the Claimant who alleges same; but where the Claimant has adduced evidence of how the accident occurred, the onus shifts to the Defendant to offer an explanation about how the accident happened and to show that the Defendant is not at fault. See the cases of ***IFEANYI IBEKENDO VS. IKE (1993) 4 SCNJ 50;*** and ***UBA PLC VS. ACHORU (1990) 9 - 10 SC 115.***

The only witness called by the 1st Defendant (the D.W 1), who is their Fleet Manager, did not have much to say about how the accident occurred. He admitted under cross examination that he was not even the Fleet Manager at the time of the accident and that he never visited the scene of the accident.

In the case of ***MOSES V. STATE (2006) 11 NWLR (pt. 992) 458, 497 paragraphs D - E,*** the Supreme Court, *per* ***EJIWUNMI, JSC***, held inter alia:

".... There can be no doubt that it is settled law that where the driver of a vehicle left his own side of the road to collide with another vehicle coming on the opposite direction and was being driven properly on its own side of the road, that driver who left his own side of the road to cause the collision drove his vehicle negligently and dangerously ..."

Similarly, in the case of ***ABDULLAHI V STATE (1985) 1 NWLR (pt. 3), p. 523*** the Supreme Court, *per* ***KAWU, JSC*** approved of the finding of the trial Judge to the effect that to leave one's lane for another when another vehicle is approaching from the opposite direction and to cause an accident is a dangerous piece of driving.

In the instant case, the 1st Defendant failed to discharge the onus on them to proof that their Driver was not at fault. I hold that the driver was in breach of the duty of care which he owed to the Claimant and other road users plying the road at that time.

The third consideration is to determine whether there were any damages or injury arising from the breach of the duty of care.

In the instant case, the Claimant adduced copious evidence to show that the accident caused serious damages to the Mercedes Benz S550 and the Range Rover Armored cars and that the occupants of the two cars including him sustained serious life threatening injuries. He tendered several documents to substantiate his oral evidence.

From the totality of the evidence adduced by the Claimant, I hold that he has established the fact that the negligence of the driver of the Dangote Cement truck actually caused the accident on the day in question.

The next thing to determine is whether the Defendants are vicariously liable for the negligence of the driver.

At this stage, it is pertinent to observe that although there are three Defendants sued in this suit, it is only the 1st Defendant, Dangote Cement Plc. that filed a Statement of Defence and adduced evidence in defence of this suit. The 2nd and 3rd Defendants to wit: Dangote Cement Works Ltd. and Dangote Cement Transport Ltd. which appear to be servicing companies affiliated to the 1st Defendant, did not file any defence. In

this suit, the parties focused all their attention on the 1st Defendant. From the totality of the evidence before the Court, there was no defence raised on behalf of the 2nd and the 3rd Defendants in this suit.

However, from the totality of the evidence adduced in this suit it is apparent that there is a symbiotic relationship between the 1st Defendant, the 2nd and the 3rd Defendants. The 2nd and 3rd Defendants apparently, are the servicing companies affiliated to the 1st Defendant. The identity card of the absconding driver (Exhibits "G" & "G1"), revealed that he was a staff of the 3rd Defendant (Dangote Cement Transport Ltd.). Furthermore, the only witness called by the 1st Defendant, the D.W.1, testified that his address is Dangote Cement Company Obajana, Kogi State and that he is the Fleet Manager to Dangote Cement Transport (3rd Defendant). Under cross examination, the witness admitted that he is also the fleet manager of the 1st Defendant. I find as a fact that there is a working synergy between the three companies, more so as it relates to the incident culminating in this suit.

Thus, on the issue of the vicarious liability of the three Defendants, I am of the view that the liability or otherwise of the three Defendants are joint. Incidentally, the Claimant sued the three Defendants jointly.

The question now is whether the Defendants are vicariously liable for the negligence of their driver?

The term vicarious liability has been defined by the Apex Court in the case of ***Ifeanyi Chukwu (Osondu) Company Ltd. v. Soleh Bonieh (Nig.) Ltd. (2000) LPELR-1432 (SC)*** as follows:-

"---the case of one person taking the place of another in so far as liability is concerned."

See also ***NPF & ANOR V. STATE (2020) LPELR-50330(CA) (PP. 9 PARAS. A).***

However, a *sine qua non* for the invocation of the doctrine of vicarious liability is that a Master would only be held liable for the wrongs of his Servant while acting in the course of his employment. See ***Ifeanyi Chukwu (Osondu) Ltd V. Soleh Boneh Ltd (2000) supra.***

The legal concept of vicarious liability requires three parties. First is the injured party, second is the person whose act or default caused the injury and the third is the person who is vicariously liable for the latter's act or default. See ***BOYLE V KODAK (1986) NWLR 661***

Furthermore, the liability of the master is dependent on the Claimant being able to establish the servant's liability for the tort. It is only when it is established that a tort has been committed, who committed it and that the tortfeasor is an employee or agent of a principal and that the tort was committed in the course of his employment that the issue of vicarious liability can arise. So unless the servant is liable, the master cannot be liable for his acts. See ***FIRST BANK V. AZIFUAKU (2016) LPELR-40173(CA) (PP. 23-24 PARAS. A).***

Already, I have made a finding that the driver was negligent.

From the available evidence, the driver was in the employment of the Defendants at the time of the accident and there is nothing to show that he was on a frolic of his own when the accident occurred. I find as a fact that at the time of the accident, the driver was a servant of the Defendants carrying out a lawful assignment for them.

Consequently, I hold that the Defendants are vicariously liable for the negligence of the driver. Issue one is therefore resolved in favour of the Claimant.

ISSUE 2:

Whether the Claimant is entitled to the reliefs claimed in this suit?

In this suit, the Claimant is seeking the following reliefs:

1) ***AN ORDER compelling the Defendants to pay the Claimant the sum of Three Hundred Thousand United States Dollars ($300,000) and Five Thousand Three Hundred and Eighty Pounds (£5,380) being part of the cost incurred by the Claimant on treatments;***
2) ***AN ORDER compelling the Defendants to pay the Claimant the sum of N2,000,000,000 (Two Billion Naira) being general damages for the psychological trauma, loss of business and income caused as a result of the accident, which was as a result of the reckless driving of the Defendant's truck driver;***

3) ***AN ORDER compelling the Defendants to pay the Claimant 10% monthly interest of the Judgement until fully liquidated;***
4) ***AN ORDER compelling the Defendants to pay the Claimant the sum of N15, 000,000 (Fifteen Million Naira) being the cost of prosecuting this suit;***

Essentially, relief (1) is for special damages.

It is settled law that to succeed in a claim for special damages, the Claimant must specifically plead and strictly prove that he suffered such damages as claimed. However, this does not means that the law requires a minimum measure of evidence or that the law lays down a special category of evidence required to establish entitlement to special damages. What is required to establish entitlement to special damages is credible evidence of such a character as would suggest that he indeed is entitled to an award under that head otherwise the general law of evidence as to proof by preponderance or weight as usual in civil cases operates. See the following cases: ***OSHINJIRIN V. ELIAS (1970) ALL NLR 153; WARNER INTERNATIONAL V. FEDERAL HOUSING AUTHORITY (1993) 6 NWLR (PT. 298) 148;*** and ***REGISTERED TRUSTEES OF PEOPLE CLUB OF NIGERIA V. REGISTERED TRUSTEES OF ANSAR-UD-DEEN SOCIETY OF NIGERIA & ORS (2019) LPELR-47523(CA) (PP. 68-69 PARAS. E).***

In the instant case, the Claimant's claims on special damages are in respect of his medical expenses incurred while receiving treatment for the life threatening injuries which he sustained from the accident.

At the trial, the Claimant testified that immediately after the accident, he was first rushed to the University of Benin Teaching Hospital (UBTH) for treatment but he was later transferred to another Hospital in the United Kingdom for further treatment because the injuries were too serious for the UBTH to handle. Curiously, he did not give evidence of how much he spent on his treatments in Nigeria.

He testified that in the United Kingdom, he received treatment at Wexham Park Hospital where he spent the sum of Five Thousand Three Hundred and Eighty Pounds (£5,380) for his medical bills and he tendered a bundle of medical bills which were admitted in evidence as Exhibit C.

The Claimant also gave evidence of how he was subsequently transferred to another hospital in the United States of America for further treatments. He alleged that he spent about the sum of Three Hundred Thousand United Dollars ($300,000) for the said treatments. He mentioned some of the health facilities that treated him in the United States as: Emory Healthcare; Emory Clinic; Emory Univ. Hospital; Emory Johns Creek Hospital; MRI Imaging Specialist; First Foundation Medical; Georgia Spinal Health Clinic; and Resurgens Orthopaedics. He tendered several copies of the medical bills, receipts, vouchers, statements of accounts and medical reports which are contained in the bundle of documents admitted as Exhibit C.

The issue now is whether, the Claimant has strictly proved the alleged expenses which he incurred in the course of his treatments. In relation to his treatment at treatment at Wexham Park Hospital in the United Kingdom where he allegedly spent the sum of Five Thousand Three Hundred and Eighty Pounds (£5,380) for his medical bills I observed that apart from the assertion in his deposition, the Claimant did not tender any document whatsoever in relation to his alleged treatment in the aforesaid hospital. He alleged that the medical bill is part of the bundle of documents in Exhibit C, but I diligently searched every document in Exhibit C but there is nothing relating to the said Wexham Park Hospital. Under cross-examination, the Claimant stated thus: ***"I went for treatment at Wexham Park Hospital in the UK. I have the medical report; I do not know whether it is part of Exhibit C."*** So for some inexplicable reasons, the Claimant failed to tender any document to substantiate his alleged treatment in the aforesaid hospital. This omission is fatal to the proof of his claim for the said sum of £5,380; it has not been strictly proved.

Coming to the bulk sum of Three Hundred Thousand United States Dollars ($300,000) which the Claimant allegedly spent on his treatments in the United States, the Claimant mentioned some of the health facilities that treated him in the United States such as: Emory Healthcare; Emory Clinic; Emory Univ. Hospital; Emory Johns Creek Hospital; MRI Imaging Specialist; First Foundation Medical; Georgia

Spinal Health Clinic; and Resurgens Orthopaedics. He also alleged that the documents evidencing the alleged expenses are contained in some of the documents contained in Exhibit C.

While challenging these set of reliefs, the 1st Defendant's counsel revealed during his cross-examination that some of the medical bills tendered in evidence were for treatment of an underlying medical condition (lumber spondylosis) which is unrelated to the accident.

Furthermore, the Claimant's medical history also revealed the existence of the said ailment which the Claimant had been treating long before the occurrence of the accident.

It is pertinent to note that in his evidence before the Court, the Claimant did not give any breakdown of the expenses incurred at each health facility and to identify the particular documents containing particular expenses incurred in each health facility. He simply identified a bundle of documents which he claimed are in respect of his treatments in the United Kingdom and the United States and dumped the documents for the Court to sort them out.

It is settled law that it is not the duty of a Court to embark upon cloistered justice by making enquiry into the case outside the open Court, not even by examination of documents which were in evidence but not examined in open Court; a Judge is an adjudicator and not an investigator. See the following cases on the point: ***Queen Vs Wilcox (1961) All NLR 633; Duriminiya Vs Commissioner of Police (1961) NRNLR 70; Ivienagbor Vs Bazuaye (1999) 6 SCNJ 235; Onibudo Vs Akibu (1982) All NLR 207;*** and ***Action Congress of Nigeria Vs Lamido (2012) LPELR 7825 (SC).***

Thus, it is not my duty to sift through the bundle of documents admitted as Exhibit C, to align them with the various medical institutions in order to ascertain whether the Claimant incurred the alleged sum of sum of Three Hundred Thousand United States Dollars ($300,000) in respect of his medical expenses in the United States. Unfortunately, I hold that this head of special damages is also bound to fail.

The next head of damages I will consider is for the sum of N15, 000,000 (Fifteen Million Naira) being the cost of prosecuting this suit. It is a notorious fact that litigation involves expenses by both parties. These expenses include amount spent for the preparation and filing of processes and other documents, summoning of witnesses and of course, the legal practitioner's fees where on is engaged.

Costs are meant to compensate one of the parties, most often the successful party, for the expenses he has incurred in the litigation. However, it must be noted that costs rarely indemnifies fully the party in whose favour it is ordered for the entire amount spent by him and it is not awarded to punish the unsuccessful litigant. See the case of ***J. D. Inneh v. Chief Obaraye (1957) 2 FSC 58 at 59***.

The exercise of the power to award costs is at the discretion of the Court. See the cases of ***Afribank (Nig.) Plc v. Geneva (1999) 12 NWLR Pt. 632 page 567;*** and ***OYEWO V. KOMOLAFE (2010) LPELR-4820(CA) (PP. 51-52 PARAS. E).***

I am of the view that the Claimant is entitled to some reasonable costs to assuage him for the arduous task of litigating this case.

Next is the claim for sum of N2, 000,000,000 (Two Billion Naira) as general damages for the psychological trauma, loss of business and income caused as a result of the accident.

It must be noted that general damages cover all losses which are not capable of exact qualification. It includes all non-financial loses (past and future). Items of general damages need not and should not be specially pleaded, but some evidence of such damages is required. The Courts have held that there is no fixed rule by which to assess general damages. The matter is therefore, at the discretion of the Court to award a fair and reasonable compensation having regard to the circumstances of the particular loss. ***See Okuneye V Lagos City Council (1973) 2 CCHCJ page 38, Mobil Oil Nig Ltd V Akinfosile (1969) NWLR (pt 11) 112, A.G Oyo State V Fairlakes Hotels Ltd (No. 2) (1989) 5 NWLR (pt 121) 355.***

In awarding general damages, the trial judge can take into consideration the loss of earnings by the victim. Where the discretion of the Court is properly and validly exercised, an appellate Court will not interfere with it. See the case of ***CBN V Okojie (2015) LPELR - 24740 (SC).***

Upon the evidence adduced by the Claimant, I am of the view that he actually suffered psychological trauma, loss of business and income as a result of the accident. He is entitled to reasonable compensation for all that he suffered.

Issue two is therefore partially resolved in favour of the Claimant.

<u>ISSUE 3</u>:

Whether the Third Party is under a legal obligation to indemnify the 1st Defendant under the Insurance Policy?

It is settled law that a Third Party by implication is a party brought in by a defendant to an action as one against whom he has a cause of action with respect to the main action. The Third Party is not a Defendant to the main action as the Claimant has no cause of action against him. The Claimant has no relief against a Third Party. See the

case of ***EEDAY-NWANKWO V. WEMA BANK & ORS (2018) LPELR-45527(CA) (PP. 11 PARAS. B).***

In the present suit, it is pertinent to note that the Claimant did not institute this suit against the Third Party and no allegation was made against the Third Party by the Claimant in this suit, neither is he seeking any relief against the Third Party.

From the record of proceedings, it was the 1st Defendant who obtained the leave of this Court to serve a third party notice on the Third Party.

The issue to be resolved now is to determine the status of the Third Party in this suit.

A third party proceeding does not make the Third Party a party to the main claim; he is only a defendant as regards the defendant. See ***Okafor vs. A.C.B. Ltd (1975) 9 NSCC 276 at 282*** where the Apex Court stated the position thus:

"The mere service of a third party notice does not make the person on whom it is served a defendant to the main action but makes him only a defendant vis-a-vis the person serving the notice. In the main action the rights of the plaintiff and the defendant are determined without reference to the defendant's claim against the third party, but when those rights have been ascertained, it is then open to the person brought in as a third party to have all relevant disputes determined between him and the person serving the notice." See also, the case of ***ONIKOYI & ORS V. ONIKOYI & ORS (2018) LPELR-43680(CA) (PP. 20-21 PARAS. C).***

In practical terms, the purpose of a Third Party Proceedings such as was activated in the instant suit is to prevent multiplicity of actions and to enable the Court to settle the disputes between all the parties connected to the dispute, that is as between the Claimant and the Defendant(s) and between the Defendant(s) and the Third Party. This is to prevent the subject matter of the claim from being tried twice. See the

cases of ***BANK OF IRELAND V. UNION BANK OF NIGERIA LIMITED & ANOR (1998) LPELR-744 (SC) PAGE 16, PARAGRAPHS B-C;*** and ***UNIVERSITY OF CALABAR V. AMCON & ORS (2019) LPELR-47309(CA) (PP. 28 PARAS. C).***

In the instant case, the learned counsel for the Claimant has seriously contended that since the Third Party is only a defendant to the Defendant in the main case, he had no business in defending the main claim brought by the Claimant as was done in this instant case. He therefore urged the Court to expunge all the proceedings relating to the Third Party defending the main Claim.

Furthermore, he maintained that in the instant suit, the Third Party never asked for leave to defend the Claimant's case or for an order to be joined as a defendant to enable it defend this suit.

In his reply to the objections raised by the Claimant's counsel, the very learned counsel representing the Third Party referred to the provisions of ***Order 13 Rules 22 and 23 of the Edo State High Court (Civil Procedure) Rules, 2018,*** and submitted that by virtue of the said provisions, the Third Party is entitled to enter appearance in the suit and file pleadings in response to the processes served on him. He pointed out that the Rules of this Honourable Court states literally that if the Third Party defaults in filing pleadings after being served with the Order of Court and all the processes in the suit then he shall be deemed to have admitted the validity of the Claim and shall be bound by the judgment.

He further submitted that there is no provision, in the ***Edo State High Court (Civil Procedure) Rules 2018***, for the Third Party to apply for and obtain the leave of Court to defend this action, as canvassed by the Claimant's counsel.

I have carefully examined the provisions of the provisions of ***Order 13 Rules 22 and 23 of the Edo State High Court (Civil Procedure) Rules, 2018,*** and I am satisfied that by virtue of the said provisions, the Third Party is entitled to enter appearance in this suit and file pleadings in response to the processes served on him. ***Order 13 Rules 23 of the Edo State High Court (Civil Procedure) Rules, 2018,*** categorically states that ***"If the third party duly served with the order and all existing processes does not enter an appearance or makes default in filing any pleading, he shall be deemed to admit the validity of the claim and shall be bound by any judgment given in the action, whether by consent or otherwise"***(underlining, mine).

In view of the foregoing, I hold that the Third Party validly took part in the proceedings of this instant suit and the Court cannot close its eyes to the third party's processes or expunge the evidence of the participation of the Third Party. The most important thing is to bear in mind that the Third Party is at all times a defendant to the 1st Defendant in this suit in relation to the contract of indemnity contained in the Insurance Contract between them.

In defence of the aforesaid Insurance Contract, the Third Party made some serious attempt to repudiate the contract on the ground *inter alia* that the 1st Defendant ignored the terms of the contract by entering appearance in the matter without informing the Third Party. They maintained that the 1st Defendant displayed its intention to abandon the contract and defend itself in the suit.

From the totality of the evidence before me, I think the position taken by the Third Party is quite misconceived. The 1st Defendant obtained the leave of this Court to bring in the Third Party pursuant to the indemnity clause contained in the Insurance Policy. The Third Party was served with all the processes in this suit and gallantly fought side by side with the 1st Defendant to ensure that damages are not awarded

against the 1st Defendant. It is too late in the day for the Third Party to complain that the 1st Defendant did not inform them about the incident. I am of the view that since the Court has found the 1st Defendant liable; the Third Party is under a contractual and statutory duty to indemnify the 1st Defendant according to the terms of the Insurance Policy between them.

Issue three is therefore resolved in favour of the 1st Defendant.

Having resolved Issues 1 and 2 in favour of the Claimant, I hold that the Claimant's suit succeeds in part and he is granted the following reliefs:

1) ***AN ORDER compelling the Defendants to pay the Claimant the sum of N20,000,000.00 (Twenty Million Naira) being general damages for the psychological trauma, loss of business and income caused as a result of the accident, which was as a result of the reckless driving of the Defendant's truck driver;***
2) ***AN ORDER compelling the Defendants to pay the Claimant 10% monthly interest of the Judgement until fully liquidated; and***
3) ***AN ORDER compelling the Defendants to pay the Claimant the sum of N5, 000,000 (Five Million Naira) being the cost of prosecuting this suit.***

P.A.AKHIHIERO
JUDGE
20/01/25

COUNSEL:
M.O. IGIEDE ESQ---CLAIMANT.
DAVID NKIRE ESQ---1ST DEFENDANT.
O.O. ERHAHON---THIRD PARTY.