

IN THE SUPERIOR COURT OF JUSTICE

5 B E T W E E N:

JENNIFER TOTH, Minor, MICHELLE TOTH, Minor,
JESSICA TOTH, Minor, ROBERT TOTH, Minor, STACY TOTH, Minor,
MARGARET TOTH, Litigation Guardian and PAUL TOTH

10 Plaintiffs

- and -

15 SHAWN HOLLINGWORTH

Defendant

20 R U L I N G

25 BY THE HONOURABLE MR. JUSTICE W. FESTERYGA
on the 9th day of November, 2006, at HAMILTON, Ontario

APPEARANCES:

30 C.M. Fotopoulos

Counsel for the Plaintiffs

B. Evans

Counsel for the Defendant

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November 9, 2006

R U L I N G

FESTERYGA, J:

THE COURT: This is a motion by the plaintiffs to add Pete Cosco Ltd. (Pete Cosco) as a party defendant *nunc pro tunc* and to amend the statement of claim per Rules 1.04, 5.04 and 26.01.

Facts

The action arises out of a motor vehicle accident that occurred on June 11, 2002. There is a two year limitation period to sue. The plaintiff, Margaret Toth, notified the adjusters for the defendants, that is, the defendant Hollingworth and the proposed defendant, Pete Cosco, on June 27, 2002 of a potential claim. The statement of claim was issued on December 18, 2002 naming only Shawn Hollingworth, who was the operator of the truck owned by Pete Cosco. The then solicitor for the plaintiffs failed to name Pete Cosco through inadvertence. The statement of claim was served on the named defendant on December 30, 2002. The insurer of Pete Cosco and the named defendant acknowledged receipt of a statement of claim as served on Hollingworth in a letter dated January 13th of 2003.

CGU, now Aviva, was the insurer of Hollingworth and Pete Cosco at all material times. The statement of defence, dated September 12, 2003, was delivered for Hollingworth on September 15, 2003 by in-house

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counsel for Aviva. There are no apparent insurance coverage issues.

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Hollingworth was examined for discovery October 7, 2004. On April 28, 2005 the Ontario Court of Appeal released its decision in *Vollick, et al v. Sheard, et al* (2005) 75 O.R. (3d) 621. The Court of Appeal found that an employer could be both a protected defendant as owner of a motor vehicle and an unprotected defendant as an employer vicariously liable for the negligent acts of its employees who cause injury while operating motor vehicles in the course of their employment for accidents occurring before October 1, 2003.

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Up until the *Vollick* decision, both the employer/owner of the motor vehicle and the employee/driver in the course of his employment were protected defendants. Since there were no coverage issues there was no need to seek to sue the employer/owner.

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On July 15, 2005 a trial date was set for February 20, 2006. On February 17, 2006, the trial date was adjourned in order that this motion could be brought to add Pete Cosco as a defendant.

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This motion was first brought August 24, 2006. The proposed defendant does not raise delay in bringing this motion. The insurer of this proposed defendant waived the 60 days to bring the motion as set out in

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the order of Borkovich, J. endorsed on the trial record February 17, 2006.

Analysis

Since the two year limitation period has expired, there is a presumed prejudice to the proposed defendant. I find under these circumstances before me that this presumption has been rebutted by the plaintiffs. There is no prejudice to the proposed defendant because the adjusters for the owner/ employer and driver have had an opportunity to investigate and secure evidence to defend this action.

Pete Cosco was not misled in any way or taken by surprise because its insurer knew about the case back in June of 2002. However, there would be prejudice to the plaintiffs if the party is not added because if the plaintiffs are unable to prove their case is an exception to the threshold, then their action would fail. Further, if they were able to prove the exception, then their damages would be subject to the appropriate deductibles. On the other hand, with Pete Cosco as a defendant, the plaintiffs will not be faced with those obstacles.

In my view, the *Vollick* decision is a special circumstance that permits the adding of Pete Cosco. In addition, the plaintiffs could not have reasonably discovered that Pete Cosco was not a protected defendant before the *Vollick* case. It would be a

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fundamental unfairness to require the plaintiffs to name Pete Cosco initially.

Under these circumstances, there would have been nothing to gain to name Pete Cosco earlier.

I find that it is just to allow the motion to advance the interests of timely and cost effective justice in civil disputes. In addition to the *Vollick* decision, I rely on *Mazzuca, versus...*

MS. FOTOPOULOS: Your Honour, *Silver Creek*.

THE COURT: ...*Silver Creek*, yes. I was just looking at it. *Silver Creek Pharmacy Ltd.* [2001] O.J. No. 4567 in the Court of Appeal; *Vance v. Peglar*, [1996] B.C.J. No. 1753; *Swain Estate v. Lake of the Woods District Hospital* (1992) 9 O.R. (3d) 74; and *Peixeiro v. Haberman*, (1997) 3 S.C.R., 549. *Ksiazek, et al, v. Newport Leasing Ltd.*, a decision of my brother, Harris J., in court file No. 002053, August 10, 2005.

In conclusion, there will be an order to go as asked in paragraphs one and two of the Notice of Motion. Any submissions on costs?

MS. FOTOPOULOS: Your Honour, it's my submission that as we were seeking the indulgence of this court, that there be no costs awarded. We were successful in our motion but we were seeking the relief of the court.

THE COURT: Can't argue with that, can you?

MR. EVANS: I can't argue with that, Your Honour.

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THE COURT: I have endorsed the motion record:
November 9th, '06, Ms. C. Fotopoulos for the
plaintiffs, moving parties, Mr. B. Evans for
the defendant and proposed defendant,
respondent parties. For all reasons given in
court today, order to go as asked in
paragraphs one and two of the Notice of
Motion.

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Costs: The plaintiffs do not request costs,
although successful. No order as to costs.

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COURT ADJOURNED

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7.
Certification

Form 2
Certificate of Transcript
Evidence Act, subsection 5(2)

I, Tricia Reed, certify that this document is a true and accurate transcript of the recording of Toth, et al v. Hollingworth, in the Ontario Court of Justice held at 45 Main Street East, Hamilton, Ontario, taken from Recording No. 142/06, which has been certified in Form 1.

December 1, 2006 *T. Reed*
(Signature of Authorized Person)