CITATION: Sherzai v. Dutka, 2014 ONSC 4792
COURT FILE NO.: 2392/10
DATE: 2014/08/20

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Mahjbeen Sherzai, Salim Sherzai, Bibi Janebdar, Habibullah Janebdar, and Haroun Sherzai, and Sahil Sherzai by their Litigation Guardian, Salim Sherzai (Plaintiffs)

- and -

Linda Dutka, Aviscar Inc., Nathan O'Connor and The Waterloo Catholic District School Board (Defendants)

BEFORE: Justice J. N. Morissette

COUNSEL: No one appearing for the plaintiffs, taking no position on this motion.

Peter N. Downs, for the defendant, Nathan O'Connor

Patricia Forte, for the defendant, the Waterloo Catholic District School Board

Linda O'Brien, for the defendant, Linda Dutka

HEARD: August 18th, 2014

ENDORSEMENT

Background:

[1] This is a summary judgment motion brought by the defendant, Nathan O'Connor (Nathan), for an order dismissing the action against him on the basis that he did not rent the passenger van involved in the car accident on October 5th, 2008 operated by the defendant, Linda Dutka (Linda).

[2] The defendant, The Waterloo Catholic District School Board (WCDSB), responds to the motion by asking that the motion be dismissed or alternatively, asking this court to determine either Nathan or Linda or both as the renter of the vehicle in the accident.

[3] Nathan takes the position that he was not the renter of Linda's van and further states that Linda's van was in fact rented by Linda on behalf of St. Benedict's Catholic Secondary School, which is part of the WCDSB (the board).

[4] Linda takes the position that she was merely the driver of the rental van involved in the accident. She further takes the position that either Nathan on behalf of the WCDSB and/or the WCDSB itself was the renter of the van in question.

[5] Linda further states that if this court is not prepared on this motion to determine the WCDSB as the renter of the van in question, than she asks that the motion be dismissed.

[6] The issue of "who is the renter" is really a determination of which insurer must respond first to the plaintiff's claims.

Overview of the facts:

[7] In October 2008, the Outers Club at St. Benedict's in Cambridge, Ontario had a trip scheduled to Killarney Provincial Park near Sudbury, Ontario. Teachers, Nathan, Linda and Melissa volunteered to drive the students on the trip.

[8] The trip was scheduled to start on Thursday, October 2, 2008, departing from St. Benedict's and end on Sunday, October 8, 2008 upon return to St. Benedict's. There were three vans rented from Aviscar Inc. (Avis) for the trip. The van operated by Linda was a 2007 GMC Savanah that could carry between six and nine passengers, including the driver.

[9] On October 5, 2008, Linda was operating her van, swerved into the path of the plaintiff's motor vehicle causing both vehicles to leave the road and rolling over.

[10] The plaintiffs brought a claim against the defendants claiming damages as a result of the aforesaid accident. The plaintiffs have claimed damages from Nathan on the basis that he was allegedly the lessee of Linda's van.

Amendment to the pleadings:

[11] Nathan seeks an amendment to the statement of defence and crossclaim. The board resists the amendment on the basis that it is a withdrawal of an admission.

[12] At the time of drafting the statement of defence, counsel for Nathan drafted the statement of defence on the assumption that Nathan had signed the rental agreement for Linda's van.

[13] Not until the discovery process, has it come to light that Nathan had not signed any rental agreement with respect to Linda's van.

[14] The fact remains that at paragraph 4 of the statement of defence, Nathan denies that he was the lessee (renter) of Linda's van. It is only in the alternative that he pleads that "he entered into a contract with the defendant, "Avis".

[15] In my view, to seek an amendment to the words "arranged for the rental of vans from Avis Car Rental" is not a withdrawal of an admission. If this Court is wrong about this, it remains that the test under Rule 51.05 is met, because the reasonable explanation of why the admissions in paragraphs 5 and 7 were made are acceptable. These new facts came out later.

[16] For these reasons, the amendment to the pleading is allowed as proposed in the attached "amended statement of defence, crossclaim and counterclaim of the defendant Nathan O'Connor to the amended amended statement of claim.

Procedures and Policies at St. Benedict's:

[17] In October 2008, Mr. James McKinnon was the principal at St. Benedict's which school is part of the WCDSB. It was the practice at St. Benedict's that a teacher was to advise a rental car company to invoice the school directly. To Mr. McKinnon's knowledge, there was never an occasion when the school credit card was given to a teacher for the purposes of renting a van.

[18] From time to time, Mr. McKinnon was required to approve transportation for educational purposes. In the St. Benedict's procedures and policies with respect to licencing and vehicle requirements, the transportation procedure states that for a vehicle with a seating capacity of six to nine passenger, plus the driver "must be owned, leased or rented in the name of the WCDSB or operated under contract with the Board."

[19] Counsel for the WCDSB submits that this procedures and policy refers to vehicle licensing requirements for instances when the board rents vehicles. At the time of the accident, the Ontario School Boards' Insurance Exchange (OSBIE) insured the WCDSB pursuant to a comprehensive liability policy. That policy provides coverage for loss or damage arising from the use or operation of a vehicle not owned by the WCDSB.

[20] At issue is whether that coverage is available when, in this instance, a teacher rents a vehicle on behalf of the board. The board submits that the teachers did not rent the vehicles in question on its behalf, and that this position by the board is consistent with the information contained in the Boards' Volunteer Driver forms and declarations of Insurance forms signed by each teacher.

[21] At the time of the accident, the WCDSB required volunteer drivers, including teachers, to provide proof of adequate automobile liability insurance coverage before being permitted to drive students.

[22] During the course of their involvement with the Outers Club, Nathan and Linda completed Volunteer Driver Forms in connection with the transportation of students. The Volunteer Driver Forms provides that "the board's excess liability insurance comes into effect only after the 'Trip Drivers' insurance has been exhausted" and that "volunteer drivers must have a minimum of $1,000,000 insurance liability."

[23] Linda and Nathan each signed a Declaration of Insurance form confirming that their personal automobiles had minimum limits of $1,000,000 in liability insurance.

Issues and the law:

[24] The issue on this motion is whether there is a genuine issue requiring a trial respecting the plaintiffs' allegations against Nathan. The answer to this question lies in whether or not Nathan was the lessee (renter) of Linda's van.

The principles of summary judgment:

Hryniak v. Mauldin

[25] The Supreme Court of Canada ("SCC") has held that there will be no genuine issue requiring a trial when the court is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process:

(a) allows the court to make the necessary findings of fact;

(b) allows the court to apply the law to the facts; and

(c) is a proportionate, more expeditious and less expensive means to achieve a just result.

[26] In response to a motion for summary judgment, a party must "put its best foot forward" and "lead trump or risk losing". The court is entitled to assume that the parties have done so and that the record before it contains all evidence which the parties would adduce if the case proceeded to trial. The court must assume that neither party would present additional evidence at trial.

[27] On this last point, Linda's submission that she seeks a dismissal of the motion if this Court is unable to declare the board as the "renter", in order to allow her an opportunity to present further evidence, must fail.

[28] It is conceded, however, that subject to any cogent submissions made on behalf of the other parties, this action is amenable to summary judgment.

Review of *Intact v. American Home*[1]:

[29] *Intact* considered the issue of who was the renter of a vehicle for the purposes of s. 277(1.1) of the *Insurance Act* when an employee rents a vehicle for work purposes.

[30] Section 277(1.1) of the *Insurance Act* establishes the priority in which automobile insurance policies must respond to losses involving leased or rented vehicles. In short the statutory scheme provides the order in which a payor is to respond to losses involving rented automobiles as follows: first the renter, then the driver, and then the owner of the rented vehicle.

[31] In the *Intact* case, Shahran Ashrafi rented a car for work purposes. The rental agreement was signed by Mr. Ashrafi. He used a credit card issued by his employer to pay for the rental and was reimbursed by his employer for the cost of the rental. Mr. Ashrafi was involved in an accident while in the course of his employment and he and his employer were sued. A priority dispute arose between Mr. Ashrafi's personal automobile insurer, *Intact*, and his employer's insurer, American Home. As such, they brought an application to determine the issue of which policy should respond to the plaintiff's claims.

[32] The court held that Mr. Ashrafi was the "renter" of the vehicle for the purpose of subsection 277(1.0) of the *Insurance Act* such that his personal automobile insurer had to respond to the plaintiff's claim. Mr. Justice Perrel found that the definition of lessee [renter] in s. 277(1.1) is "clear and specific, such that there is no reason to delve into an analysis of who is the *de facto* renter or interpret renter by reference to inquiries about the purpose of the rental, the manner of payment or reimbursement for the rental expense." The court also agreed that there is no reason to depart from the ordinary meaning of the term "lessee", which includes the person who enters into a car rental agreement with a car rental company.

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[1] 2013 ONSC 2371 (SCJ)

[33] Therefore, a court will not look to principles of employment law, agency law, corporate law, partnership law, or the law of contract to determine who may be the "*de facto* lessee" for the purposes of liability.

[34] Determining who the *actual* lessee is, as opposed to the *de facto* lessee, is a legal question of privity of contract. Counsel for all parties suggested that the question to be posed, as in *Intact*, is: Who can the lessor sue to enforce the car rental agreement?

[35] In the *Intact* case, there is no indication in the reasons for decision by Justice Perell that the insurer for the employee argued that the employee was acting as an agent for his employer or was not contracting personally. Instead, the insurer for the employee simply argued that the employer was the "*de facto* lessee" because the employee was engaged in business on behalf of his employer at the time he signed the contract.

Application of the *Intact* case and analysis:

[36] The question remains whether this court has cogent and reliable evidence before it to be able to reach a fair and just determination on the merits as to whether who is the lessee (renter) or would this genuine issue be best answered requiring a trial?

[37] The invoice from Avis for Linda's van was submitted directly to St. Benedict's at 50 Sagineau Parkway, meaning that Avis billed St. Benedict's directly. Mr. McKinnon, the principal of the school authorized the payment of this invoice. Neither Nathan nor Linda submitted to Avis a credit card to pay for the vans rented. When attending to pick up the three vans, the three teachers, Linda, Nathan and Melissa, were required to provide a copy of their driver's licence and each was required to be personally present to sign documents and pick up the vehicles.

[38] Nathan did not sign any documents in relation to the rental of Linda's van although the rental forms for all three vehicles reference "Nathan O'Connor St. Benedict's High School" as a customer. The only signature that appears on the documentation related to Linda's van is Linda, herself as an "additional driver", and not

as renter. There is a signature above the notation "renter" but no one knows whose signature this is. Nathan says it is not his signature, and Linda says it is not Nathan's signature.

[39] Both Nathan and Linda's evidence is that they were renting these vans on behalf of the Board. On each invoice, the credit identification is stated as: Nathan O'Connor St Benedict's High School.

[40] Following the principles set out in *Intact*, the corporate policy in that case was very clear. In that case, it was clear that an employee had to use the American Express Card issued by the employer every time the employee rented a vehicle "in the name of Colt [the employer]" because by doing so, the employee was instructed to waive the collision damage insurance coverage because the American Express card provided for such coverage. The policy further went on to state that if "an employee chose to use his or her own credit card to reserve and pay for a rental vehicle when doing business on behalf of Colt, it is your responsibility to ensure that you have adequate coverage in place."

[41] In the case before this court, the WCDSB's policy is less clear. The board's policy stipulates what occurs when a personal vehicle is used for the purpose of transporting students and how the driver's personal insurance applies first. Nowhere in that policy does it refer to rental vehicles.

[42] On the other hand, the declaration signed by each teacher does state:

> A "trip driver" is defined as any person authorized by the board who has agreed to be a driver for a certain trip while they are driving their own or another licensed automobile.

[43] One could infer that "another licensed automobile" includes a rental vehicle, which would mean that the "renter's" own personal insurance of up to $1,000,000 would apply first. The WCDSB's policy would only apply as "excess" coverage.

[44] Each teacher was required to declare that they had personal insurance coverage of $1,000,000 for their own personal vehicles, which all three teachers did.

[45] Had Avis been required to sue to enforce payment of the contract, the question is to whom would it have looked to? At first impression, one could infer that Avis would have looked to Linda as the signatory to the agreement. No one else signed the rental agreement. Would Avis been able to sue Nathan for payment on the contract? I believe that answer is yes, given that he was named as the "customer on behalf of St. Benedict's High School" (which is not a legal entity). But in that kind of fact scenario, Nathan could have sought reimbursement from the board. In my view, answering this latter question does not help to establish who is the renter for the purpose of the legislative scheme, in this case.

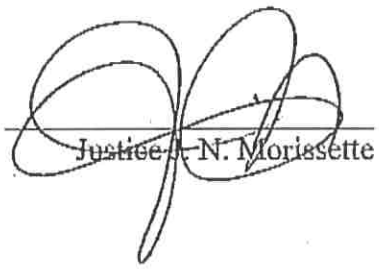
[46] As an analogy, what if Mr. Mackinnon, the principal of the school, would have made contact with Avis to negotiate for the lease of three vehicles that his teachers were going to drive. The school would pay for the leases and that each teacher would have attended personally to sign their respective rental agreement as the renter and drivers, then the issue would be moot. Each teacher would have been the renter as well as the driver. Each teacher would have had their personal insurance apply in that case.

[47] The same, I think, can be said for Nathan. He was the organiser and negotiator for the three vehicles. Avis required each teacher to attend personally to provide details of licenses and each signed the rental agreement. Each had provided a declaration to the board that they each had personal automobile insurance and declared it to be for at least $1,000,000.

[48] In my view, if one applies the principles in *Intact*, I find that the renter for Linda's van is Linda. Her personal insurance shall be first for the purpose of the legislative scheme and the board's insurance coverage shall come as excess coverage if required.

[49] For these reasons, this court finds and declares that Nathan is not the renter of Linda's van. Accordingly, the motion for summary judgment is granted dismissing the within action against him on the basis that he did not rent the passenger van involved in the car accident on October 5th, 2008 operated by the defendant, Linda Dutka.

[50] As discussed, brief written submissions on costs can be reviewed, if necessary within 30 days hereof by the moving party with responding submissions within 15 days thereafter and reply if any within 10 days thereafter.



Date: August 20, 2014