

Case Name:

Wilkinson v. Braithwaite

Between

**Glen Robert Wilkinson, Plaintiff, and
Sonny James Braithwaite, Sandy Sidorovski, John Doe (1), John
Doe (2) and Allstate Insurance Company of Canada, Defendants**

[2011] O.J. No. 1714

2011 ONSC 2356

Oshawa Court File No. 44861/06SR

Ontario Superior Court of Justice

A. Sosna J.

Heard: March 9, 2011.

Judgment: April 13, 2011.

(40 paras.)

Civil litigation -- Civil procedure -- Parties -- Adding or substituting -- After expiry of limitation period -- Motion by plaintiff to add Liberty Mutual Insurance as defendant dismissed -- Plaintiff was passenger injured in motor vehicle accident with unidentified vehicle that left scene -- Plaintiff's vehicle was owned by Sidorovski and operated by Braithwaite -- Defendant, Allstate, provided uninsured and unidentified motorist coverage to plaintiff's parents -- Liberty was listed as insurer for the Sidorovski vehicle and provided uninsured and unidentified motorist coverage -- Failure to name Liberty was not a misnomer -- Adding Liberty seven years after accident and five years after expiration of limitation period was contrary to Limitations Act.

Civil litigation -- Limitation of actions -- Expiry of limitation periods -- Effect of -- Motion by plaintiff to add Liberty Mutual Insurance as defendant dismissed -- Plaintiff was passenger injured in motor vehicle accident with unidentified vehicle that left scene -- Plaintiff's vehicle was owned by Sidorovski and operated by Braithwaite -- Defendant, Allstate, provided uninsured and unidentified motorist coverage to plaintiff's parents -- Liberty was listed as insurer for the Sidorovski vehicle and provided uninsured and unidentified motorist coverage -- Failure to name Liberty was not a misnomer -- Adding Liberty seven years after accident and five years after expiration of limitation period was contrary to Limitations Act.

Insurance law -- Actions -- Practice and procedure -- Parties -- Limitation periods -- Adding or removing parties -- Motion by plaintiff to add Liberty Mutual Insurance as defendant dismissed -- Plaintiff was passenger injured in motor vehicle accident with unidentified vehicle that left scene -- Plaintiff's vehicle was owned by Sidorovski and operated by Braithwaite -- Defendant, Allstate, provided uninsured and unidentified motorist coverage to plaintiff's parents -- Liberty was listed as insurer for the Sidorovski vehicle and provided uninsured and unidentified motorist coverage -- Failure to name Liberty was not a misnomer -- Adding Liberty seven years after accident and five years after expiration of limitation period was contrary to Limitations Act.

Statutes, Regulations and Rules Cited:

Insurance Act, R.S.O. 1990, c. I.8, s. 267.5

Limitations Act, 2002, S.O. 2002, Chapter 24, s. 4, s. 20, s. 21, s. 52

Ontario Rules of Civil Procedure, Rule 5.04

Counsel:

William G. Scott, for the Plaintiff.

Martin P. Forget, for the Defendant, Liberty Mutual Insurance Company.

J. Jason M. Kerr, for the Defendant, Sandy Sidorovski.

Michael Cannings, for the Defendant, Allstate Insurance Company of Canada.

REASONS FOR JUDGMENT

1 A. SOSNA J.:-- The plaintiff seeks leave to amend their Statement of Claim to add Liberty Mutual Insurance Company ("Liberty Mutual") to a Statement of Claim issued on June 21, 2006.

2 The action for damages for personal injuries arises out of a motor vehicle accident which occurred on June 24, 2004. The plaintiff Glen Robert Wilkinson ("Wilkinson") was a passenger in a motor vehicle that collided with an unidentified motor vehicle that left the scene. Wilkinson's motor vehicle was operated by the defendant Sonny James Braithwaite ("Braithwaite") and owned by the defendant Sandy Sidorovski ("Sidorovski").

3 Liberty Mutual was listed on the motor vehicle report as the insurer for the Sidorovski motor vehicle operated by Mr. Braithwaite.

4 Allstate insured the plaintiff's parents, Steven and Gail Wilkinson. The Allstate policy provided coverage to the plaintiff for uninsured and unidentified motorist coverage.

5 On September 13, 2005, Braithwaite provided a statement where he denied having Ms. Sidorovski's consent to use her motor vehicle. He further claimed that she would not have permitted him to use the vehicle, as she was aware his driver's licence was suspended at the time. He later acknowledged the same in examination for discovery on April 8, 2009.

6 On November 30, 2006, Allstate served its Statement of Defence. At paragraph 4, it admitted to having issued a standard automobile policy to the plaintiff's parents which included underinsured and unidentified motorist coverage.

7 On January 24, 2007, Ms. Sidorovski served her Statement of Defence. At paragraph 8 she pleaded that Braithwaite was operating her motor vehicle without her consent.

8 At all times pursuant to section 267.5 of the *Insurance Act* and by the terms of its own policy, Liberty Mutual also provided the plaintiff unidentified and uninsured motorist coverage.¹

Position of the Plaintiff

9 The plaintiff argues that Liberty Mutual has defended the action throughout on behalf of its insured Sidorovski pursuant to the liability coverage sections of its policy.

10 The plaintiff contends that Liberty Mutual on reading the Statement of Claim would know that it, and not Allstate, was the insurer that provided unidentified and/or uninsured motorist coverage for the plaintiff.

11 The plaintiff submits that naming Allstate as the insurer which provided uninsured and unidentified motorist coverage is a misnomer and may be corrected by adding the correct insurer, namely Liberty Mutual, as a party.

12 Alternatively, the plaintiff submits that this misnomer may be corrected by substituting Liberty Mutual as the correct insurer from that of Allstate.

Position of the Defendant

13 The defendant argues that the plaintiff's motion to add Liberty Mutual as a defendant to the action nearly seven years after the accident is not a misnomer since the plaintiff did not improperly name or describe Liberty Mutual in its Statement of Claim, but failed to name Liberty Mutual as a defendant in entirety.

14 The defendant submits that the limitation period for the plaintiff to bring this action expired on the June 24, 2006. For two years prior to that date, the plaintiff did not take any steps to add or substitute Liberty Mutual as a defendant despite being aware of the involvement of an unidentified/uninsured motorist.

15 In the alternative, the defendant submits that even if this action was commenced within the two year limitation period, it would still be barred since the Sidorovski motor vehicle was operated without her consent. Therefore, setting aside the issue of misnomer, there is no cause of action against Liberty Mutual.

16 On these grounds, Liberty Mutual seeks to have this motion dismissed.

17 Allstate Insurance, the present party defendant, takes no position in this application.

Analysis

18 For the following reasons the plaintiff's motion is dismissed.

19 It is undisputed that throughout these proceedings Liberty Mutual has acted on behalf of its insured Sidorovski.

20 When the Statement of Claim was issued on June 21, 2006, the plaintiff named Allstate as the only defendant from which it was seeking uninsured and unidentified motorist coverage. Liberty Mutual was never named although at all times it also provided the same coverage.

21 As noted in paragraph 20 in *Jackman v. John Doe*:²

The doctrine of misnomer to substitute the name of one party to another requires the court to find "a coincidence between the plaintiff's intention to name a party and the intended party's knowledge that it was the intended defendant".

22 A misnomer is the misnaming of a party. Allowing the correction of a misnomer is recognition that the title of proceedings can be amended to reflect the proper party referred to in the Statement of Claim.³

23 Correcting a misnomer does not "add" a party to an action as sought by the plaintiff but rather allows for the insertion of a name into the action to substitute a name for a descriptor or for that of another named party.⁴

24 Contrary to the plaintiff's submission, the naming of Allstate as a defendant in the original Statement of Claim was not an error. Allstate was and is a defendant from which the plaintiff sought relief as a defendant under his parents' insurance coverage with Allstate.

25 I further reject the plaintiff's submission that Liberty Mutual on reading this Statement of Claim would know that it and not Allstate was the insurer which provided unidentified motorist coverage to the plaintiff.

26 "The test for whether a person has knowledge that it is the intended defendant is whether the person or its representatives would have known or 'could easily have ascertained' that the person was the intended defendant."⁵

27 "The doctrine of misnomer requires that the unnamed person be able to "easily" ascertain that it was the intended defendant, not speculate as to why it has not been named in the circumstances when a plaintiff might have reasonably named the unnamed person as a defendant."⁶

28 There is no evidentiary basis on which I can find that Liberty Mutual in reviewing the Statement of Claim on behalf of its insured Sidorovski would have reason to believe that the plaintiff intended to name it rather than Allstate as a party to the action. Allstate is the only named party. The pleadings referred to an actual policy number of the Allstate policy not the Liberty policy, and Allstate admitted insuring the unidentified vehicle confirming there is coverage for this claim subject to the pleaded defences.

29 Therefore, in finding that there was no misnomer by the plaintiff in identifying Allstate as opposed to Liberty Mutual as a defendant to this action, and concluding that Liberty Mutual would have no reason to believe that it and not Allstate was the properly named party, the plaintiff's motion is dismissed.

30 I further find the limitation period to add Liberty Mutual as a defendant has expired and the court has no discretion to grant the relief sought by the plaintiff.

31 Section 4 of the *Limitations Act* provides for a basic limitation of two years from the date the claim is discovered, unless the *Act* provides otherwise.⁷

32 To discover a claim the plaintiff must only have sufficient facts upon which to support an allegation that there is a cause of action. It is not necessary for the plaintiff to have discovered complete evidentiary support to make the claim winnable.⁸

33 In the Statement of Claim the plaintiff set out that he was a passenger who sustained personal injuries in a motor vehicle accident. He set out that the vehicle that he occupied was owned by Sidorovski and that Liberty Mutual was the insurer. He further set out that the owner/driver of the second motor vehicle involved in the accident was unidentified and fled the scene.

34 In this application to add Liberty Mutual as a defendant, the plaintiff has not satisfied its onus pursuant to section 52 of the *Limitations Act* to find that it would have been highly unlikely if not impossible with due diligence to have obtained the necessary information to include Liberty Mutual as a defendant to this action within two years of its occurrence.

35 Further, the combined operation of sections 20 and 21 of the *Limitations Act* has removed the court's previous common-law discretion in applying the doctrine of special circumstances to extend limitation periods or to add a party pursuant to *Rule 5.04*.⁹

36 In *Atlas Corp. v. Ingriselli*, in an application to add defendants after the expiration of a limitation period, the court held at paragraph 24:

There no longer being an entitlement to extend a statutory limitation period because of special circumstances, and irrespective there is clearly being no special circumstances here, the *Limitations Act* applies. ... The application to add additional parties is now statute-barred."¹⁰

37 The same principle applies to the present application. Adding Liberty Mutual as a defendant to the present action as submitted by the plaintiff seven years after the incident and almost five years after the limitation period expired in 2006 would be contrary to both the language and spirit of the *Limitations Act* and case law review of its provisions.

38 For all the aforementioned reasons, the plaintiff's motion is dismissed.

39 Having made these findings it is not necessary to review the defendant's last argument submitting that, in any event, the plaintiff has no cause of action against Liberty Mutual because insurance coverage is excluded to occupants when the vehicle is operated without the owner's consent.

40 If the parties cannot agree as to costs of this motion, written submissions are to be filed within 30 days of this judgment.

A. SOSNA J.

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¹ *Insurance Act*, R.S.O. 1990, c. 1.8

² *Jackman v. John Doe*, [2011] O.J. No. 652, para. 20

³ *Urie v. Peterborough Regional Health Centre*, [2010] O.J. No. 3962 at para. 99

4 *Ibid*, para. 101

5 *Jackman v. John Doe*, [2011] O.J. No. 652, para. 36

6 *Ibid*, para. 42

7 *Limitations Act*, 2002, S.O. 2002, Chapter 24, Schedule B

8 *Lawless v. Anderson*, [2011] O.J. No. 519 at para. 36

9 *Joseph v. Paramount Canada's Wonderland*, [2008] O.J. No. 2339 (C.A.) and *Rules of Civil Procedure*, R.R.O. Reg. 194

10 *Atlas Corp. v. Ingriselli*, [2010] O.J. No. 1402