

CITATION: Reece v. Wase, 2010 ONCA 343  
DATE: 20100510  
DOCKET: C51457

COURT OF APPEAL FOR ONTARIO

Laskin, Gillese and Juriansz JJ.A.

BETWEEN

Everett Reece

Respondent (Plaintiff)

and

Cory Wase and Ken Wase

Appellants (Defendants)

and

David Reece, Deanne Weller, Eric Weller, minors by their Litigation Guardian,  
The Children's Lawyer and Tina Weller and Paul Weller

Respondents (Third Parties)

David Zarek for the appellants (defendants)

Saman M. Jaffery, for David Reece, by his litigation guardian, the Office of the  
Children's Lawyer

Greg Robson, for the respondent (third party) Tina Weller

Heard & released orally: April 23, 2010

On appeal from the judgment of Justice Whitten of the Superior Court of Appeal dated September 29, 2009.

#### ENDORSEMENT

[1] On consent, the third party claim against David Reece is dismissed. The third party claim against Deanne Weller, Eric Weller and Paul Weller is discontinued. Consequently, the appeal concerns only the third party action against Tina Weller.

[2] While significant deference is due to the conclusion of the motion judge, we would allow the appeal.

[3] The motion judge stated the correct test. However, we are persuaded that the motion judge did not attach sufficient weight to the fact that this was a third party action. His reasons indicate that he proceeded solely on the basis that the responsibility for advancing the third party claim rested on counsel for the defendants. The motion judge failed to recognize that the progression of the third party claim to trial was entirely dependent on the main action. The main action had been struck from the trial list, finally reinstated, and is still pending. The third party action was progressing steadily, albeit slowly, when the registrar dismissed it. Discoveries had been completed.

[4] Moreover, when the third party action was dismissed, the form of the court's order misled all counsel into believing that it was the main action that had been dismissed. The style of the dismissal order did not include the third parties. Counsel all acted diligently when the mistake was discovered.

[5] In addition, the motion judge's finding of prejudice has been overtaken by subsequent events. That finding rested entirely on the "unbearable" effect of the delay on the memories of the minor third party defendants. The defendants are no longer proceeding against the minors, and the respondent recognizes that, as a result, no prejudice would be suffered by the reinstatement of the third party claim.

[6] The appeal is allowed. The order of the motion judge and the order of the registrar are set aside and the third party claim is reinstated.

[7] The appellants/defendants are entitled to their costs of the appeal in the amount of \$2,500 plus disbursements and GST.

[8] There shall be no costs of the motion vis-à-vis the third party Tina Weller.

"John Laskin J.A."  
"E.E. Gillese J.A."  
"R.G. Juriensz J.A."