

SUPERIOR COURT OF JUSTICE – ONTARIO

74 Woolwich Street, Guelph, ON N1H 3T9

RE: STEPHANIE VILLELLA et al., Plaintiffs.

AND

THELMA ROSE, by her Litigation Guardian ERIC ROSE et al.,
Defendants.

BEFORE: Justice J. Trimble, in person.

COUNSEL: Ashu Ismail -ashu@campsisilaw.ca , Lawyer for the Plaintiff

Rachel Jadd - Rjadd@ztgh.com , Lawyer for the Defendant

HEARD: September 10, 2024, by Attendance

ENDORSEMENT

[1] The Defendant, Rose, brings this motion to set aside the Plaintiff's noting her in default.

[2] The Plaintiffs agreed at the motion to that relief but seek terms. Their consent was contingent in Ms. Rose obtaining the consent of all other parties to Case Management.

[3] The relevant dates and events are as follows:

a. Mar 1/23 – MVA

- b. May 23/23 – SOC issued.
- c. Sept 23/23 – Ms. Rose’s insurer appointed counsel advised that they had been retained, Ms. Rose was seeking counsel with respect to the significant claim in excess of the limits, and the insurer appointed lawyer would be in touch.
- d. Oct. 26/23 – Insurer appointed counsel advised that he was advised by Ms. Rose’s family that she was not mentally competent, and she needed a litigation guardian. She was 93 at the time of the accident.
- e. January 22 to February 29/24 – Plaintiffs counsel was advised of the steps begin taken to appoint a litigation guardian.
- f. March 26/24 – SOC was served on Ms. Rose personally, but served late.
- g. April 16/24 – Plaintiffs obtained an order extending the time for service to 23 April, and for substituted service on Ms. Rose’s counsel.
- h. May 3/24 – Plaintiffs say that if they do not receive Rose’s SOD by 13 May they will note Ms. Rose in default.
- i. May 7/14 – Ms. Rose serves a Notice of Intent to Defend.
- j. May 27/24 – Plaintiffs note Ms. Rose in Default.
- k. Between 3 and 27 May the insurer appointed counsel brought a motion to appoint the litigation guardian.

[4] This motion ought never to have been brought. The Plaintiff ought never to have noted Rose in default.

[5] Experienced plaintiffs’ counsel such as those in this case must have known that Defending this matter could not reasonably be done in the timelines set because:

- a. The Claim advanced was clearly in excess of the limit most automobile policies. Ms. Rose had to retain and instruct a solicitor with respect to the excess claim. The solicitors would have to consult on all matters, each take instructions, confer again, then act on those instructions.
- b. A litigation guardian had to be appointed. This required obtaining medical records (and the necessary consents to obtain them), and probably a capacity assessment before those consents could be executed.

[6] Plaintiff's counsel acted unreasonably:

- a. The consent regarding setting aside the Noting in Default was conditional, and those conditions kept changing. No conditions ought to have attached other than costs thrown away.
- b. The first condition on the was for Ms. Rose to obtain the consent of all counsel to have this matter Case Managed. Case Management is obtained by writing to the RSJ, on the consent of all parties. The matter could not be consented to by Ms. Rose until the litigation guardian was appointed.
- c. Later conditions imposed concerned whether Ms. Rose would plead inevitable accident because of Ms. Rose's alleged incapacity, as, the Plaintiff argued, it spoke to prejudice on setting aside the Noting in Default. I disagree.
- d. The Plaintiff, having been informed of the possibility that Ms. Rose was not competent, ought not to have issued the ultimatum to note in default, and having done so, ought to have agreed to setting aside the noting in default with only costs thrown away to be decided.

[7] Order to go on consent setting aside the Noting in Default of Ms. Rose. The Statement of Defence be served and filed by 4 pm, 24 September 2024

[8] The Plaintiff asks that I impose other terms as set out in para. 65 of the Affidavit. I decline to do so as they require the participation of all other parties to the action.

[9] In light of my comments with respect to the issue of the noting in default, the Plaintiffs will pay the Defendants costs for the motion fixed at \$1500.00, in the cause.

**Jamie
Trimble** Digitally signed
by Jamie Trimble
Date: 2024.09.10
14:16:58 -04'00'

Justice J. Trimble