Velasco et al. v. North York Chevrolet Oldsmobile Ltd. et al.

[Indexed as: Velasco v. North York Chevrolet Oldsmobile Ltd.]

105 O.R. (3d) 47

2011 ONSC 85

Ontario Superior Court of Justice,
McEwen J.
January 5, 2011

Limitations -- Discoverability -- Plaintiffs' lawyers issuing statement of claim in March 2006 in action arising out of 2005 motor vehicle accident in which D was named as owner of vehicle he was driving -- Plaintiffs' lawyers relying on motor vehicle accident report which mistakenly identified D as owner -- Lawyers receiving Crown Brief in January 2007 containing Ministry of Transportation vehicle licence plate search which showed that NYC owned D vehicle -- Crown Brief fully reviewed by law clerk but plaintiffs' lawyer only discovering licence plate search in Crown Brief while preparing for examination for discovery in January 2009 -- Lawyer commencing action against NYC in May 2009 -- Action statute-barred -- Plaintiffs should have known that they had cause of action against NYC when Crown Brief was received in January 2007.

The plaintiffs brought an action for damages arising out of a multi-vehicle accident that occurred in July 2005. The statement of claim was issued in March 2006 and named D as both the owner and operator of the vehicle that he was operating. In drafting the statement of claim, the plaintiffs' lawyer relied

upon the motor vehicle accident report prepared by the police, which mistakenly identified D as the owner. D's own insurer did not provide coverage to D and added itself as statutory third party. The insurer delivered a pleading in October 2006 in which it wrongly admitted that D was the owner of the vehicle. D never defended and was noted in default. In July 2006, the plaintiffs' lawyers received an investigator's report which identified North York Chevrolet Oldsmobile Ltd. as having a registered lien against D. In January 2007, the lawyers received a Crown Brief with respect to criminal charges that were laid against D. One of the documents in the brief was an Ontario Ministry of Transportation vehicle licence plate search that showed that North York Chevrolet Ltd. owned the D vehicle. The investigator's report and the Crown Brief were fully reviewed by a law clerk. In January 2009, one of the plaintiffs' lawyers discovered the licence plate search in the Crown Brief while preparing for D's examination for discovery. The lawyers for D's insurer confirmed on May 4, 2009 that the vehicle was leased. On May 29, the plaintiffs' lawyers issued a statement of claim naming North York Chevrolet Oldsmobile Ltd. and North York Chevrolet Ltd. as defendants. The defendants brought a motion for summary judgment dismissing the action on the basis that it was commenced outside the two-year limitation period set out in the Limitations Act, 2002, S.O. 2002, c. 24, Sch. B.

Held, the motion should be granted.

The plaintiffs did not exercise reasonable or due diligence to discover the information that would have led to the identity of the owner of the D vehicle within two years of the issuance of the statement of claim. While the plaintiffs' lawyers should not have relied solely on the motor vehicle accident report in preparing the statement of claim, they did not fail to exercise reasonable or due diligence in the circumstances of this case, prior to the receipt of the Crown Brief, given the combined information of the motor vehicle accident report and the admission in the pleading of D's insurer. A proper review of the Crown Brief would have brought the ownership issue clearly to the lawyers' minds, particularly when [page48]read in conjunction with the investigator's report. The plaintiffs,

through their lawyers, should have known that they had a cause of action against North York as the owner of the D vehicle in January 2007. The statement of claim was issued more than two years later. The plaintiff's lawyer was aware in January 2009 that North York was the owner, but did not issue a statement of claim at that time. Had he done so, he would have had a strong argument that he exercised reasonable or due diligence, and might well have fallen within the two-year limitation period. Waiting until May to issue the statement of claim fell below the reasonable or due diligence standard. There was no genuine issue requiring a trial.

Cases referred to

Bremer v. Foisy, [2009] O.J. No. 3678, 82 C.P.C. (6th) 133 (S.C.J.-Master); Toneguzzo v. Corner (2009), 94 O.R. (3d) 795, [2009] O.J. No. 1565, 75 C.P.C. (6th) 165, 176 A.C.W.S. (3d) 982 (Div. Ct.); Wakelin v. Gourley, [2006] O.J. No. 1442, 145 A.C.W.S. (3d) 512 (Div. Ct.), affg (2005), 76 O.R. (3d) 272, [2005] O.J. No. 2746, [2005] O.T.C. 572, 19 C.P.C. (6th) 13, 140 A.C.W.S. (3d) 745 (S.C.J.-Master); Wong v. Adler (2005), 76 O.R. (3d) 237, [2005] O.J. No. 1400, 17 C.P.C. (6th) 65, 28 M.V.R. (5th) 38 (Div. Ct.), affg (2004), 70 O.R. (3d) 460, [2004] O.J. No. 1575, [2004] O.T.C. 336, 2 C.P.C. (6th) 175, 5 M.V.R. (5th) 142, 130 A.C.W.S. (3d) 703 (S.C.J.-Master), consd

Other cases referred to

Blanchard v. Denyer, Court File No. 07-0507; D'Ambrosia v. Denyer, Court File No. CV-07-084294-00; Giovannoli Investments Ltd. v. Western Underwriting Mgrs. Ltd., [1990] O.J. No. 2132 (Gen. Div.-Master); Ioannou v. Evans, [2008] O.J. No. 21, 50 C.P.C. (6th) 358, 162 A.C.W.S. (3d) 914 (S.C.J.); Joseph v. Paramount Canada's Wonderland (2008), 90 O.R. (3d) 401, [2008] O.J. No. 2339, 2008 ONCA 469, 294 D.L.R. (4th) 141, 56 C.P.C. (6th) 14, 166 A.C.W.S. (3d) 762, 241 O.A.C. 29; Kostecki v. Goodman, [2003] O.J. No. 523, 2003 CarswellOnt 561 (S.C.J.-Master); Parent v. Janandee Management Inc., [2009] O.J. No. 3763, 82 C.P.C. (6th) 321 (S.C.J.-Master); Pepper v. Zellers Inc. (2006), 83 O.R. (3d) 648, [2006] O.J. No. 5042, 278 D.L.R. (4th) 175, 39 C.P.C. (6th) 81, 154 A.C.W.S. (3d) 336 (C.A.); Speed v. Denyer, Court File No. CV-07-083679-00; Swiderski v. Broy Engineering Ltd. (1992), 11 O.R. (3d) 594, [1992] O.J. No.

2406, 60 O.A.C. 260, 16 C.P.C. (3d) 46, 40 M.V.R. (2d) 228, 36 A.C.W.S. (3d) 1019 (Div. Ct.); Weislar v. Doman, [1952] O.J. No. 196, 1952 CarswellOnt 331, [1952] O.W.N. 632 (H.C.J.); Young v. Progressive Insurance, [2002] O.J. No. 909, 37 C.C.L.I. (3d) 317, 112 A.C.W.S. (3d) 233 (S.C.J.); Zapfe v. Barnes (2003), 66 O.R. (3d) 397, [2003] O.J. No. 2856, 230 D.L.R. (4th) 347, 174 O.A.C. 211, 35 C.P.C. (5th) 317, 39 M.P.L.R. (3d) 161, 41 M.V.R. (4th) 171, 124 A.C.W.S. (3d) 262 (C.A.)

Statutes referred to

Family Law Act, R.S.O. 1990, c. F.3, s. 5 [as am.], 1(b), (2), Part V [as am.]

Limitations Act, 2002, S.O. 2002, c. 24, Sch. B [as am.]

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 20

MOTION for summary judgment dismissing an action.

William Scott and Robin Linley, for plaintiffs.

Van Krkachovski and Anthony Cole, for defendants. [page49]

MCEWEN J.: --

Order Sought

[1] The defendants seek an order for summary judgment under Rule 20 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, dismissing the plaintiffs' claims on the basis that the claims have been commenced outside the two-year limitation period set out in the Limitations Act, 2002, S.O. 2002, c. 24, Sch. B, as well as the costs of defending the plaintiffs' claims and costs of this motion.

Overview

[2] This action arises out of a motor vehicle accident that occurred on July 23, 2005. On that date, a multi-car accident involved a vehicle in which the plaintiffs Elizabeth Velasco, Angela Velasco and Samuel Velasco were occupants. Elizabeth

Velasco suffered a T4/5 fracture resulting in complete paraplegia. The other plaintiffs bring their actions pursuant to the provisions in Part V of the Family Law Act, R.S.O. 1990, c. F.3.

[3] The plaintiffs first brought an action against Steven Denyer ("Denyer"), Douglas P. Coombs ("Coombs"), David J. Hodgins ("Hodgins") and Amy E. Blanchard ("Blanchard") (the "Denyer action"). The statement of claim in the Denyer action was issued on March 15, 2006. Robin Linley ("Linley") of Blake, Cassels and Graydon LLP ("Blakes") prepared the statement of claim, and Gordon McKee ("McKee") of the same firm reviewed it. It named Denyer as both the operator and owner of the vehicle that he was operating (the "Denyer vehicle") that was involved in the accident. Denyer, however, was not the owner. In fact, the owner of the vehicle was one or both of the defendants in this action, North York Chevrolet Oldsmobile Ltd. and North York Chevrolet Ltd. ("North York").

[4] It is alleged that Denyer and Coombs lost control of their respective vehicles, collided with each other and then collided with the vehicle in which Elizabeth Velasco, Angela Velasco and Samuel Velasco were occupants.

[5] At the time Linley prepared the statement of claim in the Denyer action, he relied upon the motor vehicle accident report that the investigating police officer had completed which mistakenly identified Denyer as the owner. In July 2006, McKee amended the statement of claim to add the Personal Insurance Company, who insured the Velasco vehicle, as a defendant with respect to underinsurance coverage. Denyer's own insurer, Royal & SunAlliance Insurance Company ("Royal & SunAlliance"), did not provide coverage to Denyer, and added itself as a statutory third party to the Denyer action. [page50]

[6] Royal & SunAlliance delivered a pleading in October 2006 in which it wrongly admitted that Denyer was the owner of the vehicle he was operating at the time of the accident. Denyer never defended the Denyer action and was noted in default. Based on the foregoing, McKee and Linley believed that Denyer owned the vehicle he was operating at the time of the accident,

and as a result, McKee did not turn his mind to requesting a motor vehicle licence plate search, which would have disclosed that North York was in fact the true owner.

[7] In the spring of 2007, three other actions were also commenced as a result of the motor vehicle accident: Speed v. Denyer, Court File No. CV-07-083679-00 (the "Speed action"); Blanchard v. Denyer, Court File No. 07-0507 (the "Blanchard action"); and D'Ambrosio v. Denyer, Court File No. CV-07-084294-00 (the "D'Ambrosio action") (collectively known as the "companion actions").

[8] Each of the statements of claim in the companion actions alleged that Denyer was the owner of the Denyer vehicle. McKee received the statement of claim in the Speed action on April 24, 2007 and received the statement the claim in the D'Ambrosio action on June 17, 2007, within two years from the date of the accident. Royal & SunAlliance, once again, had itself added as a statutory third party in both the D'Ambrosio and Speed actions, and once again admitted that Denyer was the owner of the motor vehicle. Royal & SunAlliance's statements of defence and a cross-claim in this regard were prepared on September 20, 2007, outside the two-year limitation period. McKee, however, does not depose in his affidavit that he relied upon those pleadings concerning the issue of ownership.

[9] Even though the Royal & SunAlliance pleading in the Denyer action, and perhaps the other above pleadings led McKee to believe that Denyer owned the Denyer vehicle, Blakes also had the following documentation, obtained within two years from the date of the accident that indicated otherwise:

(a) In July 2006, Blakes received a report from Integra Investigation Services Ltd. (the "Integra Report") that it requisitioned with respect to the personal financial worth of Denyer. This report identified North York Chevrolet Oldsmobile Ltd. as having a registered lien against Denyer.
(b) In January 2007, Blakes received a Crown Brief with respect to the criminal charges that were laid against Denyer and Coombs. The brief totalled 732 pages. One of the documents in it was an Ontario Ministry of Transportation vehicle [page51]licence plate search that clearly showed that

North York Chevrolet Ltd. owned the Denyer vehicle.

[10] A law clerk employed by Blakes reviewed both the Integra Report, to determine if Denyer had significant personal assets, and the Crown Brief, to determine if Denyer and Coombs were racing at the time of the accident. There is no dispute that the clerk reviewed both documents in totality. She obviously did not, however, notice in the Integra Report that North York Chevrolet Oldsmobile Ltd. may have an ownership interest in the Denyer vehicle, or that the licence plate search in the Crown Brief clearly disclosed that North York Chevrolet Ltd. was the owner of the Denyer vehicle. The affidavit evidence filed at the motion demonstrates that neither Linley nor McKee reviewed these documents when Blakes received them within the two-year limitation period.

[11] Coombs' insurer, State Farm Insurance Company, obtained an order adding itself as a statutory third party, and Coombs was also noted in default. The plaintiffs' examinations for discovery were conducted on November 7, 2007. In April 2008, this action was dismissed against Hodgins and Blanchard.

[12] In January 2009, Linley was preparing for the examination for discovery of Denyer. At that time, he reviewed the Crown Brief and found the licence plate search that identified North York Chevrolet Ltd. as the registrant/lessor. The plaintiffs do not dispute the fact that "registrant" means the same as "owner". Linley also reviewed the Integra Report and noticed the registered lien in favour of North York Chevrolet Oldsmobile Ltd. against Denyer. Denyer was examined for discovery on January 12, 2009 and confirmed that the vehicle was leased. The Bell, Temple law firm, lawyers for Royal & SunAlliance, further confirmed this fact on May 4, 2009.

[13] Thereafter, on May 29, 2009, Blakes issued the statement of claim in this action.

[14] It should be noted that North York was insured by Royal & SunAlliance as the owner of the vehicle. Additionally, North York had a policy of excess insurance with Lombard Insurance

Company ("Lombard"). The parties admit that North York was aware that the Denyer vehicle sustained property damage in or about the time of the motor vehicle accident because Royal & SunAlliance reimbursed North York. North York, however, first received notice of the actual motor vehicle accident in July 2009. Prior to that time, it would have only been aware of the fact that the vehicle sustained some property damage. Similarly, Lombard was only first made aware of this accident in July 2009. [page52]
Positions of the Parties

The defendants' position

[15] North York submits that there is no genuine issue requiring a trial since the statement of claim was clearly issued outside of the two-year period provided for in the Limitations Act:

> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
>
> 5(1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the cicumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place,

unless the contrary is proved.

[16] North York submits that clause 5(1)(b) relates to this action, and specifically, whether the plaintiffs ought to have discovered that North York was the owner of the vehicle more than two years prior to the May 29, 2009 issuance of the statement of claim. North York further submits that subsection 5(2) places the onus on the plaintiffs to establish that the identity of North York was not earlier discoverable.

[17] North York further submits that the plaintiffs need to demonstrate that they exercised reasonable or due diligence to discover the information with respect to ownership of the vehicle, in accordance with the principle the Ontario Court of Appeal set up in Pepper v. Zellers Inc. (2006), 83 O.R. (3d) 648, [2006] O.J. No. 5042 (C.A.). North York further relies upon another decision of the Court of Appeal in Zapfe v. Barnes (2003), 66 O.R. (3d) 397, [2003] O.J. No. 2856 (C.A.), in which the court stated, at para. 24:

> [T]he discoverability principle rests by definition on the requirement of due diligence by the plaintiff. . . . That requirement dictates the test to be [page53]applied in determining the start of a limitation period under the discoverability principle: when can it be said that the plaintiff knew, or by reasonable diligence could have discovered, the material facts on which to base a cause of action against the proposed defendant?

[18] With respect to the above, North York points out that Blakes possessed documentation (i.e., the Integra Report and the Crown Brief) that it had received within the two-year limitation period, and that the simple reading of this documentation, particularly the Crown Brief, would have established that North York owned the vehicle in question. This information was obtained more than two years before the statement of claim was issued in this action.

[19] In further support of their submissions that the plaintiffs did not use reasonable or due diligence, North York cites the decision of Aylen J. in Weislar v. Doman, [1952] O.J.

No. 196, 1952 CarswellOnt 331, [1952] O.W.N. 632 (H.C.J.), in which it is stated:

> The records of the Registrar no doubt do not constitute absolute evidence of ownership but a plaintiff who fails to search those records has not made every reasonable effort to ascertain the name of the owner. In this case I do not consider that the plaintiff was entitled to rely solely on statements made to him by the police constable, based on notes made at the time of the accident and which at best could only be based on statements made to him. That is especially so when it is considered that the police officer was under no special obligation to furnish the plaintiff with accurate and complete information.

[20] North York further relies upon the decision of Perell J. in Ioannou v. Evans, [2008] O.J. No. 21, 50 C.P.C. (6th) 358 (S.C.J.), in which he describes, at para. 51, a licence plate search as being a "rudimentary and handy step".

[21] Based on the foregoing, North York submits that the plaintiffs, through Blakes, failed to exercise due diligence in relying upon the police notes and in not obtaining a licence plate search, while simultaneously ignoring evidence, whether through neglect or otherwise, contained in the Integra Report and the Crown Brief that disclosed that North York owned the vehicle.

[22] North York also seeks to distinguish the two cases the plaintiffs rely upon to defend the summary judgment motion.

[23] In the first case, Toneguzzo v. Corner (2009), 94 O.R. (3d) 795, [2009] O.J. No. 1565 (Div. Ct.), the Divisional Court in a similar case extended the limitation period. North York points out, however, that in Toneguzzo the defendant driver defended the action and admitted in his own statement of defence that he was the owner of the vehicle. In this case, Denyer did not defend the action and, therefore, made no admissions. It was his insurer, Royal & SunAlliance, that admitted that Denyer was [page54]the owner. Royal & SunAlliance admitted this in the context of denying coverage

and having itself added as a statutory third party. North York points out that, therefore, it cannot be said that ownership ceased to be an issue to the plaintiffs in this case because Denyer's insurer, rather than Denyer himself, made the admission on ownership in a situation where the insurer was denying coverage.

[24] North York also points out that in Toneguzzo, the party that brought the motion, Lloyd's Underwriters, had added itself as a statutory third party, and by virtue of the fact that it insured the vehicle by way of a primary policy, it knew or ought to have known that the admission about ownership was wrong. North York submits that, in this case, there is a distinction in that neither North York nor its excess insurer Lombard had any knowledge of this action or of any admissions prior to the statement of claim being issued against North York in May 2009.

[25] Lastly, North York points out that in Toneguzzo, the documentation that would have confirmed ownership, being a certificate of insurance, was barely legible and had portions missing. In this action, the licence plate search was legible and complete.

[26] North York, therefore, argues that the Toneguzzo case is entirely distinguishable.

[27] Regarding the second case of Bremer v. Foisy, [2009] O.J. No. 3678, 82 C.P.C. (6th) 133 (S.C.J.-Master), North York argues that the decision of Master Beaudoin, as he then was, ought not to be followed. Once again, the fact situation is similar to the facts of this case: the police report erroneously showed that the owner of the vehicle was its operator, Foisy. Foisy's insurer, Federation, added itself as a statutory third party and admitted that Foisy was the owner and operator of the vehicle. Master Beaudoin relied upon Toneguzzo in concluding that there was an admission of ownership. North York submits, however, that the facts in Toneguzzo differ from Bremer: the defendant driver in Toneguzzo defended and admitted that he was also the owner, as opposed to Bremer in which it was the insurer who made the admission on ownership. North York

argues that Master Beaudoin erred in relying upon Toneguzzo.

[28] Lastly, North York argues that virtually all of the case law referred to at the motion deals with cases where plaintiffs sought to add defendants to an existing action. North York submits that the threshold for adding a defendant to an existing action is low and has been described as "not very much": Wakelin v. Gourley (2005), 76 O.R. (3d) 272, [2005] O.J. No. 2746 (S.C.J.-Master), at para. 14, affd [2006] O.J. No. 1442, 145 A.C.W.S. (3d) 512 (Div. Ct.). Unlike cases involving motions to add parties to [page55]an existing action, such as Toneguzzo and Bremer, this motion is not a motion to add a defendant at the pleading stage, but rather a motion for summary judgment where the plaintiffs bear the onus of establishing that their claim was not discoverable prior to two years before the commencement of the action on May 29, 2009. As such, North York argues that the plaintiffs have a positive duty to satisfy the court that it would have been highly unlikely, if not impossible, with due diligence to have obtained the necessary information: see Parent v. Janandee Management Inc., [2009] O.J. No. 3763, 82 C.P.C. (6th) 321 (S.C.J.-Master). In this regard, North York submits that the plaintiffs, through their solicitors, did not take reasonable steps, and in fact took no positive steps at all. The plaintiffs simply relied upon the police report, the pleading of Royal & SunAlliance, and the insurer of Denyer who took an off-coverage position while overlooking or ignoring the evidence contained in the Integra Report and the Crown Brief.

[29] In the circumstances, North York submits that the neglect of the plaintiffs in failing to review these documents cannot extend the limitation period.

The plaintiffs' position

[30] The plaintiffs concede that Blakes received the Integra Report and the Crown Brief within the two-year limitation period and more than two years before the statement of claim was issued in this action.

[31] The plaintiffs, however, argue that this is not in any

way fatal to their discoverability argument.

[32] Firstly, they argue that the Integra Report only referred to a lien being placed on the vehicle and did not identify North York as either the owner or the lessor. The plaintiffs submit that the lien could have been in place for a number of reasons, including an unpaid purchase price, and therefore the lien is not evidence of ownership in any way, shape or form. The plaintiffs also point out that Blakes obtained the Integra Report in order to determine the assets of Denyer and not the ownership of the vehicle. It was received and reviewed in that context.

[33] Secondly, with respect to the Crown Brief, the plaintiffs argue that while Blakes did have the brief, it was a voluminous 732-page document, and that in a "perfect world" they would have seen the plate search document in the brief. The plaintiffs submit, however, that the brief was ordered with respect to the issue of liability and racing, and that they did not fall below the standard of reasonable or due diligence in failing to notice the one-page document. [page56]

[34] The plaintiffs submit that the case must be looked at in its entire context, and the fact is that Royal & SunAlliance, the insurer of Denyer, admitted within the limitation period that Denyer was the owner. It is submitted that this admission carries a lot of weight since Royal & SunAlliance insured both Denyer and North York. Royal & SunAlliance should have known who its insurers were, and the admission of Royal & SunAlliance merely confirmed the information that McKee and Linley had gleaned from the police report.

[35] The plaintiffs further submit that Royal & SunAlliance's admission, and the reliance that McKee and Linley placed upon it, was made more significant by the fact that it made the same admission in the D'Ambrosio and Speed actions. Furthermore, the plaintiffs in the companion actions also alleged that Denyer was the owner of the Denyer vehicle.

[36] Additionally, the plaintiffs argue that in or about April 2007, Royal & SunAlliance and/or its solicitors had the

vehicle plate search showing North York as the owner and did not amend the pleading or alert the plaintiffs as to this true state of affairs.

[37] It was not until January 2009, when Linley conducted an in-depth review of the file in preparation for Denyer's examination for discovery, [that] the plaintiffs [learned] about the true state of affairs concerning the ownership.

[38] The plaintiffs argue that therefore, in all of the circumstances, they acted reasonably and exercised due diligence in relying upon the police report and the admissions of Royal & SunAlliance. The Integra Report provided no evidence of ownership, and the inadvertence of Blakes in failing to see the licence plate search document in the Crown Brief is understandable given the brief's voluminous nature. The reason for which the Crown Brief was ordered was unrelated to the issue of ownership, and, in fact, the ownership did not seem to be an issue, given the police report and the admissions in pleadings of Royal & SunAlliance. In support of this position, the plaintiffs rely upon Toneguzzo and Bremer, both of which involve facts that are very similar to this case. They submit that those cases are not distinguishable in any meaningful way.
Analysis

Distinction between adding a party to an existing action versus bringing a new claim after a limitation period has expired

[39] As noted above, North York argues that Toneguzzo and Bremer ought not to be considered because unlike this action, those cases involved motions to add a defendant at the pleading [page57]stage and employed a much lower threshold than that which the plaintiffs are required to meet to successfully defend this summary judgment motion.

[40] In order to consider North York's argument, I must first determine what the court's approach should be when considering whether to add a defendant at a pleading stage in circumstances such as these, where the plaintiffs allege that the limitation period has not yet expired because they could not, with due

diligence, have discovered the existence of said defendant.

[41] Prior to Toneguzzo and Bremer, the court has discussed this approach in several decisions. In Wong v. Adler (2004), 70 O.R. (3d) 460, [2004] O.J. No. 1575 (S.C.J.-Master), affd (2005), 76 O.R. (3d) 237, [2005] O.J. No. 1400 (Div. Ct.), Master Dash stated [at para. 45]:

> What is the approach a judge or master should take on a motion to add a defendant where the plaintiff wishes to plead that the limitation period has not yet expired because she did not know of and could not with due diligence have discovered the existence of that defendant? In my view, as is clearly implied in Zapfe, the motions court must examine the evidentiary record before it to determine if there is an issue of fact or of credibility on the discoverability allegation, which is a constituent element of the claim. If the court determines that there is such issue, the defendant should be added with leave to plead a limitations defence. If there is no such issue, as for example where the evidence before the motions court clearly indicates that the name of the tortfeasor and the essential facts that make up the cause of action against such tortfeasor, were actually known to the plaintiff or her solicitor more than two years before the motion to amend, the motion should be refused. If the issue is due diligence rather than actual knowledge, this is much more likely to involve issues of credibility requiring a trial or summary judgment motion, provided of course that the plaintiff gives a reasonable explanation on proper evidence as to why such information was not obtainable with due diligence. That is not to say that such motion could never be denied if the evidence is clear and uncontradicted that the plaintiff could have obtained the requisite information with due diligence such that there is no issue of fact or credibility.

(Emphasis added)

[42] In Wakelin, supra, at paras. 14-15, Master Dash discussed the amount of evidence and what the evidence must prove in order to add the defendants:

> The question is how much evidence must the plaintiff put in at the pleadings amendment stage to establish that the proposed defendants could not have been identified with due diligence within the limitation period? The short answer is: not very much. As stated by the Court of Appeal in Zapfe: "In most cases one would expect to find, as part of a solicitor's affidavit, a list of the attempts made by the solicitor to obtain information to substantiate the assertion that the party was reasonably diligent" and provide "an explanation for why she was unable to determine the facts".
>
> Therefore, as long as the plaintiff puts in evidence as to steps taken to ascertain the identity of the tortfeasors and gives a reasonable explanation on [page58]proper evidence as to why such information was not obtainable with due diligence then that will be the end of the enquiry and the defendants will normally be added with leave to plead a limitations defence. This is not a high threshold. If the plaintiff fails to provide any reasonable explanation that could on a generous reading amount to due diligence the motion will be denied. If the plaintiff puts in evidence of steps taken but the proposed defendant also provides evidence of further reasonable steps that the plaintiff could have taken to ascertain the information within the limitation period then the court will have to consider whether the plaintiff's explanation clearly does not amount to due diligence. If there is any doubt whether the steps taken by the plaintiff could not amount to due diligence then this is an issue that must be resolved on a full evidentiary record at trial or on summary judgment. The strength of the plaintiff's case on due diligence and the opinion of the master or judge hearing the motion whether the plaintiff will succeed at trial on the limitations issue is of little or no concern on the motion to add the defendants. The only concern is whether a reasonable explanation as to due diligence has been provided such as to raise a triable issue.

(Emphasis added)

[43] I agree that Wong outlines the court's approach on a motion to add a defendant at the pleading stage where discoverability is an issue, and that the threshold is arguably

lower than the situation in this case, where a new action has been commenced, because the approach in Wong is used merely to determine whether or not an issue arises as to discoverability. I also agree that Wakelin outlines the low evidentiary burden the plaintiff must meet in order to be successful on a motion to add. However, in comparing Wong and Wakelin to Toneguzzo and Bremer, I disagree with North York's argument that the court ought not to consider Toneguzzo and Bremer in this summary judgment motion.

[44] The courts in Toneguzzo and Bremer did not merely determine whether an issue arose as to discoverability. In Toneguzzo, the court, on the evidence, found that it was not reasonable to conclude that the plaintiff ought to have discovered the actual status of ownership of the defendant's vehicle by the exercise of due diligence prior to December 15, 2005. In Bremer, the court found that the plaintiff could not have discovered the identity of the true owner of the motor vehicle until March 2008. Since these findings firmly disposed of any possible limitation defence to the issue of discoverability, it is unsurprising that the courts granted the motion to add without giving leave to plead a limitations defence.

[45] While Toneguzzo and Bremer involve adding a defendant at the pleading stage, in both cases, the courts neither followed the approach outlined in Wong nor did they appear to follow the low evidentiary threshold in Wakelin. Rather, it appears that the courts decided on the issue of discoverability by carefully assessing the evidence before them on that issue, much as this court is [page59]now required to do for the within summary judgment motion. Accordingly, Toneguzzo and Bremer provide useful assistance in attempting to determine whether, in this case, the proposed defendants could have been identified within the limitation period.

The test

[46] Pursuant to the provisions of s. 5 of the Limitations Act, the plaintiffs bear the onus of establishing that the identity of North York was not discoverable more than two years

prior to the commencement of this action on May 29, 2009.

Discoverability

[47] Although I have great sympathy for the plaintiffs given the nature of the injuries sustained, I cannot conclude that they exercised reasonable or due diligence to discover the information that would have led to the identity of the owner of the Denyer vehicle within two years of the issuance of the statement of claim.

[48] Linley relied solely upon the motor vehicle accident report in preparing the statement of claim, and thus alleged in the claim that Denyer was the owner of the Denyer vehicle. This error was confirmed in Royal & SunAlliance's statement of defence and cross-claim that McKee received. As such, McKee did not turn his mind to requesting a motor vehicle licence plate search. While I am of the view that Linley should not have relied upon solely the motor vehicle accident report in preparing the statement of claim, and that in each and every case plaintiffs' counsel should obtain a motor vehicle licence plate search to determine ownership, I cannot conclude that Blakes failed to exercise reasonable or due diligence in the circumstances of this case, prior to receipt of the Crown Brief, given the combined information of the motor vehicle accident report and the admission in the Royal & SunAlliance pleading.

[49] In my view, however, Blakes ought not to have considered that the ownership of the defendant's vehicle ceased to be an issue for the plaintiffs at this time. Denyer had not defended the action and, therefore, there was no admission from him, one way or the other. Furthermore, Royal & SunAlliance had taken an off-coverage position concerning Denyer. Any admissions Royal & SunAlliance made were not binding on Denyer.

[50] In or about this time frame, however, Blakes also received the Integra Report in July 2006 and the Crown Brief in January 2007. From McKee's affidavit, it appears that both of these documents came to his attention when they were received, and he had a law clerk review them. While I do not find fault

with Blakes for not gleaning from the Integra Report that North York [page60]was likely the owner, the situation changed dramatically when it obtained the Crown Brief, which contained a specific licence plate search that identified North York as the registrant/lessor. Notwithstanding that the brief was a voluminous 732-page document, it is admitted that a law clerk at Blakes reviewed it. A proper review of the Crown Brief would have brought the ownership issue clearly to the mind of Blakes, particularly when read in conjunction with the Integra Report. This is clearly evidenced by the fact that when Linley ultimately read the Crown Brief and the Integra Report in January 2009, he identified North York as the registrant/lessor and that North York had a registered lien in its favour against Denyer.

[51] In my view, as noted above, the information contained in the motor vehicle accident report and the Royal & SunAlliance pleading should not have caused Blakes to close its mind to the issue of ownership to the extent that it could ignore the information contained in the Integra Report and particularly in the Crown Brief concerning ownership. Based on the facts of this case, I therefore find that by an exercise of reasonable or due diligence, the plaintiffs, through [their] solicitors, should have known that they had a cause of action against North York as the owner of the Denyer vehicle in January 2007. The statement of claim was issued in May 2009, which was well outside the two-year limitation period provided for in the Limitations Act.

[52] Another criticism I have with respect to the issue of the plaintiffs' due diligence stems from the fact that Linley admittedly knew in January 2009, when he reviewed the Crown Brief, that North York was listed as the lessor/registrant. Denyer further confirmed the fact that it was a leased vehicle at his examination for discovery on January 12, 2009. For reasons that are not explained in the materials that the plaintiffs filed, no statement of claim was issued against North York at that time alleging it was the owner of the vehicle. Had the plaintiffs done so, they would have had a strong argument that they exercised reasonable or due diligence, and they also may well have fallen within the two-

year limitation period prescribed in the Limitations Act since they only became aware of the ownership issue, as I have found above, in January 2007.

[53] Instead, for some unknown and inexplicable reason, Blakes waited until it received confirmation from Bell, Temple in May 2009 before issuing the statement of claim, notwithstanding McKee's admission in his affidavit that he took from Denyer's examination for discovery evidence that Denyer did not own the Denyer vehicle and that North York had leased it to him. In my view, this falls below a reasonable or due diligent standard, [page61]and the resulting approximate four-month delay caused the statement of claim to be issued outside the two-year period from when the plaintiffs' cause of action against North York arose in or about January 2007. I should add that in coming to this conclusion, I considered that it would have taken some time after the receipt of the Crown Brief to properly review it, and make proper conclusions concerning ownership, but certainly this should not have taken four months, and there is no evidence in the plaintiffs' materials to suggest that the Crown Brief was not reviewed in January 2007 or very shortly thereafter.

[54] In coming to the above conclusion, I am aware of the fact that the conclusion that I have reached is different from that in Toneguzzo and Bremer. There are, however, a number of important distinguishing features.

[55] Firstly, in Toneguzzo, the defendant Way, the actual driver, defended the action and admitted that he was the driver and, mistakenly, the owner. As a result, the court concluded that ownership ceased to be an issue. As noted above, that was not the case in this action.

[56] Secondly, in Toneguzzo, the documents that would have disclosed the true state of affairs concerning ownership were barely legible, with portions missing or important information omitted. That was not the case in this action.

[57] Thirdly, in Toneguzzo, at his examination for discovery, the defendant Way admitted he was the owner of the defendant's

vehicle. That was not the case in this action.

[58] Lastly, in Toneguzzo, the court concluded that Lloyd's Underwriters, who was defending the action as a statutory third party, knew or ought to have known that Way's admission was incorrect. While it is true that in the Denyer action Royal & SunAlliance was in the same position as Lloyd's Underwriters, we have a distinguishing feature in that not only did North York not know of the existing action until it was served with the statement of claim, but its excess insurer Lombard also did not know until that time. Accordingly, it cannot be said that North York or Lombard knew or ought to have known of the error. In any event, the court in Toneguzzo was dealing with both principles of discoverability and special circumstances. In my view, this discussion concerning insurer's knowledge more properly would fall within the special circumstances analysis, as opposed to discoverability, which, as a result of the Court of Appeal's decision in Joseph v. Paramount Canada's Wonderland (2008), 90 O.R. (3d) 401, [2008] O.J. No. 2339 (C.A.), can no longer form the basis for extending the limitation period. [page62]

[59] With respect to Bremer, the facts are much more similar to this case: the defendant Foisy was noted in the police report to be the operator and owner of his vehicle, which was not the case because it was owned by a leasing company; Foisy did not defend, and his insurer, Federation, did not defend him and had itself added as a statutory third party; and Federation mistakenly admitted that Foisy was the owner of the vehicle.

[60] Master Beaudoin, as he then was, concluded that Toneguzzo was determinative of all of the issues on the motion before him, and that the admission of ownership of the motor vehicle and the statement of defence of Federation did not require the plaintiff to conduct further inquiries. There is, in my view, an important distinguishing feature in the Bremer case, in that Federation refused to produce a certificate of insurance, wrongfully claiming privilege over the document, which would have clarified the issue of ownership. Further, in Bremer, the plaintiffs did not have clear evidence of ownership in their possession as the plaintiffs had in this case.

[61] As can be seen from the above, the difficulty that I have concerning reasonable or due diligence lies with Blakes and not the plaintiffs themselves. Unfortunately for the plaintiffs, however, the acts of their solicitors cannot be said to vitiate the requirement of the plaintiffs to exercise due diligence as to who was the owner of the Denyer vehicle: Kostecki v. Goodman, [2003] O.J. No. 523, 2003 CarswellOnt 561 (S.C.J.-Master), at paras. 60-64; Young v. Progressive Insurance, [2002] O.J. No. 909, 37 C.C.L.I. (3d) 317 (S.C.J.) (Jennings J.); Swiderski v. Broy Engineering Ltd. (1992), 11 O.R. (3d) 594, [1992] O.J. No. 2406 (Div. Ct.); and Giovannoli Investments Ltd. v. Western Underwriting Mgrs. Ltd., [1990] O.J. No. 2132 (Gen. Div.-Master) (Master Peppiatt).

[62] In a secondary submission, plaintiffs' counsel argued that this may also be an appropriate case to refer to the trial judge. I disagree. No factual matters were in dispute at the motion, no transcripts were filed with respect to cross-examinations on affidavits and no credibility issues were raised. As such, I cannot conclude that the interest of justice requires a trial.

Disposition

[63] As a result of the foregoing, I find there is no genuine issue requiring a trial, and I grant the defendant's order for summary judgment dismissing the within action, along with costs of both the motion and the action. [page63]

[64] If the parties cannot agree upon costs, they are to make submissions to the court in writing, not to exceed five pages, within 30 days.

Motion granted.