Case Name:

Bennett v. J.K. (Jim) Moore Ltd. (c.o.b. Jim Moore Petroleum)

Between
Eliza Bennett, Plaintiff, and
J.K. (Jim) Moore Ltd., (c.o.b. Jim Moore Petroleum), Steve Haglund, John Doe, John Doe Incorporated, Aultman's Heating Ltd., Chris Heasman, Bechtel's Home Heat, Terry Allan Bechtel, David and Monika McComiskey, Defendants

[2014] O.J. No. 2309

2014 ONSC 2859

Court File No. CV-11-20

Ontario Superior Court of Justice

J.A.S. Wilcox J.

Heard: April 1, 2014.
Judgment: May 12, 2014.

(63 paras.)

Civil litigation -- Civil procedure -- Parties -- Adding or substituting -- After expiry of limitation period -- On own motion -- Motion by plaintiff to add or substitute defendants dismissed -- Haglund installed fuel oil tank on McComiskeys' property, bought by plaintiff, who brought action for negligence respecting fuel oil spill -- Plaintiff was out of time to add McComiskeys as defendants -- Plaintiff or subrogated insurer had necessary facts to sue McComiskeys within limitation period -- Insurer was aware that McComiskeys did work that might have led to loss -- This was not case of misnomer -- Nobody who was knowledgeable in facts and looked at description of Haglund would discern that McComiskeys were intended parties.

Civil litigation -- Limitation of actions -- Time -- Discoverability -- Expiry of limitation periods -- Effect of -- Motion by plaintiff to add or substitute defendants dismissed -- Haglund installed fuel oil tank on McComiskeys' property, bought by plaintiff, who brought action for negligence respecting fuel oil spill -- Plaintiff was out of time to add McComiskeys as defendants -- Plaintiff or subrogated insurer had necessary facts to sue McComiskeys within limitation period -- Insurer was aware that

McComiskeys did work that might have led to loss -- This was not case of misnomer -- Nobody who was knowledgeable in facts and looked at description of Haglund would discern that McComiskeys were intended parties.

Motion by the plaintiff to add or substitute defendants. Haglund installed a fuel oil tank on the McComiskeys' property in 2003. There was a spill on the property. The Technical Standards and Safety Authority prepared a report. The plaintiff bought the property in 2008, waiving a condition for an inspection. Another spill was discovered in 2009. A report prepared for the plaintiff's insurer concluded that the 2009 spill was caused by faulty installation and attached the TSSA report. The insurer advised the McComiskeys in 2010 that they were being held responsible for the 2009 spill. In 2011, the plaintiff brought an action for negligence with respect to the 2009 spill, but did not name the McComiskeys as defendants. In 2014, she sought to add them or substitute them in place of Haglund, who was described in the statement of claim as a contractor for the purpose of a regulation made under the Technical Standards Safety Act.

HELD: Motion dismissed. The plaintiff was out of time to add the McComiskeys as defendants. The plaintiff or her subrogated insurer had the necessary facts to sue the McComiskeys within the limitation period. The insurer was aware that the McComiskeys previously owned the property and did work on it that might have led to the loss. In any event, the claim against the McComiskeys was not brought within two years of when it was discovered. The agreement of purchase and sale stated that the seller represented and warranted that the "chattels and fixtures" were "in good working order". Had the plaintiff not waived the condition for an inspection, it probably would have revealed any deficiencies in the oil system. The report prepared for the insurer said that the failure occurred within five years of the installation. It was highly likely that a conversation with the TSSA would have suggested that the McComiskeys were liable. This was not a case of misnomer. Nobody who was knowledgeable in the facts and looked at the description of Haglund would discern that the McComiskeys were the intended parties. The McComiskeys were not "contractors".

Statutes, Regulations and Rules Cited:

Fuel Oil Regulations, O. Reg. 213/01, "contractor, s. 5, s. 15(1), s. 26

Limitations Act, S.O. 2002, c. 24, Schedule B, s. 4, s. 5(1), s. 5(2), s. 21, s. 21(2)

Rules of Civil Procedure, Rule 5.04(2), Rule 26.01, Rule 26.02

Technical Standards Safety Act, 2000, R.S.O. 2000, Chapter 16,

Counsel:

F. Mendes, for the Plaintiff.

Philip A. Garbutt, for the Defendant J.K. Moore.

Ian Peck, for the Defendant Aultman's Heating Ltd.

Christopher I.R. Morrison, for the Defendants Terry Allen Bechtel and Bechtel's Home Heat.

Martin P. Forget, for the Defendants David and Monika McComiskey.

[Editor's note: An amended judgment has been released by the Court June 19, 2014; the changes have been made to the text and correction is appended to this document.]

DECISION

1 J.A.S. WILCOX J.:-- This motion arises in the context of a lawsuit for damages for alleged negligence leading to a heating fuel oil spill on the Plaintiff's property.

2 The Plaintiff moves in an Amended Notice of Motion for

a) an order granting leave to the Plaintiff to amend the Statement of Claim to add David McComiskey and Monika McComiskey as Defendants to this proceeding along with the appropriate amendments to the allegations as set out in the Second Fresh as Amended Statement of Claim;
b) in the alternative, granting leave to the Plaintiff to substitute David and Monika McComiskey in place of the Defendant Steve Haglund, with leave to make related amendments to the title of proceedings as the Fresh as Amended Statement of Claim.

3 Counsel for the moving party (the Plaintiff) and for the McComiskeys indicated that the other parties took no position on the motion.

4 FACTS

5 The facts in this matter are found in the affidavits of Edward J. Dreyer, sworn January 16, 2014, David McComiskey sworn March 24, 2014, and Helen Sinclair sworn March 25, 2014.

6 The property in question, 1153 Riding Ranch Road, South River, Ontario (the Bennett property) was previously owned by the McComiskeys, from January 13, 1989, to May 30, 2008. It was part of a larger property that the McComiskeys had owned, which included a house and a ceramics shop. David McComiskey states in his affidavit that the property was formally divided into three in 2007, becoming 1083, 1145 and 1153 Riding Ranch Road, respectively.

7 In August 2003, the Defendant Steve Haglund allegedly installed a fuel oil tank on the McComiskeys' property, on the part that later became the Bennett property.

8 There was a subsequent fuel oil spill (the 2003 spill). This was unknown to the Plaintiff until the Flynn report of October 27, 2009, mentioned below. It appears to have been at the site of the original house on the McComiskeys' property, which remained unit #1145 after the properties were divided.

9 A report of September 11, 2003 was done by the Technical Standards and Safety Authority's (TSSA) Richard Tetreault regarding the 2003 spill.

10 On November 19, 2003, there was an inspection of the property and report by the Defendant Chris Heasman.

11 After November 19, 2003, the McComiskeys renovated the ceramic shop on what later became the Bennett property into a residence and allegedly re-installed or altered the fuel tank system.

12 On May 30, 2008, the Plaintiff bought the Bennett property from the McComiskeys.

13 The Agreement of Purchase and Sale of February 16, 2008 was conditional on a satisfactory inspection of the fuel oil system. The Plaintiff waived that condition.

14 On March 30, 2009, a fuel oil spill, this time on the Bennett property (the 2009 spill), was discovered and the Plaintiff reported it to her insurer, West Wawanosh Mutual Insurance Company (West Wawanosh). West Wawanosh retained an adjuster, Judy Smith of ClaimsPro to investigate.

15 ClaimsPro retained Michael Flynn of First Dimension Engineering to determine the cause of the 2009 spill.

16 Flynn's report of October 27, 2009 (the Flynn report) concluded that the 2009 spill was caused by faulty installation of the oil tank and system.

17 The Flynn report notes:

> A former inspector from the TSSA had inspected the dwelling on or about October 2003 due to a previous spill occurrence. Those documents were also reviewed.

18 Attached to the Flynn report is the TSSA Inspector's Instructions/orders Report dated September 11, 2003, issued to David McComiskey at 1145 Riding Ranch Road, RR 1, South River. The inspector who authored it was Richard Tetreault, badge number 195. Its summary refers to an on-site investigation of an oil leak on a new outdoor oil tank. Two furnace oil supply tanks are recorded, both with installation dates of August 12, 2003, including one at the "House" and one at the "Potery"(sic).

19 Also attached to the Flynn report is a Fuel Oil Distributor Inspections Report dated November

19, 2003 for a property identified as Dave McComiskey's at 1145 Riding Ranch Road, South River, "Wolfe Creek Pottery". The author is not identified. The signature is illegible. The certificate number of the author is only partly legible. As noted below, the author was later identified as Chris Heasman.

20 By letter of June 5, 2010, ClaimsPro's Judy Smith advised David McComiskey that he was being held responsible for the damages resulting from the 2009 spill.

21 McComiskeys contacted their insurer, Farmers' Mutual Insurance Company (FMIC) (now the Commonwealth Mutual Insurance Group). In her affidavit, Helen Sinclair, a senior claims representative for FMIC, states that Judy Smith advised her on July 29, 2010, "that the insurer's claim against the McComiskeys was based on the fact that they had previously owned the property in question and had conducted renovations which may have resulted in the ruptured fuel lines".

22 Greg Madill of Upper Canada Adjusters Inc. responded to Judy Smith by letter of August 11, 2010 indicating that they had been retained by McComiskeys' insurers and were investigating.

23 Greg Madill sent a further letter of September 19, 2010 to Judy Smith enclosing a copy of the Agreement of Purchase and Sale, noting certain conditions in it, and questioning how the McComiskeys could be liable in view of those.

24 The Statement of Claim was issued on March 7, 2011. The McComiskeys were not named as defendants.

25 Greg Madill wrote on March 21, 2011 to Judy Smith referencing, but not detailing, their previous correspondence and discussions, except to say that she had advised that the Statement of Claim had been issued but not served. He noted that the limitation period for claiming against the McComiskeys ended March 20, 2011, and sought a copy of the Statement of Claim.

26 In his affidavit of January 16, 2014 filed on the motion, Edward J. Dreyer identified himself as the lawyer with Madorin, Snyder LLP, the lawyers for the Plaintiff, who drafted the Statement of Claim. He states that, in doing so, "I considered a claim against the McComiskeys on the basis of strict liability, but thought that there was no liability at law. I had no reason to believe that the owner had knowledge of a faulty installation of the fuel oil tank, or was involved in any modifications of the fuel oil tank between the 2003 inspection and the sale of the property in 2008. Adding the McComiskeys as defendants would have been a fishing expedition".

27 Dreyer wrote to the TSSA on January 10, 2011 seeking to identify the author of the November 19, 2003 report. In the TSSA's email of December 20, 2011, that information was produced pursuant to Koke J.'s Order of November 28, 2011, and Chris Heasman was named. He was added as a Defendant by order dated May 4, 2012.

28 The Defendant Chris Heasman was examined for discovery on May 3, 2013. He confirmed

that he had inspected the fuel tank on what later became the Bennett property on November 19, 2003 and that he would not have approved the installation as it appeared in photos taken in 2009. At the time of his 2003 inspection, the property had still consisted of a house and a ceramic shop. From his answers, it appeared that the ceramic shop had been renovated and that the oil tank and oil line had been moved since his 2003 inspection and prior to the Bennetts' purchase of the property in 2008.

29 David McComiskey's affidavit states that he renovated the ceramic shop's interior early in 2007 into a residential dwelling. He denies being involved in the installation of or making any changes to the heating system, which had been installed in 1996 with the oil tank and line being replaced in August of 2003. He and his family had occupied the residence from October 2007 to May 2008, then moved next door to 1083, where he still lives. The Plaintiff was made aware by him that he had recently converted the building into a residence, doing most of the work himself. He notes as well that he and his wife, Monika McComiskey, have never been fuel/oil contractors, nor in the business of installing, renovating, repairing, altering or servicing fuel or oil appliances. Furthermore, after learning in early April 2009 of the 2009 spill, he had attended and offered assistance. However, his offer was not taken up, nor was he asked for information about the property.

30 The Plaintiff's insurer has paid out a substantial amount of money as a result of the 2009 spill.

31 *LIMITATIONS ACT* AND RULES

32 The *Limitation Act* provides:

> **Basic limitation period**
>
> **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. 2002, c. 24, Sched. B, s. 4.
>
> **Discovery**
>
> **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 of 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 circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c.24, Sched. B, s. 5(1).

Presumption

(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. 2002, c. 24, Sched. B, s.5(2).

Misdescription

(2) Subsection (1) does not prevent the correction of a misnaming or misdescription of a party. 2002, c. 24, Sched. B, s. 21(2).

33 The Rules of Civil Procedure provide:

MISJOINDER, NON-JOINDER AND PARTIES INCORRECTLY NAMED

5.04(2) Adding, deleting or substituting parties - At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

RULE 26 AMENDMENT OF PLEADINGS

GENERAL POWER OF COURT

> 26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

WHEN AMENDMENTS MAY BE MADE

26.02

party may amend the party's pleading,

(a) without leave, before the close of pleadings, if the amendment does not include or necessitate the addition, deletion or substitution of a party to the action;
(b) on filing the consent of all parties and, where a person is to be added or substituted as a party, the person's consent; or
(c) with leave of the court.

34 POSITION OF THE MOVING PARTY

35 The Plaintiff seeks to add the McComiskeys as parties to the action on the grounds that the principle of discoverability applies and the limitation period for a claim in tort against them only started to run on May 3, 2013.

36 In support, the Plaintiff argued that, up to May 3, 2013, the Plaintiff's information was that the fuel oil tank that had leaked had been installed by the Defendant Steve Haglund in August, 2003 and inspected by the Defendant Chris Heasman in November, 2003. Indeed, the Flynn report on the 2009 spill revealed that there had been a previous spill in 2003 and a subsequent inspection in November, 2003 by a then-unidentified technician. It was not until January, 2012 that the technician was identified as Chris Heasman. He was added as a Defendant in May, 2012 and examined for discovery in May, 2013.

37 The Statement of Claim had been issued without naming the McComiskeys as Defendants. The reasons for this were that the Agreement of Purchase and Sale allegedly absolved them of liability in contract or for misrepresentation, and there was thought not to be any claim against them on the basis of strict liability nor reason to believe that they were involved in or knew of a faulty installation or modification which would support a claim. Only in the discovery of Chris Heasman did it appear to Plaintiff's counsel that there were renovations or alterations to the oil tank system after Heasman's November, 2003 inspection for which the McComiskeys could be liable.

38 In the alternative, the Plaintiff relied on the doctrine of misnomer in arguing that the

McComiskeys should be substituted for the Defendant Steve Haglund.

39 POSITION OF RESPONDING PARTY

40 Counsel for the McComiskeys took the position that:

- the Plaintiffs had the necessary facts to know to sue the McComiskeys within the two year limitation period from the March 30, 2009 spill;
- even if the Plaintiffs did not know, they ought to have known;
- this is not a case of misnomer.

41 ANALYSIS

42 It appears to me that the Plaintiff, or at least her subrogated insurer, had the necessary facts they needed to know to sue the McComiskeys within the two year limitation period following the 2009 spill. This is clear from the affidavit of Helen Sinclair in which she deposes as to her July 29, 2010 conversation with Judy Smith in which the latter obviously was aware that the McComiskeys had previously owned the property and performed work on it which might have led to the loss. That is the basis on which the Plaintiff now wants to sue them. There is no affidavit from Judy Smith offering an explanation at variance with this conclusion, nor anything to detract from Sinclair's evidence. McComiskeys' counsel noted that Sinclair had not been cross-examined on her affidavit, indicating that her evidence had been accepted by the Plaintiff.

43 Even if my conclusion on that point is in error, I find that the claim against McComiskeys is not being brought within two years of the day it was discovered, as that term is defined in the *Limitations Act*, which day I find was in March, 2011 at the latest.

44 The Agreement of Purchase and Sale was conditional on the Plaintiff purchaser obtaining a report from a fuel oil distributor registered under the *TSSA* stating that the tank system and oil burning appliance was in safe operating condition and in legal compliance. That was to be done by March 10, 2008. I find on a balance of probabilities that such an inspection, if it had been done, would have revealed the deficiencies in the oil system if they existed at the time when the McComiskeys still owned the property. However, the condition was waived.

45 The May 30, 2009 spill occurred just over a year after the Plaintiff bought the property from McComiskeys. The Flynn report of October 27, 2009 attributed it to faulty installation and said the failure occurred within five years of installation. I fail to see how this does not implicate the McComiskeys.

46 Edward Dreyer deposed that when he drafted the Statement of Claim, the McComiskeys were not added as defendants because they appeared to have no liability. This follows the paragraph in his affidavit in which he states that Upper Canada Insurance Adjusters Inc. (Greg Madill) alleged in its letter of September 19, 2010 to Judy Smith that the terms of the Agreement of Purchase and Sale

absolved Mr. McComiskey of any liability in connection with the 2009 fuel oil spill. The letter noted that the agreement states in addition to the aforementioned condition that:

> The seller represents and warrants that the chattels and fixtures as included in this Agreement of Purchase and Sale will be in good working order and free from all liens and encumbrances on completion. The parties agree that this representation and warranty shall survive and not merge on completion of this transaction, but apply only to the state of the property at completion of this transaction.

47 As it is the state of the property at the completion of the McComiskeys' sale to the Plaintiff that is central to the case, I do not agree that the McComiskeys are necessarily so absolved.

48 The uncontradicted information of David McComiskey is that the Plaintiff knew that he had renovated the property, that the McComiskeys were living next door at the date of the spill and up to the present, and that he made his availability known after the 2009 spill, but was never contacted. That he had some role to play in this and should at least have been contacted to see what information he could provide seems obvious.

49 Nevertheless, the Plaintiff argues that there were no grounds to support that the McComiskeys might be liable until the examination for discovery of Chris Heasman in May, 2013. The lengthy process of identifying Heasman as the technician whose November, 2003 inspection report came to light in the Flynn report is outlined above in the facts. The Flynn report also revealed that an inspection report had been done by TSSA inspector Richard Tetreault in September, 2003. It is highly likely that a conversation with Tetreault would have revealed information similar to that obtained later from Heasman, suggesting liability on the part of the McComiskeys. Even if it took as long to get information from Tetreault once he was identified as it did to get it from Heasman once he was identified, the claim would have been discovered for purposes of the *Limitations Act* by February, 2011.

50 It follows that the Plaintiff is out of time to add the McComiskeys as Defendants.

51 MISNOMER

52 I now turn to the issue of whether the McComiskeys can be substituted for another defendant.

53 As indicated at the outset, the Notice of Motion sought in the alternative to substitute them for the Defendant Steve Haglund. This was the argument that was outlined in the Plaintiff's factum, also. In oral argument, however, the Plaintiff sought to substitute the McComiskeys for the Defendant John Doe.

54 McComiskeys' counsel noted that the Defendant Haglund was in default of a defence.

55 The Statement of Claim identifies the Defendant Steve Haglund as a contractor for the

purpose of O. Reg. 213/01 made pursuant to the *Technical Standards Safety Act* (the *Act*). It alleges that, in installing a tank system at the Bennett property in August 2003, he was negligent, thereby causing or contributing to the 2009 spill and the resulting damages.

56 The Statement of Claim also identifies the Defendant John Doe as a contractor for the purposes of O. Reg. 213/01 made pursuant to the *Act* and alleges that his negligence or that of his employees for whom he is responsible caused or contributed to the 2009 spill. The allegations with respect to his inspection of the tank system are that he:

i) failed to identify the deficiencies;
ii) breached a duty to warn the fuel oil distributor and owner that the tank system failed to conform with the Fuel Oil Regulations, contrary to s. 26 of the Fuel Oil Regulations, O. Reg. 213/01;
iii) breached a duty to affix a warning to the tank system in accordance with the Fuel Oil Regulations, O. Reg. 213/01, s. 26;
iv) negligently misrepresented to the fuel oil distributor and the owner that the tank system complied with the Fuel Oil Regulations, O. Reg. 213/01;
v) failed to take reasonable precautions to ensure that their employees complied with the *Technical Standards and Safety Act*, 2000, S.O. 2000, Chapter 16 and its regulations in the performance of any inspections contrary to s. 5 of the Fuel Oil Regulations;
vi) employed inexperienced, unqualified, and or inadequately trained employees.

57 The *Act* defines "contractor" as "a person who carries on, in whole or in part, the business of installing, removing, repairing, altering or servicing appliances, and includes a person or an agent of the person who agrees to install, remove, repair, alter or service appliances sold or leased by the person".

58 S. 15(1) of that Act states that, "no person shall act as a contractor unless the person is registered for that purpose".

59 S. 21 of the *Limitations Act* states:

(1) If a limitation period in respect of a claim against a person has expired, the claim shall not be pursued by adding the person as a party to any existing proceeding. 2002, c.24, Sched. B, s.21(1).
(2) Subsection (1) does not prevent the correction of a misnaming or misdescription of a party.

60 The case law on misnomer was briefly summarized by Master Brott in *McCormick v. Tsai*, 2011 ONSC 2057 as follows:

(8) In *Omerod v. Strathroy Middlesex General Hospital* [2009] O.J. No. 4071 the

Court of Appeal detailed the two-step process in misnomer cases. First, the Court must ask itself if this is in fact a case of misnomer. Second, even if it is a misnomer, the Court holds a residual discretion to deny the proposed amendment.

(9) In determining the first part of the analysis, the Court must analyze the claim to determine if the 'litigating finger' is pointed at the proposed defendants. In *Spirito Estate v. Trillium Health Centre* [2007] O.J. No. 3832, Van Rensburg, J. recited the test:

> "If the 'litigating finger' is pointed at the proposed defendant in the Statement of Claim, such that a person having knowledge of the facts would be aware of the true identity of a misnamed party by reading the Statement of Claim, then the defendant will be substituted unless there is prejudice that cannot be compensated for in costs."

(10) It has been held however, that the Court need not limit its assessment only to the knowledge of the proposed defendant. It may consider the intended defendants' representative and other 'relevant persons'.

61 In the *Omerod* case, the Court of Appeal referred back to its recent summary of the current approach to misnomer which it set out in *Lloyd v. Clark,* [2008] O.J. No. 1682 (Ont. C.A.) at paragraph 4 as follows:

> The case law amply supports the proposition that where there is a coincidence between the plaintiff's intention to name a party and the intended party's knowledge that it was the intended defendant, an amendment may be made despite the passage of the limitation period to correct the misdescription or misnomer. See *Ladouceur v. Howarth,* [1973] S.C.J. No. 120 (S.C.C.); *Kitcher v. Queensway General Hospital,* [1997] O.J. No. 3305 (C.A.) and *J.R. Sheet Metal & Manufacturing Ltd. v. Prairie Rose Wood Products,* [1986] A.J. No. 7 (C.A.).

62 Applying this law to the facts, I find this is not a case of misnomer. McComiskeys, or at least their insurers, might well have expected them to be named as defendants, at least until the limitation period had passed. That is not enough to find that there is the required coincidence. The Plaintiffs might have developed an intention to name the McComiskeys as a party. However, neither the McComiskeys nor any person knowledgeable in the facts and looking at the description of the Defendants Steve Haglund and John Doe in the Statement of Claim would discern that the McComiskeys were the intended parties. Most obviously, the McComiskeys are not contractors as defined in regulation 213/01 under the *Act.* Therefore, the McComiskeys shall not be substituted as Defendants for either Steve Haglund or John Doe.

63 In the result, the motion is dismissed. Costs are reserved to the trial judge.

J.A.S. WILCOX J.

* * * * *

CORRECTION
Released: June 19, 2014.

The two parties, David and Monika McComiskey, along with their counsel Martin P. Forget, were added to the title of proceedings.