

[Nguyet v. King, \[2011\] O.J. No. 1699](#)

Ontario Judgments

Ontario Court of Appeal

Toronto, Ontario

D.H. Doherty, M.J. Moldaver and K.N. Feldman JJ.A.

Heard: April 11, 2011.

Judgment: April 13, 2011.

Docket: C52950

[2011] O.J. No. 1699 | 2011 ONCA 297 | [2011] I.L.R. I-5136 | 200 A.C.W.S. (3d) 521 | 2011 CarswellOnt 2468

Between Thi Anh Ton Nguyet, Plaintiff, and Virginia King, Defendant (Appellant), and Hertz Canada Limited, Defendant (Respondent)

(4 paras.)

Case Summary

Insurance law — Insurers — Duties — Duty to defend — Appeal by individual defendant from determination that insurer was required to defend on behalf of and indemnify car rental company allowed — While car being repaired, individual defendant rented car from rental company and struck plaintiff — Plaintiff sued individual defendant and rental company for damages and rental company brought motion for determination that individual defendant's insurer was obliged to respond first — Motion judge assumed it followed from his determination that individual defendant's insurer obliged to respond first, that insurer obliged to defend on behalf of and indemnify rental company, but Insurance Act, s. 227(1.1) imposed no such duty.

Insurance law — The insurance contract — Interpretation — Appeal by individual defendant from determination that insurer was required to defend on behalf of and indemnify car rental company allowed — While car being repaired, individual defendant rented car from rental company and struck plaintiff — Plaintiff sued individual defendant and rental company for damages and rental company brought motion for determination that individual defendant's insurer was obliged to respond first — Motion judge assumed it followed from his determination that individual defendant's insurer obliged to respond first, that insurer obliged to defend on behalf of and indemnify rental company, but Insurance Act, s. 227(1.1) imposed no such duty.

Statutes, Regulations and Rules Cited:

Insurance Act, [R.S.O. 1990, c. I.8, s. 227](#)(1.1), s. 277(1.1)

Appeal From:

On appeal from the order of Justice Belobaba of the Superior Court of Justice dated October 18, 2010.

Counsel

Angelo G. Sciacca, for the defendant (appellant), King.

Marcus A. Knapp, for the defendant (respondent), Hertz Canada Limited.

[Editor's note: A correction was released by the Court April 28, 2011; the change has been made to the text and the correction is appended to this document.]

APPEAL BOOK ENDORSEMENT

The following judgment was delivered by

THE COURT

1 The motion judge appears to have assumed that it followed automatically from his determination that King's insurer was obliged to respond first under s. 277(1.1) of the *Insurance Act*, (a finding both parties accept on appeal), that King's insurer was obliged to defend on behalf of Hertz and to indemnify Hertz. With respect, those issues were not before the motion judge and he should not have addressed them.

2 We have heard argument on both points. We are satisfied that s. 277(1.1) imposes no duty on King's insurer to defend on behalf of Hertz. There is no contractual relationship between the two parties. Section 277(1.1) speaks to the priorities of payment of losses by third party plaintiffs and not to an obligation to defend on behalf of others.

3 With respect to the indemnity issue, we do not think that it can be resolved on this record. The plaintiff in the underlying action may well have an interest in the question of indemnity and the matter should not be resolved in the context of a dispute between the two insurers. The question of indemnity will not be addressed. To that extent, paragraph 2 of the order below will be varied.

4 Costs to the appellant in the amount of \$2,000, inclusive of disbursements and HST.

* * * * *

Correction

Released: April 28, 2011

The amendment is reflected in the second sentence of paragraph 2 with the correction of the reference to the section number. It should read "We are satisfied that s. 277(1.1) imposes no duty"

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