See para. 2

Case Name:

Parris v. Laidley

Between
Sandra Parris, Plaintiff (Respondent), and
Derrick Laidley, Gerald Laidley and ING Insurance Canada,
Defendants (Appellant)

[2012] O.J. No. 5214

2012 ONCA 755

Docket: C54791

Ontario Court of Appeal
Toronto, Ontario

J.M. Simmons, R.P. Armstrong and D. Watt JJ.A.

Heard: October 31, 2012.
Oral judgment: October 31, 2012.
Released: November 7, 2012.

(5 paras.)

Civil litigation -- Civil evidence -- Weight -- Assessing credibility of witnesses -- Witnesses -- Credibility -- Appeal by defendant vehicle owner from order granting summary judgment on issue of implied consent allowed -- Defendant's vehicle was involved in accident while being driven by defendant's son -- Motions judge drew adverse inference from defendant's failure to make effort to make son's evidence available and found defendant had not rebutted presumption of implied consent -- Motions judge failed to take into account all relevant evidence -- Motions judge failed to make findings of credibility regarding evidence that supported defendant's position that son drove vehicle without consent.

Transportation law -- Motor vehicles and highway traffic -- Liability -- Civil actions -- Owner -- Appeal by defendant vehicle owner from order granting summary judgment on issue of implied consent allowed -- Defendant's vehicle was involved in accident while being driven by defendant's son -- Motions judge drew adverse inference from defendant's failure to make effort to make son's evidence available and found defendant had not rebutted presumption of implied consent -- Motions

judge failed to take into account all relevant evidence -- Motions judge failed to make findings of credibility regarding evidence that supported defendant's position that son drove vehicle without consent.

Appeal From:

On appeal from the decision of Justice James M. Spence of the Superior Court of Justice, dated December 1, 2011.

Counsel:

Alan L. Rachlin, for the appellant Gerald Laidley.

Ari Krajden and Kyle T.H. Smith, for the respondent ING Insurance Company.

ENDORSEMENT

The following judgment was delivered by

1 THE COURT (orally):--The motions judge granted summary judgment on the issue of implied consent against the owner of a car involved in an accident when driven by his son. Essential to his conclusion that the defendant had not rebutted the presumption of consent was an adverse inference he drew against the defendant because he failed to make any real effort to make his son Derrick's evidence available.

2 Drawing adverse inferences from failure to produce evidence is discretionary. The inference should not be drawn unless it is warranted in all the circumstances. What is required is a case-specific inquiry into the circumstances including, but not only, whether there was a legitimate explanation for failing to call the witness, whether the witness was within the exclusive control of the party against whom the adverse inference is sought to be drawn, or equally available to both parties, and whether the witness has key evidence to provide or is the best person to provide the evidence in issue.

3 In this case, the motions judge failed to take into account all relevant evidence in determining that the conditions precedent to drawing the adverse inference had been met. In particular, he made no findings concerning the credibility of the defendant's evidence that supported his position that his son had no consent, express or implied, to drive the automobile on the occasion in issue. The evidence, if accepted, gave rise to a strong inference of lack of consent. It was an error to draw an adverse inference without assessing this evidence.

4 In the result, the appeal is allowed. Paragraph 1 of the formal order is set aside and an order dismissing the summary judgment motion brought by ING is substituted for paragraph 1.

5 The appellant shall have his costs of the appeal that we fix in the amount of $6,500, inclusive of disbursements and all applicable taxes.

J.M. SIMMONS J.A.
R.P. ARMSTRONG J.A.
D. WATT J.A.

---- End of Request ----
Email Request: Current Document: 1
Time Of Request: Sunday, June 12, 2016 14:47:17