

SUPREME COURT OF QUEENSLAND

CITATION: *Van Steensel Van Der A'A v Nominal Defendant* [2004] QCA 53

PARTIES: **VAN STEENSEL VAN DER A'A, Antoinette**
(applicant/respondent)
v
NOMINAL DEFENDANT
(respondent/applicant)

FILE NO/S: Appeal No 11518 of 2003
DC No 504 of 2003

DIVISION: Court of Appeal

PROCEEDING: Application for leave s 118 DCA (Civil)

ORIGINATING COURT: District Court at Southport

DELIVERED EX TEMPORE ON: 2 March 2004

DELIVERED AT: Brisbane

HEARING DATE: 2 March 2004

JUDGES: McMurdo P, McPherson JA and White J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Leave to appeal granted**
2. Appeal allowed with costs to be assessed
3. The order made at first instance is set aside and instead it is ordered that the application filed on 18 September 2003 is dismissed with costs to be assessed

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – GENERALLY – where respondent injured in motor vehicle accident – where leave granted allowing proceedings to continue against respondent, despite application being out of time – where decision contrary to later Court of Appeal authority on point – whether leave to appeal should be granted

INSURANCE – MOTOR VEHICLES – COMPULSORY INSURANCE LEGISLATION – WHERE IDENTITY OF VEHICLE CANNOT BE ESTABLISHED – QUEENSLAND – EXTENSION OF TIME – where respondent injured in motor vehicle accident with unidentified vehicle – where notice of accident received by the Nominal Defendant outside three month period prescribed

by s 37(2) *Motor Accident Insurance Act 1994 (Qld)* – whether leave could be granted under s 39(5)(c) of the Act to continue proceedings against applicant

District Court Act 1967 (Qld), s 118(3)

Motor Accident Insurance Act 1994 (Qld), s 39(5)(c)

Miller v Nominal Defendant [2003] QCA 558, Appeal No 4398 of 2003, 15 December 2003, applied

COUNSEL: Mr K N Wilson SC for the applicant
No appearance for the respondent

SOLICITORS: Phillips Fox for the applicant
No appearance for the respondent

THE PRESIDENT: The respondent was injured in a motor vehicle accident which she claims was caused by the negligence of the driver of an unidentified motor vehicle on 21 June 2002. She filed an application on 18 September 2003, almost 15 months after the accident, seeking orders, including an order under section 39(5)(c) of the *Motor Accident Insurance Act 1994 (Qld)* ("the Act"), that she have leave to proceed under that section. His Honour relevantly granted leave under that section to continue proceedings against the respondent, despite temporal non-compliance with the notice requirements of section 37 of the Act and ordered that costs be costs in the proceedings. The applicant applies for leave to appeal from that decision under section 118(3) *District Court Act 1967 (Qld)*.

It is common ground now that the learned primary Judge's decision is plainly wrong having regard to this Court's decision in *Miller v. Nominal Defendant* [2003] QCA 558, Appeal Number 4398 of 2003, 15 December 2003, Davies JA at paras

[33]-[40] and Mackenzie J at para [54].

The respondent to this application has written to the Registry conceding that the application for leave to appeal should be granted and the appeal allowed. The respondent solicitors have not appeared today so as not to incur any further costs.

As the decision of the primary Judge is plainly wrong and the respondent's claim is effectively barred by the provisions of the Act, this is an appropriate case in which to grant leave to appeal and the appeal should be granted for the reasons given.

I would make the following orders: Leave to appeal granted; appeal allowed with costs to be assessed; the order made at first instance is set aside and instead it is ordered that the application filed on 18 September 2003 is dismissed with costs to be assessed.

McPHERSON JA: I agree.

WHITE J: I agree.

THE PRESIDENT: Those are the orders of the Court.