

14-48443 A1

Court File No. ~~6465/13~~

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

(Court Seal)

JODI GAWRYLASH, MICHAEL GAWRYLASH, KAY GAWRYLASH
and CHRIS GAWRYLASH

Plaintiffs

and

JAMES M CONNELLY, THE CITY OF HAMILTON,
THE DOMINION OF CANADA GENERAL INSURANCE COMPANY
and JOHN DOE

Defendants

and

228704 ONTARIO INC., PHILIPS ENGINEERING LTD. and GARY TANSLEY

Third Parties

THIRD PARTY CLAIM

TO THE THIRD PARTY

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by way of a Third Party Claim in an action in this Court.

The action was commenced by the Plaintiff against the Defendant for the relief claimed in the Statement of Claim served with this Third Party Claim. The Defendant has defended the action on the grounds set out in the Statement of Defence served with this Third Party Claim. The Defendant's Claim against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS THIRD PARTY CLAIM, you or an Ontario lawyer acting for you must prepare a defence in Form 29B prescribed by the *Rules of Civil Procedure*, serve it on the lawyers for the other parties or, where a party does not have a lawyer, serve it on the party, and file it, with proof of service, WITHIN TWENTY DAYS after this Third Party Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Third Party Defence is forty

days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Third Party Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Third Party Defence.

YOU MAY ALSO DEFEND the action by the Plaintiff against the Defendant by serving and filing a Statement of Defence within the time for serving and filing your Third Party Defence.

IF YOU FAIL TO DEFEND THIS THIRD PARTY CLAIM, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date July 29, 2014 Issued by L. A. ROY
Local Registrar

Address of
court office: 45 Main Street E.
Hamilton ON L8N 2B7

TO: 228704 Ontario Inc.
3215 North Service Road
Burlington ON L7N 3G2

AND TO: Philips Engineering Ltd.
3215 North Service Road
Burlington ON L7N 3G2

AND TO: Gary Tansley
3215 North Service Road
Burlington ON L7N 3G2

CLAIM

1. The Defendant, City of Hamilton, claims against the Third Parties, 228704 Ontario Inc., Philips Engineering Ltd., and Gary Tansley for the following:

- (a) contribution and indemnity under sections 2 and 3 of the *Negligence Act*, R.S.O. 1990, c. N.1, as amended, for any amounts which the City of Hamilton may be found to be responsible to the Plaintiffs;
- (b) contribution and indemnity under common law and equity for any amounts which the City of Hamilton may be found to be responsible to the Plaintiffs;
- (c) contribution and indemnity pursuant to the terms of the 2005 contract between the City of Hamilton and the Third Party, Philips Engineering Ltd., for any amounts which the City of Hamilton may be found to be responsible to the Plaintiffs;
- (d) the costs of the main action, plus all applicable taxes;
- (e) the costs of this Third Party Claim, plus all applicable taxes; and,
- (f) Such further and other Relief as to this Honourable Court may seem just.

Background

2. The City of Hamilton is a municipal corporation, incorporated pursuant to the laws of Ontario and the provisions of the *Municipal Act, 2001*, S.O. 2001, c. 25, as amended.

3. The Third Party, Philips Engineering Ltd., was, at all material times, a corporation incorporated pursuant to the laws of Ontario, which carried on the business of, among other things, a consulting engineering firm.

4. The Third Party, Gary Tansley, was, at all material times, a professional engineer practicing in the Province of Ontario. The City of Hamilton pleads that, at all material times, Gary Tansley was a director, officer, agent and/or employee of Philips Engineering Ltd. and/or 228704 Ontario Inc.

5. The Third Party, 228704 Ontario Inc. is a corporation incorporated pursuant to the laws of Ontario.

6. The City of Hamilton pleads that in or around May of 2009, the corporation, Philips Engineering Ltd., changed its corporate name to 228704 Ontario Ltd.

7. The City of Hamilton pleads that 228704 Ontario Inc. is the successor corporate name of Philips Engineering Ltd. and therefore, 228704 Ontario Inc. assumes all of the liabilities and obligations of Philips Engineering Ltd. and its predecessor entities.

8. On or about November 25, 2013, the Plaintiffs issued a Statement of Claim as against the Defendants in the main action, in connection with a motor vehicle accident which occurred on December 3rd, 2011, on the southbound lanes of the Red Hill Valley Parkway onto the exit ramp for King Street, in the City of Hamilton. In the main action, the Plaintiffs' allegations as against the City of Hamilton include the claim that the accident was caused or contributed to by the negligent design and construction of the roadway.

9. In the main action, the Plaintiffs seek general and special damages in excess of \$2,000,000.00 from the Defendants the City of Hamilton, James M. Connelly, the Dominion of Canada General Insurance Company and John Doe.

10. The City of Hamilton has defended the main action, and has denied all liability for the Plaintiffs' damages.

11. In its Defence of the main action, the City of Hamilton has plead that the accident of December 3, 2011, was solely caused by the negligence of the Plaintiff, Jodi Gawrylash. The City of Hamilton has specifically denied any negligence with regard to the design, construction, inspection and maintenance of the Red Hill Valley Parkway and the King Street exit.

12. In the alternative, the City of Hamilton has plead that it was not responsible for the design of the area at issue in this proceeding and relied upon the engineering services provided by Philips Engineering Ltd. with respect to the design of the Red Hill Valley Parkway in the area of the accident of December 3, 2011.

Engineering Services Contract

13. The City of Hamilton retained the services of professional engineers employed by Philips Engineering Ltd. to perform engineering services in connection with the design and development of the Red Hill Valley Parkway project, which was opened to the public in or around 2007.

14. In or around April of 2005, Philips Engineering Ltd. entered into a contract with the City of Hamilton, to provide engineering services in connection with the Red Hill Valley Parkway (the "Agreement").

15. Pursuant to the terms of the Agreement, all engineering services provided by the Third Party, Philips Engineering Ltd., were to be performed with all due and reasonable diligence, professional skill and competence and in accordance with the standards, codes and requirements of the profession.

16. The Agreement included an indemnity clause, in which the Third Party, Philips Engineering Ltd., agreed to indemnify and save harmless the City from, amongst other things, all claims and costs attributable or connected with the performance, non performance or purported performance of the obligations pursuant to the Agreement.

17. The City of Hamilton pleads and relies upon the terms and provisions of the Agreement, including all schedules, appendices and amendments.

18. Philips Engineering Ltd. prepared design drawings for a section of the Red Hill Valley Parkway for an area extending from the south of Greenhill Ave. to Queenston Road, which included the area of the accident of December 3rd, 2011.

19. The design drawings prepared by Philips Engineering Ltd. were stamped by Gary Tansley, a professional engineer in Ontario.

20. At all material times, engineer Gary Tansley was a director, officer, agent or employee of Philips Engineering Ltd. and/or 228704 Ontario Inc.

21. The City of Hamilton has plead that the accident was solely caused by the Plaintiffs and denies that it is in any way liable for any loss or damage claimed by the Plaintiff.

22. In the alternative, if the Plaintiffs have suffered any loss or damage for which City of Hamilton is to be held liable, the City of Hamilton pleads that such loss or damage was caused or contributed to by the negligence and/or breach of contract by the Third Parties and/or their agents, servants or employees, for which they are liable. The particulars of the negligence and breach of contract against the Third Parties include, but are not limited to, the following:

- (a) they and/or their employees, agents or servants failed to properly design the Red Hill Valley Parkway in the vicinity of the accident;
- (b) they and/or their employees failed to meet the standards expected of a professional engineering firm and professional engineers;
- (c) their conduct fell below industry standards and/or the applicable engineering standards with respect to the design of the Red Hill Valley Parkway;
- (d) they failed to hire competent employees who were adequately trained in the design of municipal highways and guide rail systems;
- (e) they failed to design the highway in a manner that met the applicable highway design specifications, guidelines and good engineering practices;

- (f) their conduct fell below industry standards and/or the applicable engineering standards with respect to the design of the Red Hill Valley Parkway;
- (g) they failed to exercise reasonable skill expected of engineers with regard to designing the Red Hill Valley Parkway and its guide rail system;
- (h) they employed incompetent employees, servants or agents to perform the required services;
- (i) they failed to warn the City of Hamilton that the Red Hill Valley Parkway was not in a reasonable state of repair; and
- (j) further particulars of negligence that are within the knowledge of the consulting engineering firms; the engineer; their agents, servants and employees and successor entities.

23. The City of Hamilton pleads that Philips Engineering Ltd. and/or 228704 Ontario Inc. are liable for the actions of its engineers, including the stamped drawings prepared by engineer C.D. Tansley, as its engineers were retained, employed and/or instructed by Philips Engineering Ltd. at all material times.

24. This Defendant pleads and relies upon the terms of the Agreement in support of its Third Party Claim, including the pre-amble, attached schedules and changes to the Agreement.

25. This Defendant pleads that, pursuant to section 6.15, the Third Party, Philips Engineering Ltd., agreed to indemnify and hold harmless the City of Hamilton from all claims, actions, causes of action, losses or damages arising out of the negligence, errors, omissions or wilful misconduct of this Third Party, its officers, officials, employees, agents and subcontractors, attributable to or connected with the performance, non-performance or purported performance of the obligations pursuant to the Agreement.

26. This Defendant proposes that the Third Party claim be tried together with the main action or as directed by the Trial Judge.

27. The City of Hamilton pleads and relies upon the provisions of the *Municipal Act, 2001*, S.O. 2001, c. 25, the *Courts of Justice Act*, R.S.O. 1990, c. c. 43, as amended and the *Negligence Act*, R.S.O. 1990, c. N.1, as amended.

(Date of issue)

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JODI GAWRYLASH et al.
Plaintiffs

-and- JAMES M CONNELLY et al.
Defendants

-and- 228704 ONTARIO INC. et al
Third Parties
Court File No. 6465143

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CERTIFIED TO BE A TRUE COPY OF THE
ORIGINAL IN THE PROCESS ISSUED HEREIN


Signature for Plaintiff / Applicant

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT
HAMILTON

THIRD PARTY CLAIM

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