

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CHRISTA DOMCHEK

Plaintiff

- and -

BEN WEBBER, PAUL WEBBER, BEN WEBBER also
known as PAUL WEBBER

Defendant

MEMORANDUM ON *EX PARTE* APPLICATION

- [1] The Plaintiff by her solicitors has submitted for filing a notice of discontinuance of action without liability for costs. The notice is endorsed with the consent of an individual described as the agent for the Defendant's insurer.
- [2] The court file contains only the Statement of Claim and an affidavit of service on the Defendant. The Statement of Claim claims damages arising out of a motor vehicle accident.
- [3] The Plaintiff could discontinue the action pursuant to Rule 309(1)(a) by serving a notice of discontinuance on the Defendant along with proof of service.
- [4] The Plaintiff has chosen, however, to submit a notice of discontinuance without liability for costs. Under Rule 312, "the consent of all parties" is required. In this case, that means the consent of the Defendant or his solicitor.
- [5] Counsel for the Plaintiff submits that the insurer should be considered a party where it defends a claim on behalf of its insured. However, the authorities cited by counsel do not, in my view, stand for that proposition.
- [6] It may be that a subrogated claimant that instructs counsel to prosecute its claim can be considered a party, but the insurer has not instructed counsel to prosecute

its claim in this case. The case of *Jahnke v. Wylie*, [1994] A.J. No. 912 (C.A.) deals with Alberta Rule 187 which says that a person for whose benefit an action is prosecuted or defended shall be regarded as a party, but for purposes of discovery of documents only. Northwest Territories' Rule 220 is the same.

- [7] Finally, in *Mangelana v. McFadzen*, (2005) NWTSC 54, Richard J. was not convinced that the reference in Rule 643(1) to “the party by whom” includes a non-party to the litigation. In that case, the non-party was the Government of the Northwest Territories which had a subrogated claim for hospital costs incurred for the plaintiff’s treatment and the issue was whether the Government was a party for purposes of an award of costs in favour of the defendants.
- [8] None of the authorities cited say that where consent of a named party is required, that consent can be provided by someone who is neither that party nor a solicitor. Nor is there any provision in the Rules for an agent to consent. I do not see any basis upon which an agent for an insurer for a party can provide the required consent.
- [9] Accordingly, the notice of discontinuance of action presented will not be filed.

Dated at Yellowknife, NT, this 19th day of June 2006

V.A. Schuler
J.S.C.

Counsel for the Plaintiff: Sarah A.E. Kay

S-0001-CV-2005000039

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MEMORANDUM ON *EX PARTE* APPLICATION OF
THE HONOURABLE JUSTICE V.A. SCHULER
