



**TANYA CALDWELL, Administrator of the ESTATE OF SCOTT MCCARTHY, and TANYA CALDWELL a**

2013 | Cited 0 times | Court of Appeals of Iowa | July 24, 2013

IN THE COURT OF APPEALS OF IOWA

No. 3-485 / 12-2191 Filed July 24, 2013

TANYA CALDWELL, Administrator of the ESTATE OF SCOTT MCCARTHY, and TANYA CALDWELL and CALLEN MCCARTHY, Parents of Scott McCarthy, Plaintiffs-Appellees,

vs.

HOLIDAY LAKE OWNERS ASSOCIATION, INC. Defendant-Appellant,

and

RICKY RIZZIO, Defendant. \_\_\_\_\_

HOLIDAY LAKE OWNERS ASSOCIATION, INC., Counter-Claim Plaintiff,

vs.

TANYA CALDWELL, Third-Party Defendant. \_\_\_\_\_

HOLIDAY LAKE OWNERS ASSOCIATION, INC., Counter-Claim Plaintiff,

vs.

JOHN MOSINSKI, Third-Party Defendant.

\_\_\_\_\_  
Appeal from the Iowa District Court for Poweshiek County, Dan F.

Morrison, Judge. In an interlocutory appeal, the defendant in a tort action challenges the dismissal of a third-party defendant. REVERSED AND REMANDED.

Brian R. Kohlwes of Law Office of Scott J. Idleman, Des Moines, for



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appellant.

Peter J. Leehey, Cedar Rapids, for Tanya Caldwell.

Joseph McLaughlin of Widenfeld & McLaughlin, L.L.P., Des Moines, for

Gary Caldwell.

Joseph A. Quinn and Mitchell R. Kunert of Nyemaster Goode, P.C., Des

Moines, for Ricky Rizzio.

Joel T.S. Greer, Marshalltown, for John Mosinski.

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ. TABOR, J.

This appeal involves the viability of a third-party action brought by Holiday

, which owned the road in Poweshiek County

where a teenager was killed in a golf cart accident. Holiday Lake in defending

against a negligence suit brought by the estate of Scott McCarthy 1 filed a cross

petition against Ricky Rizzio. Rizzio originally stood as a co-defendant with

Holiday Lake, but was dismissed from the action when the plaintiffs failed to

timely serve him. he district court dismissed him from the

suit again, noting the statute of limitations on the original negligence action had

expired by the time Holiday Lake brought him in as a third party. Holiday Lake

seeks reversal, contending its cross petition was allowed under Iowa Rule of Civil

Procedure 1.246 and the tolling provision at Iowa Code section 668.8 (2011).

Holiday Lake also emphasizes its right to file a contribution claim as part of the

original action under Iowa Code section 668.5.



Because the statute of limitations did not bar Holiday Lake from bringing Rizzio in as a third-party defendant under rule 1.246, we reverse the dismissal and remand for further proceedings.

### I. Background Facts and Proceedings

On August 15, 2009, fourteen-year-old Scott McCarthy was operating a golf cart on a private road owned by Holiday Lake near Brooklyn, Iowa. At a curve in the road, McCarthy swerved to avoid colliding with an oncoming pickup

1 The petition also includes loss of consortium claims by Tanya McCarthy and Callen throughout the opinion. truck driven by Rizzio. The golf cart slid and rolled, ejecting all four occupants.

McCarthy died as a result of the accident.

On June 7, 2011, McCarthy filed a petition against Rizzio and Holiday Lake seeking damages. McCarthy alleged Rizzio drove his truck negligently, including but not limited to failing to keep a proper lookout, driving left of center, McCarthy also alleged Holiday Lake was negligent for failing to maintain its roads, failing to warn of a blind curve, failing to trim excessive vegetation, and failing to post stop signs.

On July 7, 2011, Holiday Lake filed an answer and alleged affirmative defenses, including comparative fault. Holiday Lake also advanced a counter mother Tanya Caldwell and a cross claim against his step-father, John Mosinski, for failure to properly train and supervise the teenager.

On September 21, 2011, Rizzio filed a motion to dismiss for lack of proper service. The district court granted his motion on October 10, 2011. The plaintiffs appealed, and in an order dated June 27, 2012, our court affirmed the dismissal, finding the plaintiffs showed no good cause for failing to serve Rizzio within ninety days. Inc., 2012 WL 2411180 (Iowa Ct. App. 2012).

Meanwhile, on November 28, 2011, Holiday Lake sought leave to amend its petition to assert a cross claim against Rizzio, as a third-party defendant. 2 The district court granted Holiday Lake leave to amend on January 24, 2012.

2 grandfather, who owned lake property and belonged to the association. The next day Holiday Lake amended its answer to include a third-party claim against Rizzio, attributing the cause of the accident to his negligence, and seeking to recover from Rizzio to the extent any judgment was entered against Holiday Lake. Holiday Lake served the cross petition on Rizzio on January 29, 2012.

On February 16, 2012, Rizzio filed a motion to dismiss, alleging Holiday -year statute of limitations had expired on negligence action against him. Four days later, Holiday Lake resisted the motion to dismiss, highlighting its right to contribution under section 668.5. McCarthy joined Holiday Lake in its resistance to third- Rizzio filed a reply, alleging

any potential contribution claim Holiday Lake might have against Rizzio was not ripe.

The district on October 23, 2012. 3 The court reasoned that because Holiday Lake did not bring its cross petition against Rizzio within the two-year statute of limitations, it must be dismissed. After the court on to reconsider, the association filed a timely application for interlocutory appeal, which was granted by our supreme court.

## II. Scope and Standard of Review

We review a dismissal ruling for correction of errors at law. See *Shams v.*

*Hassan*, 829 N.W.2d 848, 853 (Iowa 2013); see also Iowa R. App. P. 6.907. We

3 The district court proceedings had been stayed pending the outcome of the first appeal. are s conclusions of law or its application of legal principles. *Id.*

## III. Analysis

The district court premised its dismissal on both the third-party practice provision at Iowa Rule of Civil Procedure 1.246(1) and the tolling provision at

Iowa Code section 668.8. interpretation of those provisions. We quote the language of section 1.246(1) as

the jumping off point for our review.

This impleader rule describes when a defendant may bring a third party into the lawsuit:

At any time after commencement of the action a defending party, as a third-party plaintiff, may file a

cross-petition and cause an original notice to be served upon a person not a party to the action who is or may be liable for all or part of the plaintiff's claim. The third-party plaintiff need not obtain leave to file the cross-petition if it is filed not later than ten days after the filing of the original answer. Otherwise leave may be obtained by motion upon notice to all parties to the action. . . .

Iowa R. Civ. P. 1.246(1).

clause, permitting a defendant

4 Holiday

Lake insists the statute of limitations on original action does not

dictate the timing of bringing in a third-party defendant. Holiday Lake maintains

the court properly granted leave to amend because no scheduling order was in

place and no deadline for bringing in new parties existed.

4 1.402(4). For his part, Rizzio directs our attention to the end of the first

sentence, limiting the Because the two-year statute

of limitations set by Iowa Code section 614.1(2) expired for negligence action on August 15, 2011 several months before Holiday Lake filed

its cross petition Rizzio argues he

He further reasons because he may not be held liable for all or part of

cross

petition against him.

Before attempting to resolve the conflicting views of rule 1.246, we

touch briefly on its purpose. Impleader, or third-party practice, is the procedural

device enabling the defendant in a lawsuit to bring into the action an additional

party who may be liable to the defendant for all or part of any damages the

ack H. Friedenthal, Mary

Kay Kane & Arthur R. Miller, Hornbook on Civil Procedure § 6.9. Our supreme

the

a indemnity. *Atlas, Ltd. v. Kingman Warehouse Co.* VIII, 357 N.W.2d 584, 586

(Iowa 1984) (interpreting Iowa Rule of Civil Procedure 34(a), the predecessor to

Rule 1.246). The *Atlas* court also found cases interpreting Federal Rule of Civil

Procedure 14 to be persuasive . *Id.* at 587. Both the state and federal rules aim to avoid the potential  
circuitry and multiplicity

of actions *Id.* 5

Rule 1.246 does not purport to deal with the statute of limitations. Its

explanation of when a defendant may bring in a third party is [a]ny time after the

commencement of the action. But the district court read a time limit into the

description action claim (emphasis

added by district court). The court held that because *Holiday Lake* did not bring

its cross petition within the two-year statute of limitations, *Rizzio* motion to

dismiss must be granted.

*Rizzio* argues that for *Holiday Lake* to permissibly bring him back into the

lawsuit, he must be liable to plaintiff *McCarthy* for the negligence claim. *Rizzio*

misreads the impleader rule. Rule 1.246 does not require a third-party defendant

to be liable to the original plaintiff, only that the third-party defendant be

potentially The liability is to the third-

claim. Thus, while McCarthy cannot recover from Rizzio because the estate failed to effectuate proper service within the statute of limitations, Rizzio may still be liable to third-party plaintiff Holiday Lake on a contribution claim for all or part of McCarthy

5 Accord *Blais Const. Co., Inc. v. Hanover Square Assocs.-I*, 733 F. Supp. 149, 152 (N.D. N.Y. 1990) (finding purpose of third-party practice is to discourage inconsistent results, and limit the prejudice incurred by a defendant by

removal of the time lag between a judgment against the defendant and a judgment over against a third- *Brandt v. Olson*, 179 F. Supp. 363, 364 (N.D. Iowa, 1959). Courts from other jurisdictions have recognized a third party complaint

may lie for contribution against a joint tortfeasor even where the statute of limitations has run in favor of that tortfeasor with respect to the claim of the plaintiff See *Tsz Ki Yim v. Home Indem. Co.*, 95 F.R.D. 349, 350 (D.C.D.C.

1982) (citing *Keleket X-Ray Corp. v. United States*, 275 F.2d 167, 169 (D.C. Cir.

1960) ( injured party defeat a claim of contribution. Neither releasing one tortfeasor . . .

nor allowing a statute of limitations to run in favor of one tortfeasor, . . . should be

permitted to have that effect. ); see also *MetroHealth Med. Ctr. v. Hoffmann-*

*LaRoche, Inc.*, 685 N.E.2d 529, 533 (Ohio 1997) (concluding contribution

comply with statute of limitations as to contribution defendant and noting

*Smith v.*

*Jackson* a contribution action against a third party, even if the statute of limitation would

have precluded a direct suit between the plaintiff and third

Cases interpreting Federal Rule of Civil Procedure 14, a close counterpart



to rule 1.246, bolster our conclusion the statute of limitations does not foreclose

-party action. See *Atlas, Ltd.*, 357 N.W.2d at 586. Rule 14

allow complaint on a nonparty who is or may be liable to it for all for all or part of the

in Rule 14 means the defendant

may join someone against whom a cause of action has not yet accrued, provided the claim is  
contingen s action and will accrue when

s liability is determined in the original suit. See *Fraley v. Worthington*,

64 F.R.D. 726, 728 (D. Wyo. 1974) Rule 14 impleader is permissible where the

original plaintiff is barred by the statute of limitations from bringing an action

directly against the third-party defendants. *Wandrey v. McCarthy*, 804 F.Supp.

1384, 1386 (D. Kan. 1992); see also 6 Charles A. Wright, Arthur R. Miller & Mary

K. Kane, *Federal Practice and Procedure* § 1

limitations on any claim that plaintiff might have against a third-party defendant

also should have no effect on defendant's ri.

-barred if not brought before August 15,

2011. -of-limitations argument misperceives the nature of the

claim asserted against him by Holiday Lake.

Holiday Lake is pleading a contribution claim in its amended answer,

The comparative fault chapter describes the right of contribution as existing

between or among two or more persons who are liable upon the same indivisible

claim for the same injury, death, or harm, whether or not judgment has been

recovered against all or any of them. 668.5. The right may be either in the original action or by a separate action brought for that purpose. Id. Section 668.5 sets the basis for contribution s equitable share of the obligations, including the share of fault of a claimant, as determined in accordance with section 668.3. If the percentages of fault for each of the parties to a claim for contribution (here Holiday Lake and Rizzio) are establish a p s percentage share of damages may recover judgment for contribution upon motion to the court or in a separate action. See id. § 668.6(1). If the court renders judgment for McCarthy against Holiday Lake, Holiday Lake has one year from final judgment to enforce its action for contribution against Rizzio. See id. § 668.6(3). Accordingly, the district court giving rise to the underlying tort action; Rizzio would not accrue until final judgment is entered. See *Showell Indus., Inc. v. Holmes Cnty.*, 409 So.2d 78, 79 (Fla. App. 1 Dist., 1982) (holding claim for contribution did not accrue until judgment had been entered against the defendant, third party plaintiff, or until the defendant paid the claim). Rizzio contends because judgment has not been rendered in the lawsuit, Holiday Lake can only enforce its potential contribution claim in a separate action pursuant to section 668.6(a) or (b), and that because Holiday Lake cannot satisfy the conditions in either of those We do not think section 668.6(a) or (b) are at issue here. Contrast *Brit-Tech Corp. v. Am. Magnetics Corp.*, 463 N.W.2d 26 (Iowa 1990)

(interpreting contribution claims under section 668.6(a) and (b) where defendant

did not bring in joint tortfeasors in original case). Rizzio is getting ahead of himself. The question in this appeal is not

whether Holiday Lake has a present contribution claim to enforce, but whether

Holiday Lake had a right to file a cross petition to have Rizzio brought back into

the lawsuit as a third-party defendant. Having determined the statute of

limitations on the underlying tort claim does not govern the timing of the

impleader action, we hold the district court cross petition.

Our holding does not rest on the tolling provision of section 668.8. 6 Our

supreme court has suggested the tolling provision would allow a plaintiff to bring

an action based on causal fault against a third-party defendant, and in that case

See , 423 N.W.2d 196, 198 (Iowa 1988) (citing Reese v. Werts, 379

N.W.2d 1 (Iowa 1985)). Reese -off for

the modified joint and several liability rule of section 668.4 and is intended to

Reese, 379 N.W.2d at 5. The court later explained that section

against a third-party defendant on the same cause of action alleged against the

Pepper v.

Star Equip., Ltd., 484 N.W.2d 156, 158 (Iowa 1992).

We do not see the tolling provision of section 668.8 as either aiding or

inhibiting defendant -party practice here. Rizzio points to

6 commencement of an action against all parties who may be assessed any percentage of

Iowa Code § 668.8. Collier v. General Inns Corp., 431 N.W.2d 189, 193 (Iowa Ct. App. 1988) for the proposition that a named d purposes of allocating fault. See Iowa Code § 668.2 7

. It is true that under

holding, Rizzio is not a party under section 668.2(2). But Collier

concerned a different matter. Our court decided the trial court properly refused to

permit a jury to allocate fault to a nonparty. 431 N.W.2d at 194. The Collier

decision emphasized:

Defendant did not seek to join Mateus as a third-party defendant. All parties knew Julie Mateus had been named but not served as a defendant. Defendants had the power to cross petition against her and by that means to have her fault, if any, considered by the jury.

Id. at 193.

In this case Holiday Lake did cross petition against Rizzio. Rizzio then

became a third-party under section 668.2(4).

Accordingly, he may be allocated a percentage of fault under section 668.3. 8 We

realize our supreme court has decided third-party defendants may not be brought

Pepper, 484 N.W.2d at

157. But in this case Holiday Lake is alleging a viable claim of contribution

7 Iowa Code section 668.2 reads:

1. A claimant. 2. A person named as a defendant. 3. A person who has been released pursuant to section 668.7. 4. A third- 8 The status of the parties at the time the jury decides the case is determinative. Dumont v. Keota Farmers Co-op, 447 N.W.2d 402, 404 (Iowa Ct. App. 1989). on the underlying tort, based on the expiration of the statute of limitations, does

not preclude Holiday Lake from going forward with a third-party contribution

action. Moreover, the concern for protecting plaintiff discussed in Pepper does not appear to be present in this case, considering

dismiss.

Furthermore, j -party

claim against Rizzio to proceed in the present action, instead of a separate

contribution action after the final judgment. See generally Atlas, Ltd., 357

N.W.2d at 587 (warning against multiplicity of actions); see also Cowman v.

LaVine, 234 N.W.2d 114, 123 (Iowa 1975) (concluding court should allow

addition of third party if ).

Because cross petition was not barred by the statute of

limitations, the district court improperly dismissed Rizzio as a third-party

defendant.

REVERSED AND REMANDED.