

**Boyd v Trent**

2001 NY Slip Op 30030(U)

January 24, 2001

Supreme Court, Suffolk County

Docket Number: 0006030/6030

Judge: Robert W. Doyle

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SHORT FORM ORDER

**UPDATE**  
**Clerk Notified**

1-25

INDEX No. 92-6030  
CAL. No. 99-01974-MV

SUPREME COURT - STATE OF NEW YORK  
CALENDAR CONTROL PART - SUFFOLK COUNTY

①

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 1/5/01  
ADJ. DATE \_\_\_\_\_  
Mot. Seq. # 008 - MG

..... X  
WAYNE BOYD and MARY BOYD,  
Plaintiffs,

**ACTION No. 1**  
Index No. 91-435  
HOBBES & TONETTI  
Attorneys for Plaintiffs  
739 East Main Street  
Riverhead, New York 11901

- against -

HERBERT TRENT, PAULETTE A. TRENT and :  
TOWN OF RIVERHEAD,

FLOOD, JOHNSTON & McSHANE  
Attorneys for Deft. Herbert Trent  
420 Lexington Avenue  
New York, New York 10017

Defendants. :  
..... X

HERBERT TRENT, as natural guardian of DANA :  
TRENT and RACHEL TRENT, infants under the :  
age of fourteen years, and HERBERT TRENT,  
individually,

BRAND & BRAND  
Attorneys for Deft. Paulette Trent  
100 Ring Road West  
Garden City, New York 11530

Plaintiffs,

- against -

TOWN OF RIVERHEAD, WAYNE E. BOYD, :  
MARY BOYD and PAULETTE A. TRENT,

**ACTION No. 2**  
Index No. 92-6030  
BRODER & REITER  
Trial Attorneys for Plaintiffs  
350 Fifth Avenue, Ste. 28 11  
New York, New York 10118

Defendants. :  
..... X

WEINER & MILLO  
Attorneys for Defts. Boyd  
220 Fifth Avenue, 7<sup>th</sup> Floor  
New York, New York 10001

MICHAEL T. CLIFFORD & ASSOC.  
Attorneys for Deft. Riverhead  
18 First Street, P.O. Box 479  
Riverhead, New York 11901

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Upon the following papers numbered 1- 32 read on these motions to stay action and for disqualification of plaintiffs' guardian and plaintiffs' law firms; Notice of Motion/Order to Show Cause and supporting papers 6-12; Notice of Cross Motion and supporting papers       ; Answering Affidavits and supporting papers 13-19; Replying Affidavits and supporting papers 20-22; Other 1-5;23-29;30-32; (and after hearing counsel in support and opposed to the motions) it is,

**ORDERED** that this motion (#008) by defendant in Action No. 2 Town of Riverhead for for an order disqualifying and removing plaintiff Herbert Trent in his capacity in Action No. 2 as guardian of the infant plaintiffs therein and disqualifying counsel for plaintiffs therein is granted; and, it is further

**ORDERED** that defendant in Action No. 2 Town of Riverhead is directed to serve a copy of this order on plaintiffs in Action No. 2 by certified mail, return receipt requested, within fifteen (15) days after its entry; and, it is further

**ORDERED** that all proceedings in this action shall be stayed for sixty (60) days from the date of completion of service to permit plaintiffs in Action No. 2 to engage new counsel and to apply to this Court for the appointment of proper guardians for each infant plaintiff; and, it is further

**ORDERED** that the Law Firm of Philip F. Alba, P.C. and the law firm of Broder & Reiter shall surrender the files of the instant action to incoming counsel upon request.

These actions, joined for trial in 1991, arise from a motor vehicle accident occurring on October 17, 1989. It is alleged that a vehicle owned by plaintiff in Action No. 2 Herbert Trent and operated by Paulette A. Trent, in which the infant plaintiffs in Action No. 2 were passengers, collided with a vehicle owned by defendant in Action No. 2 Mary Boyd and operated by defendant in Action No. 2 Wayne E. Boyd on Middle Road near its intersection with Ostrander Avenue, in Riverhead, New York. A prior order of this Court, dated October 4, 2000, granted the motion of plaintiffs in Action No. 2 to amend their complaint to allege exceptions to Article 16 of the CPLR, and struck the affirmative defenses of defendant in Action No. 2 Town of Riverhead (defendant Town) alleging infant plaintiffs' failure to use seat belts or other safety devices. On October 27, 2000, defendant Town served a Notice of Appeal of said order to the Appellate Division of the Supreme Court, Second Department. A hearing was held on this matter before this Court on Thursday, January 11, 2001. Defendant Town also brought a motion before the Appellate Division of the Supreme Court, Second Department to stay the instant action, which was denied by order dated January 18, 2001.

Inasmuch as defendant Town's motion for a stay was denied by the Appellate Division of the Supreme Court, Second Department, this Court will not entertain a request for the same relief.

Defendant Town now moves to disqualify and remove plaintiff in Action No. 2 Herbert Trent, father of the infant plaintiffs, as their guardian on the grounds that his position as a vehicle

owner under Vehicle and Traffic Law § 388 creates a conflict of interest in that he may be required to collect a judgment against himself on behalf of the infant plaintiffs. In addition, defendant Town requests disqualification of plaintiffs' attorneys, Philip F. Alba, P.C. and trial counsel, Broder & Reiter, Esqs., for their dual representation of plaintiff Herbert Trent and the infant plaintiffs based on their advice to discontinue the action as against defendant Paulette Trent, which resulted in a motion that was subsequently withdrawn.

In opposition, plaintiffs in Action No. 2 contend that the request for disqualification is untimely and inappropriate as no conflict exists and counsel and guardian for the infant plaintiffs have represented the infant plaintiffs zealously; and that any disqualification at this juncture would be contrary to the best interests of the infant plaintiffs. In addition, plaintiffs in Action No. 2 contend that this request is merely a delay tactic by defendant Town on the eve of trial inasmuch as defendant Town never considered plaintiff Herbert Trent as a viable or necessary defendant and did not commence any third-party action against plaintiff Herbert Trent for contribution, and that his potential liability for any judgment exceeding policy limits is speculative.

The record reveals that plaintiff Herbert Trent has been guardian of the infant plaintiffs pursuant to CPLR 1201 for approximately 8 years (*see*, CPLR 1201), and that Philip F. Alba, P.C. has been the attorney of record for plaintiffs since November, 1992. The law firm of Broder & Reiter was retained as trial counsel in June, 2000.

A parent may be removed as natural guardian if he or she has an interest adverse to the infant (*see*, *Stahl v Rhee*, 220 AD2d 39, 643 NYS2d 148 [2d Dept. 1996]) or failed to diligently represent the infant's best interests (*see*, *Rosenberg v Rosenberg*, 261 AD2d 623, 690 NYS2d 693 [2d Dept. 1999]). Here, plaintiff Herbert Trent's interest, as owner of the vehicle operated by defendant Paulette A. Trent, is adverse to that of the infant plaintiffs (*see*, *Shaikh v Waiters*, 185 Misc2d 52, 710 NYS2d 873 [2000]) inasmuch as plaintiff Herbert Trent is vicariously liable pursuant to Vehicle and Traffic Law §388 for any negligence on the part of defendant Paulette A. Trent in her operation of the vehicle. Vehicle and Traffic Law §388 was enacted to ensure access by an injured party to a financially responsible defendant (*see*, *Morris v Snappy Car Rental*, 84 NY2d 21, 614 NYS2d 362 [1994]) and may be invoked only in actions brought by third persons against the owner (*see*, *Miffs v Gabriel*, 259 AD 60, 18 NYS2d 78 [2d Dept. 1940] *affd* 284 NY 755 [1940]). The fact that the defendants in Action No. 2 did not commence a third-party action against Herbert Trent does not absolve an apparent conflict of interest in his continuing as the guardian of his children without pursuing any potential claim that the children may have against him under the Vehicle and Traffic Law §388 (*cf.* *Mowczan v Bacon*, 92 NY2d 281, 680 NYS2d 431 [1998]). So too, there is an apparent conflict of interest for in light of the injuries alleged there remains a possibility of a judgment in excess of the policy limits for which Herbert Trent may face liability. Therefore, plaintiff Herbert Trent must be discharged as the infant plaintiffs' guardian and, pursuant to CPLR Article 12, proper guardians must be appointed by the Court on behalf of each infant plaintiff who shall not be either parent or their respective attorneys (*see*, *Mullins v Saul*, 130 AD2d 634, 515

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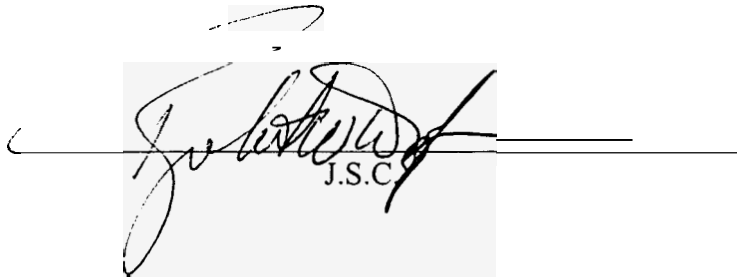
NYS2d 561 [2d Dept. 19871).

With respect to plaintiffs' attorneys, since a child may properly bring an action against his or her parents, it is improper for an attorney to represent both the parents and the child in an automobile accident action brought against the owner and driver of the other vehicle (*see, Sidor v Ziihoski*, 261 AD2d 529, 690 NYS2d 637 [2d Dept. 19991]). Indeed, because dual representation is fraught with the potential for irreconcilable conflict, it will rarely be sanctioned even after full disclosure has been made and the consent of clients obtained (*see, Greene v Greene*, 47 NY2d 447, 418 NYS2d 379 [1979]). This is especially so where the conflict extends to the very subject matter of the litigation (*see, Greene v Greene, supra*). Moreover, a minor must be presumed to lack the ability to knowingly waive a conflict of interest (*see, Matter of H. Children*, 160 Misc2d 298, 608 NYS2d 784 [19941]).

Here, the nature of this action and the parties involved renders it improper for plaintiffs' attorneys to represent the father Herbert Trent and his children, the infant plaintiffs (*see, Sidor v Zirhoski, supra*). The impropriety and potential for irreconcilable conflict is too strong to be ignored. Thus, under the circumstances of this case, the equitable doctrine of laches should not be applied to bar disqualification of the plaintiffs' attorneys (*cf. Dukus v Davis Aircraft Products Co., Inc.*, 123 AD2d 304, 506 NYS2d 203 [2d Dept. 19861]; *Thomas Supply & Equipment Co. Ltd. v White Fathers of Africa, Inc.*, 53 AD2d 607, 383 NYS2d 652 [2d Dept. 19761]). Accordingly, Philip F. Alba, P.C. and trial counsel, Broder & Reiter, Esqs., are disqualified from representing any of the plaintiffs in Action No. 2.

In view of the foregoing, the instant motion is granted.

Dated: JAN 24 2001



To: PHILLIP F. ALBA, P.C.  
 Attorney for Plaintiffs, Action No. 2  
 1250 Montauk Highway  
 West Islip, NY 11795