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COURT OF APPEAL FOR ONTARIO

RE: DAVID WATERWORTH, a mental incompetent not so found, by his Litigation Guardian James Waterworth, Sr., JAMES WATERWORTH, SR. personally, JOYCE WATERWORTH, JAMES WATERWORTH, JR., MICHAEL WATERWORTH, AND VICKI ANN WATERWORTH (Plaintiffs (Respondents)) – and – DOUGLAS RICHARD FREEMAN, ARMBRO MATERIALS AND CONSTRUCTION LTD., THE CORPORATION OF THE CITY OF MISSISSAUGA, CHRYSLER CREDIT CANADA LTD., POLLARD INDUSTRIAL ROOFING LTD., and JACQUELINE MONETTE (Defendants (Appellants))

BEFORE: FINLAYSON, CARTHY AND AUSTIN J.J.A.

**COUNSEL: Barry Percival, Q.C.
For the appellant Pollard**

**Roderic Ferguson, Q.C. and Steven M. Rastin
For the respondent Waterworth**

**Grant R. Dow And C. Zingg
For the City of Mississauga and Chrysler Credit**

HEARD: February 22, 2001

On appeal from the judgment of Justice Paul G.M. Hermiston dated October 28, 1998.

ENDORSEMENT

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[1] The appellant urges us to find that the trial was unfair because, after a Mary Carter agreement was concluded between the plaintiff and the other

defendants, counsel for one of those defendants was involved in the trial in support of the plaintiff. The trial judge did restrain the “extra” counsel by refusing to permit him to cross-examine plaintiff witnesses and we cannot see any indication that the appellant suffered in any way by having an additional opponent. The legitimacy of a Mary Carter agreement was not attacked and, while the trial judge might have restricted the added counsel to a greater degree or altogether, he committed no error in the permitted participation in this trial.

[2] The appellant’s second point is that there can be no negligence in leaving a trailer of tar at the curb on a five lane roadway in broad daylight with extended visibility in either direction. He likens it to leaving a car parked in the same position. There is, however, an added ingredient which supports the finding of negligence. The appellant’s foreman admitted seeing accumulated sand and gravel extending along the road beside the curb, and that it could cause a car trying to steer in it to skid. That is what happened and is one reason the municipality was found partially to blame for the accident. Thus, the appellant’s negligence can properly be founded in actually foreseeing the danger and failing to move the trailer off the road.

[3] For these reasons the appeal is dismissed with costs to the plaintiffs against the appellant.

“G.D. Finlayson J.A.”

“J.J. Carthy J.A.”

“Austin J.A.”