

**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 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 Lake Owners' Association, Inc., 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<sup>1</sup>—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. On Rizzio's motion, the 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

---

<sup>1</sup> The petition also includes loss of consortium claims by Tanya McCarthy and Callen McCarthy, Scott's parents. We will refer to the plaintiffs collectively as McCarthy 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, and driving too fast in light of the conditions of the roadway.” 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 claim against Scott’s 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. *Caldwell v. Holiday Lake Owners’ Ass’n, 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.<sup>2</sup> The district court granted Holiday Lake leave to amend on January 24, 2012.

---

<sup>2</sup> Holiday Lake also sought to add a cross claim against Gary Caldwell, McCarthy’s grandfather, who owned lake property and belonged to the association.

The order included a handwritten addition: “The court is informed there are no objections to this motion.” 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 Lake’s cross petition was improper because it was filed after the two-year statute of limitations had expired on McCarthy’s 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-party defendant Rizzio’s motion to dismiss. Rizzio filed a reply, alleging any potential contribution claim Holiday Lake might have against Rizzio was not ripe.

The district court granted Rizzio’s motion on October 23, 2012.<sup>3</sup> 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 denied Holiday Lake’s motion 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

---

<sup>3</sup> The district court proceedings had been stayed pending the outcome of the first appeal.

are not bound by the district court'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. On appeal, Holiday Lake challenges the court's 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).

Holiday Lake highlights the rule's opening clause, permitting a defendant to file a cross petition "[a]t any time after commencement of the action."<sup>4</sup> Holiday Lake insists the statute of limitations on McCarthy's 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.

---

<sup>4</sup> Leave to amend is to be "freely given when justice so requires." Iowa R. Civ. P. 1.402(4).

For his part, Rizzio directs our attention to the end of the rule's first sentence, limiting the category of third party defendants to persons "who [are] or may be liable for all or part of the plaintiff's claim." Because the two-year statute of limitations set by Iowa Code section 614.1(2) expired for McCarthy's negligence action on August 15, 2011—several months before Holiday Lake filed its cross petition—Rizzio argues he has no potential liability for plaintiff's claim. He further reasons because he may not be held liable for all or part of McCarthy's claim, the district court properly dismissed Holiday Lake's cross petition against him.

Before attempting to resolve the parties' 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 defendant ultimately may owe the original plaintiff." Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, *Hornbook on Civil Procedure* § 6.9. Our supreme court has rejected a restrictive reading of Iowa's impleader rule, holding that the "who is or may be liable" language was not limited to a defendant's claim for 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 in construing Iowa's impleader rule. *Id.* at 587.

Both the state and federal rules aim to avoid “the potential circuitry and multiplicity of actions” on claims involving identical facts. *Id.*<sup>5</sup>

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 of who may be the subject of a petition: “a person not a party to the action *who is or may be liable for all or part of the plaintiff’s 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’s 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 liable “for all or part of the plaintiff’s claim.” The liability is to the third-party plaintiff (here Holiday Lake) for a claim derivative to McCarthy’s negligence 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’s claim against Holiday Lake.

---

<sup>5</sup> *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 “serve judicial economy, 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-party defendant”); *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) (“We know of no reason why the law should let action or inaction of the 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 plaintiff’s claim should not be compromised because underlying claimant failed to comply with statute of limitations as to contribution defendant and noting “overwhelming majority of jurisdictions” adopted same position); *Smith v. Jackson*, 721 P.2d 508, 510 (Wash. 1986) (holding “named defendant may bring a contribution action against a third party, even if the statute of limitation would have precluded a direct suit between the plaintiff and third party”).

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 Holiday Lake’s third-party action. See *Atlas, Ltd.*, 357 N.W.2d at 586. Rule 14 allows a defending party, as third party plaintiff, to “serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it.” The phrase “may be liable” in Rule 14 means the defendant may join someone against whom a cause of action has not yet accrued, provided

the claim is contingent upon the success of plaintiff's action and will accrue when defendant'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* § 1447 ("The running of the statute of limitations on any claim that plaintiff might have against a third-party defendant also should have no effect on defendant's right to implead.").

Rizzio argues on appeal that Holiday Lake's "sole claim against [him] is grounded in negligence" and is thus time-barred if not brought before August 15, 2011. Rizzio's statute-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, asking for judgment in its favor against Rizzio "to the extent any judgment is entered against Holiday Lake Owners' Association, Inc in favor of the plaintiffs." 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." Iowa Code § 668.5. The right may be enforced "either in the original action or by a separate action brought for that purpose." *Id.* Section 668.5 sets the basis for contribution as "each person'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 established as part of McCarthy’s original suit as provided in section 668.3, “a party paying more than the party’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 was mistaken in finding Holiday Lake’s cause of action accrued on the date giving rise to the underlying tort action; Holiday Lake’s contribution action against 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 subsections, “Holiday Lake has no contribution claim to enforce.” 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 erred in dismissing Holiday Lake's cross petition.

Our holding does not rest on the tolling provision of section 668.8.<sup>6</sup> 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 the statute of limitations would not be a barrier." See *Betsworth v. Morey's & Raymond's*, 423 N.W.2d 196, 198 (Iowa 1988) (citing *Reese v. Werts*, 379 N.W.2d 1 (Iowa 1985)). *Reese* reasoned that section 668.8 was a "trade-off for the modified joint and several liability rule of section 668.4 and is intended to ameliorate it." *Reese*, 379 N.W.2d at 5. The court later explained that section 668.8 "relaxed" the statute of limitations to allow plaintiffs "to claim directly against a third-party defendant on the same cause of action alleged against the primary defendant" to avoid "recovery diminution" under section 668.4. *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 Holiday Lake's third-party practice here. Rizzio points to

---

<sup>6</sup> "The filing of a petition under this chapter tolls the statute of limitations for the commencement of an action against all parties who may be assessed any percentage of fault under this chapter." 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 defendant who is not served process is not a “party” for purposes of allocating fault. See Iowa Code § 668.2<sup>7</sup>. It is true that under *Collier’s* 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 defendant and qualified as a “party” under section 668.2(4). Accordingly, he may be allocated a percentage of fault under section 668.3.<sup>8</sup> We realize our supreme court has decided third-party defendants may not be brought into a case for the purpose of ascertaining their degree of fault “in the absence of some claim for affirmative relief against those parties.” *Pepper*, 484 N.W.2d at 157. But in this case Holiday Lake is alleging a viable claim of contribution against Rizzio. As discussed above, McCarthy’s inability to recover from Rizzio

---

<sup>7</sup> Iowa Code section 668.2 reads: “As used in this chapter, unless otherwise required, ‘party’ means any of the following:

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-party defendant.”

<sup>8</sup> 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 plaintiffs from “fault siphoning” discussed in *Pepper* does not appear to be present in this case, considering McCarthy filed a motion joining Holiday Lake’s resistance to Rizzio’s motion to dismiss.

Furthermore, judicial efficiency favors allowing Holiday Lake’s third-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 sustaining the motion will “better tend to serve justice and expedite the litigation”).

Because Holiday Lake’s cross petition was not barred by the statute of limitations, the district court improperly dismissed Rizzio as a third-party defendant.

**REVERSED AND REMANDED.**