

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**DOUGLAS KINCAID,
and JORDAN SOLWAY**

Plaintiffs

- and -

PNF HOLDINGS LIMITED, c.o.b. as PARK'N FLY

Defendant

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

STATEMENT OF CLAIM

Notice of Action issued on December 31, 2004

1. The plaintiffs claim:

- (a) an order pursuant to the *Class Proceedings Act, 1992*, certifying this action as a class proceeding and appointing the plaintiffs as Representative Plaintiffs for the Class (defined below);
- (b) damages in the amount of \$5,000,000.00;
- (c) punitive, exemplary or aggravated damages in the amount of \$1,000,000.00
- (d) special damages in the amount of \$5,000,000.00

- (e) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (f) the costs of this action on a substantial indemnity basis; and,
- (g) such further and other relief as this Honourable Court may deem just.

THE PARTIES

2. The defendant, PNF Holdings Limited, ("Park'N Fly") is a company incorporated under the laws of Canada, carrying on business under the trade name "Park'N Fly". Park'N Fly maintains its head office in Mississauga, Ontario. Park'N Fly operates airport parking services in Toronto/Mississauga, Ottawa, Windsor, Calgary, Edmonton, Montreal and Vancouver.
3. The parking services provided by Park'N Fly include a "valet" parking service at its Toronto/Mississauga location. The defendant represents that the valet parking service caters to those customers looking for the "ultimate in convenience and service".
4. The valet parking service includes the following features, all of which are included in the fee charged by the defendant to its customers:
 - (a) The customer drops off his or her vehicle at the Park'N Fly valet depot, leaving the keys in the vehicle, and is issued a locator ticket;
 - (b) The vehicle is parked by the defendant in its secure parking lot, and the location of the parked vehicle is inputted into the defendant's computer system;
 - (c) The customer is transported to and from the airport by the defendant's shuttle-bus;
 - (d) On return arrival at the airport, the customer notifies Park'N Fly by calling its central phone number and entering the locator ticket number, and upon receipt of this notification, the customer's vehicle is retrieved by the

defendant from its lot, and is immediately returned to the customer upon his or her arrival at the Park'N Fly valet depot, and upon payment of the specified fee.

The defendant advertises and warrants that the customer will receive "quick, computerized check-in and out services" and that the vehicle will be "ready and waiting at the front door".

5. The defendant is the bailee of the customer's vehicle from drop off until the vehicle is returned, on demand, to the bailor customer.
6. The plaintiff, Douglas Kincaid ("Mr. Kincaid"), is a self-employed businessman residing in the City of Mississauga in the Province of Ontario. Mr. Kincaid is required to travel frequently for his business, and is a regular customer of the defendant, particularly, using its valet parking service.
7. The plaintiff, Jordan Solway ("Mr. Solway"), resides in the City of Toronto in the province of Ontario. Mr. Solway travels on a regular basis, and is a regular customer of the defendant, particularly, using either its valet or economy parking service. He chooses to use the valet service when he requires the extra service of having his vehicle ready and waiting for him on his return from traveling.

THE CLASS

8. The plaintiffs bring this action pursuant to the *Class Proceedings Act, 1992* on behalf of the following classes:
 - (a) all persons resident in Canada who engaged Park'N Fly's valet parking service at its Toronto/Mississauga location, and required the defendant to provide delivery to them of the parked vehicle at any time between December 23, 2004 and December 29, 2004 (the "Class" or the "Class members"); and

- (b) the subclass of all parents, grandparents, children, grandchildren, siblings and spouses of the Class members referenced in (a), above, or any other individuals who were travelling with the Class members at the time the Class members required the defendant to provide delivery to them of the parked vehicle at any time between December 23, 2004 and December 29, 2004 (“Family Law Claimants”),

PARK’N FLY BECAME the BAILEE of the CLASS’S VEHICLES

9. On the morning of December 25, 2004, Mr. Kincaid drove his car, a silver 2000 VW Jetta TDI bearing licence plate AFZP583, into the valet parking lot operated by Park’N Fly, situated on Airport Road in the City of Mississauga (the “defendant’s lot”). He parked his car with the keys in the ignition, in a secure area of the defendant’s lot reserved for incoming vehicles, and proceeded to the check-in counter inside the Park’N Fly valet depot. Mr. Kincaid was issued locator ticket #77575 by the defendant, confirming receipt of and control over his vehicle by the defendant.
10. Mr. Kincaid was accompanied on his travels by his wife.
11. On Sunday, December 26, 2004, at approximately 6:50 p.m., Mr. Solway drove his car, a grey 2004 Mazda 3 bearing the licence plate 489NRP, into the valet parking lot operated by Park’N Fly, situated at 5815 Airport Road in the City of Mississauga. He parked his car with the keys in the ignition, in a secure area of the defendant’s lot reserved for incoming vehicles, and proceeded to the check-in counter inside the Park’N Fly depot. Mr. Solway was issued locator ticket #78262 by the defendant, confirming receipt of and control over his vehicle by the defendant.
12. The number on the locator tickets issued to the Class member is supposed to be inputted into the defendant’s computer system, along with the location of where the vehicle has been parked. It serves as the means by which Park’N Fly can identify the Class member’s vehicle, and where it is to be found on the

defendant's lot, using its computer system. Inputting the Class member's locator ticket number and vehicle location into the defendant's computer system is an essential element in the service provided by the defendant to the Class. If this step is not performed by the defendant, it results in the defendant being unable to locate and return the vehicles to the Class on demand as required under the terms of the Valet Parking Agreement.

13. Upon issuance of the locator tickets by the defendant to the plaintiffs, an agreement (the "Agreement") was made between the parties, pursuant to which Park'N Fly agreed to, and became the bailee of their vehicles, and was required to promptly deliver the correct vehicle back to each of them in the same condition as it had been received, forthwith on demand by each of the plaintiffs. Park'N Fly further agreed to provide the valet services referenced above, including the quick, computerized check-in and out services, and having the vehicle ready and waiting at the front door, on demand.
14. It was an express or implied term of the Agreement that the defendant would park each plaintiff's vehicle in its secure parking lot, in an area that was fenced in, under 24 hour security, and that the vehicle would be parked safely, and in an identifiable location. It was an express or implied term of the Agreement that Park'N Fly would use reasonable care in parking and storing the plaintiffs' vehicles in an identifiable location, including entering the location of the parked vehicle into the defendant's computer system, and maintaining it free from damage or loss.
15. It was an express or implied term of the Agreement that, once parked, the plaintiffs' vehicles would remain stored on the same location, and would not be removed therefrom until such time as the plaintiffs demanded return of the vehicles to each of them.
16. Further, it was an express or implied term of the Agreement that the defendant would return each plaintiffs' vehicle to him forthwith upon his demand for delivery

of it to him. In fact, Park'N Fly expressly warrants in its web page advertisement: "Upon your return, your car will be ready and waiting for you at the front door."

17. On the back of the locator ticket, the defendant has printed terms by which it purports to limit its liability for loss, theft or damage. These terms are not part of the Agreement, are not applicable to the losses sustained by the plaintiffs and the Class, and are, in any event, unenforceable as against the plaintiffs and the Class, as they are harsh and unconscionable. Further, it is unreasonable to enforce such terms against the Class in the context of this case, including the defendant's breach of the fundamental terms of the Agreement, and its gross negligence, as particularized below.
18. Agreements were made between Park'N Fly and each Class member on the same terms (express and implied) as the Agreements it made with the plaintiffs, as described, above.
19. Park'N Fly charges a higher fee for its valet services than for its self-park services specifically for the enhanced service and convenience to its customers to have the defendant park the customer's vehicle, and for the convenience and time savings of the vehicle being immediately ready for the customer upon their return from traveling.
20. Park'N Fly owed a duty of care to the plaintiffs and to the Class to store their vehicles in a secure and identifiable location, keep them free from damage or loss, and to return the vehicles promptly to them, on demand. The defendant knew or ought reasonably to have known that if it failed to return the plaintiffs' and the Class' vehicles to them promptly on demand, then the plaintiffs and the Class members would suffer mental anguish, frustration, anxiety and inconvenience. The defendant knew or ought reasonably to have known that the plaintiffs and the Class members would require immediate access to and use of their vehicles, failing which they would suffer damage.

21. The terms (both express and implied) of the Agreement between Park'N Fly and the Class and the duty of care owed by the defendant to the Class were the same as those between Mr. Kincaid, Mr. Solway and the defendant. In each case, the defendant agreed to become the bailor of the Class member's vehicle, on the terms referenced above.

LIABILITY AND DAMAGE

22. Mr. Kincaid and his wife returned to Toronto at approximately 7 pm on December 27, 2004. He immediately called to the Park'N Fly valet lot, and provided the defendant with the five-digit locator number, so that his vehicle could be identified, and retrieved for him and his wife, without delay, and would be ready for them to leave the valet parking lot immediately. Mr. Kincaid received a recorded message confirming to that the five-digit locator number had been accessed. Pursuant to the terms of the Agreement, his vehicle should have been available for him to pick up at the valet parking depot immediately thereafter.
23. Mr. Solway returned to Toronto on the evening of December 27, 2004. Upon leaving the terminal building, he immediately called to the Park'N Fly valet lot, and provided the defendant with the five-digit locator number, so that his vehicle could be identified, and retrieved for him, without delay, and would be ready for him to leave the valet parking lot immediately. Mr. Solway received a similar recorded message to that of Mr. Kincaid. Pursuant to the terms of the Agreement, his vehicle should have been available for him to pick up at the valet parking depot immediately thereafter.
24. Upon entering the defendant's valet parking depot, it was immediately apparent to the plaintiffs that Park'N Fly was unable to return vehicles to the Class members promptly. There were approximately 30 to 40 people in the depot waiting for their vehicles to be located and returned to them.

25. The plaintiffs each presented their locator ticket to the cashier, paid the requisite fee, and they were each given a receipt with an exit code that would have allowed them to depart the defendant's premises in their vehicles.
26. After waiting for over 45 minutes for his vehicle to be retrieved, Mr. Solway approached the defendant's manager, Carlos Cordoso ("Cordoso"), and was advised that Park'N Fly had failed to enter his vehicle into its computerized locator system, and was unable to find his vehicle to return it to him. At no time prior to this admission had the defendant told Mr. Solway that there would be any delay in retrieving his vehicle, or that it was not in the computer system.
27. Cordoso stated to Mr. Solway that a manual search would have to be undertaken to find the vehicle. No time estimate was provided as to how long it might take to find Mr. Solway's vehicle.
28. After waiting for approximately 90 minutes, Mr. Kincaid also spoke to Cordoso, who informed him that Park'N Fly could not find his vehicle, either. This was the first time of this admission by the defendant to Mr. Solway that there would be any delay in retrieving his vehicle, or that it was not in the computer system.
29. Neither plaintiffs' vehicle could be located by the defendant on December 27, 2004. After waiting for several hours, both plaintiffs hired taxi cabs to take them to their respective homes. Mr. Solway subsequently hired a rental car to replace his lost vehicle.
30. Park'N Fly did not find and return Mr. Kincaid's vehicle to him until approximately 4 pm on December 28, 2004. Park'N Fly did not find and return Mr. Solway's vehicle to him until the evening of December 28, 2004. Both plaintiffs made numerous telephone calls to the defendant over the course of December 28, 2004 to determine if their vehicles had been found. At no time was either plaintiff given any reassurance as to when the vehicle might be returned.
31. The Class members and the Family Law Claimants all experienced significant delays in receiving their vehicles back from Park'N Fly. The delays ranged from

approximately one hour to several days. During that time, they were denied the use of their vehicles, and were significantly inconvenienced and distressed as a result thereof.

32. Park'N Fly breached fundamental terms of the Agreements with the plaintiffs and the other Class members. In particular, it failed to park the Class members' vehicles in a secure and identifiable location, it failed to enter that location into its computerized locator system, and it failed to deliver up custody of the vehicles to the Class members forthwith upon demand.
33. Furthermore, Park'N Fly failed to exercise reasonable care in performing its duties as bailee for the Class. In fact, it was grossly negligent in:
 - (a) accepting the Class members' vehicles as bailee and failing to park the vehicle in a secure and identifiable location;
 - (b) accepting the Class members' vehicles as bailee and failing to enter the location where the vehicles were parked into its computerized locator system, at all;
 - (c) accepting the Class members' vehicles as bailee and failing to make any record of the location where the Class members' vehicles were parked, at all;
 - (d) failing to employ and properly train sufficient and competent staff, and failing adequately supervise the staff that was employed;
 - (e) upon discovery of the failure to record the location of vehicles accepted under the bailment agreements, failing to take adequate or any steps to find the Class members' vehicles, and/or to resolve the system failure; and,
 - (f) failing to give any or adequate notice to the Class members that the locator system had failed and that their vehicles could not be promptly located and returned, thereby preventing the Class members from taking any reasonable steps to mitigate their loss.

34. As a result of the defendant's fundamental breach of contract and gross negligence, the plaintiffs suffered the following damages:
- (a) loss of the use and enjoyment of their vehicles from their return to Toronto on December 27, 2004 until the vehicles were returned on December 28, 2004;
 - (b) mental distress, anguish, anxiety and extreme frustration;
 - (c) the loss of care, companionship and enjoyment of their family during the holiday season;
 - (d) out of pocket expenses for hiring taxi cabs to take them home, and to obtain a rental replacement vehicle;
 - (e) out of pocket expenses to rent a replacement vehicle;
 - (f) in the case of Mr. Kincaid, loss of income from the disruption to his ability to carry on his business as a result of the time expended by him in trying to locate his vehicle; and,
 - (g) such further and other losses that are not yet known, but will be particularized prior to the trial hereof.
35. The Class members and Family Law Claimants have suffered the same or similar damages.
36. The defendant has reimbursed the plaintiffs for the taxi fares and car rental charges they incurred since the Notice of Action was issued. It has done the same for some, but not all Class Members.
37. The conduct of the defendant in acting with gross negligence and in reckless breach of the terms of the Agreement when it knew or ought reasonably to have known that such conduct would cause extreme distress and anxiety to the Class and Family Law Claimants and cause them to suffer the losses and damage aforesaid, is deserving of the sanction of this honourable court by way of an order of punitive, exemplary or aggravated damages.

38. A representative of the defendant has admitted that it breached the Agreement and/or was negligent, saying: "What happened certainly wasn't business as usual."

The plaintiffs propose that this action be tried at Toronto, Ontario

Date: February 21, 2005

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-and-

PNF HOLDINGS LIMITED, c.o.b. as PARK'N FLY

Plaintiffs

Defendant

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

STATEMENT OF CLAIM

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