Case Name:

Boyd v. Cooper

Between
Karen Leslie Boyd and Linda Boyd, Plaintiffs, and
John Lewis Cooper and Jude Marie Cooper, Defendants, and
Farmers' Mutual Insurance Company, Interested Party

[2011] O.J. No. 1893

2011 ONSC 1869

Lindsay Court File No. 003464/01

Ontario Superior Court of Justice

H.K. O'Connell J.

Heard: May 26, 2010.
Judgment: March 24, 2011.

(48 paras.)

Civil litigation -- Civil procedure -- Disposition without trial -- Dismissal of action -- Lack of jurisdiction -- Costs -- When not awarded -- Application by intervenor insurer to dismiss plaintiffs' action and for costs allowed in part -- Action was commenced as a result of an accident in which plaintiff employee suffered a serious fall at defendants' horse farm -- Parties did not oppose dismissal of action -- Workplace Safety and Insurance Act Tribunal had exclusive jurisdiction to deal with matter -- Intervenor was not entitled to costs, despite its reasonable position, because matter was now under Tribunal's no-costs regime.

Workplace health, safety and compensation law -- Workers' compensation -- Civil procedure -- Costs -- Application by intervenor insurer to dismiss plaintiffs' action and for costs allowed in part -- Action was commenced as a result of an accident in which plaintiff employee suffered a serious fall at defendants' horse farm -- Parties did not oppose dismissal of action -- Workplace Safety and Insurance Act Tribunal had exclusive jurisdiction to deal with matter -- Intervenor was not entitled to costs, despite its reasonable position, because matter was now under Tribunal's no-costs regime.

Application by the intervenor Farmers' Mutual Insurance Company to dismiss the action of Karen and Linda Boyd and for costs. The plaintiffs and the defendants did not oppose the dismissal. The

action was commenced in August 2000 as a result of an accident that occurred in August 1998 when Karen suffered a serious fall at a horse farm owned by the Coopers. Farmers was the defendant's liability insurer. It originally claimed that it had no duty to defend. In 2001 the Coopers obtained an order that Farmers had a duty to defend them. This duty remained in force until a finding was made that the Karen was an employee, which would put the matter within the exclusive jurisdiction of the Workplace Safety and Insurance Act. This decision was upheld on appeal in 2002. Farmers' subsequently obtained an order that added it as an 'interested party', which gave it intervenor status. In 2009 Farmers obtained an order from the Workplace Safety and Insurance Act Tribunal that since Karen was an employee or worker the Tribunal had exclusive jurisdiction to deal with this matter. No appeal was taken from that decision.

HELD: Application allowed in part. The action was dismissed because only the Tribunal had jurisdiction. Farmers was not entitled to costs. Except for its attempt to deny its duty to defend, from 2002, when its appeal was dismissed, Farmers acted reasonably in its position as insurer. Its defence, that Karen was an employee and was covered by the Act, made the action moot. However, it was not awarded costs because the matter was now under the Tribunal's no-costs regime.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 13, Rule 57

Workplace Safety and Insurance Act, S.O. 1997, c. 16, Schedule A, s. 28, s. 31, s. 31(1)(a)

Workplace Safety and Insurance Board Act,

Counsel:

Mr. Martin Forget, Counsel for Farmers' Mutual Insurance.

Ms. Joyce Chun, Counsel for Karen and Linda Boyd.

Mr. Andrew Grayson, Counsel for John and Jude Cooper.

ENDORSEMENT

1 H.K. O'CONNELL J.:-- Farmers' Mutual moves for an order dismissing the action. The plaintiffs and defendants do not oppose the dismissal. Farmers' also seeks costs. I note that the style of cause refers to an 'interested patty'. Under Rule 13 of the Rules of civil Procedure, one is either a party or an intervenor. I therefore equate the reference to be to an intervenor. For the following reasons I find that costs are not awardable.

General Overview

2 The facts underpinning this action are not complex. The action was commenced on August 03, 2000. On August 06, 1998, at a horse farm owned by the Coopers, Ms. Boyd suffered a serious fall. The plaintiffs sued the Coopers as a result.

3 Farmers' is the defendant's liability insurer. Pursuant to section 28 of *The Workplace Safety and Insurance Act*, Farmers' moved for a determination that this action was "taken away" by virtue of

the jurisdiction of the *WSIA* Tribunal. By ruling dated February 06, 2009, the tribunal found that the plaintiff was an employee/worker, and as a result the tribunal had the jurisdiction to deal with the matter, In short the position of Farmers' was vindicated.

4 I note that no appeal has been taken from the decision of the Tribunal. On this motion Farmers' argues that the plaintiffs and defendants failed to engage the insurer, and costs were occasioned that were otherwise not necessary.

Full History of the Action: The Judicial Steps

5 Originally Farmers' took the position that it had no duty to defend. It did so based on its reading of the terms of the policy. Farmers' informed the Boyds of its' position by letter dated December 18, 2000. In addition counsel for the Coopers, wrote to counsel for the Boyds on March 31, 2001 taking the position that the *Workplace Safety and Insurance Board Act* was the applicable statute for any remedy.

Motion Brought by Farmers' in 2001

6 The Coopers moved before Ellen MacDonald J, at Toronto for a declaration that Farmers' had a duty to defend them in the action brought by the Boyds. Justice MacDonald heard the argument on August 24, 2001 and released her reasons six days later. Justice MacDonald fastidiously overviewed the state of the action as it existed before her, including the fact that a total of three statements of claim had been issued.

7 Mr. Forget, who also appeared for Farmers' before MacDonald J., argued that the pleadings were manipulative and were simply designed to get to the insurer's deep pocket. MacDonald J. however found favour with the established law that the court should look at the pleadings only and determine if on their face they could support the plaintiffs claim.

8 MacDonald J. also held that if the argument of Mr. Forget were to prevail, the court would be compelled to "conduct a wide ranging inquiry into the facts." MacDonald J. held that the pleadings did not justify the conclusion that the claim was outside the coverage in the policy. Justice MacDonald cited the decision in *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801. The essence of that case is that if there is a "mere possibility" that the claim against the insured could fall within the terms of the policy, the duty to defend is engaged.

9 Given that the second and third claims did not allege that Ms. Boyd was an employee of the Coopers, but rather an independent contractor, Farmer's was duty bound to defend. Justice MacDonald further noted that until a finding was made that Ms. Boyd was an employee, a fact within the exclusive jurisdiction of the *Workplace Safety and Insurance Act*, Farmers had to defend.

The Appeal by Farmers'

10 Farmers' appealed. The Court of Appeal in *Cooper v. Farmers Mutual Insurance Co.*, [2002] O.J. No. 1949, upheld the reasoning of MacDonald J. The court re-iterated the duty to defend. The court quoted Justice MacDonald in this regard:

> The claim alleges a state of facts which, if proven, would fall within coverage of the policy with the result that the insurer is obliged to defend the suit regardless of the truth or falsity of such allegations.

Farmers' Motion to be Added as a Party;

11 Farmers' sought to have the Coopers consent to its' addition as a 'interested party' to the proceedings. The Coopers did not agree. Farmers' asserted that pursuant to its' now judicially required duty to defend, the *WSIA* defence should be plead. The Coopers retained counsel. Counsel for the Coopers did not advance the defence that the action was barred by operation of the *Workplace Safety and Insurance Act*.[1].] Given that indemnity would be sought by the Coopers or Ms. Boyd, Farmers pressed its' argument that it had an interest in the action,

12 The defendants and plaintiffs opposed Farmers' request that they be added as a party. Farmers' then brought its' motion to be added as an 'interested party.'

13 Justice Salmers ruled on Farmers' motion on February 14, 2005. Salmers J. stated the following in a portion of his reasons:

> Farmers' has satisfied me that there is at least an arguable issue that the Plaintiff was an employee of the Defendants. If the Plaintiff is found to be an employee of the Defendants, then this action is statute barred. The fact that both the Plaintiff and the defendants considered the Plaintiff to be a subcontractor is not determinative of the issue. The actual nature of the relationship between the Plaintiff and the Defendants will determine whether the relationship between the Plaintiff and the Defendants was subcontractor or employee.
>
> There was sufficient information for me in the statements of the Defendants to make an arguable case with respect to the fact that he Plaintiff may have been an employee as opposed to a subcontractor.
>
> For unknown reasons, the Defendants have not asserted this arguable defence, despite having notice of it since at least October 2003. Farmers' may be adversely affected by that conduct of the defendant's defence.

14 As a result Salmers J. granted Farmers' standing as an 'interested party' Salmers J. rejected the arguments that prejudice would be occasioned by adding Farmers'; that cross examination by the Coopers by Farmers would be prejudicial; and that by adding Farmers the Coopers may be subject to sanctions by WSIB. Salmers noted, "if an insurer were required to indemnify an insured when there is a defence that is not advanced because of reasons that are not related to the action, that is not in contemplation of this rule."

15 Salmers J. also dealt with the argument that the addition of Farmers' could result in the loss of the plaintiffs tort claim if the WSIB is successful. As the learned Justice noted, "there is no prejudice to the plaintiff if she receives that to which she is entitled by law."

16 Salmers J. awarded costs in favour of Farmers'.

Leave to Appeal Sought

17 The plaintiffs then sought leave to appeal to the Divisional Court. The defendants did not take any position and did not attend at the motion for leave, Howden J. dismissed the leave application. He noted that the argument that conflicting jurisprudence was in play, was without merit. As Howden J. noted, "the insurer's position in the action would be to raise a defence not otherwise raised and to bring an application to the WSIT for a ruling as to whether the plaintiffs claim was statute barred. That is not a position adverse to the defendant insured's position in the action."

The WSIAT Proceedings

18 Farmers then made application pursuant to Section 31 of the *Workplace Safely and Insurance Act*, S.O. 1997, c. 16, Schedule A, Farmers' appeared as the applicant at the *WSIAT* hearing, Farmers' argument was that the plaintiff was an employee and not an independent contractor. The Vice Chair of the Tribunal agreed. The reasons are reported at 2009 ONWSIAT 315, in the decision rendered February 06, 2009.

Position of Farmers'

19 It is against this backdrop that Mr. Forget argues that Farmers' is entitled to its' costs. A comprehensive cost outline is provided in the materials.

20 I note that Farmers' examined the parties Ms. Boyd and Ms. Cooper. Based on the examinations and disclosures, the view of Farmers' that Ms. Boyd was an employee and not a contractor, was solidified. The declaration sought by Farmers at the *WSIAT* was vindicated. Section 28 of the *WSIAT* barred the action, an action which was brewing for some 9 years, at that time,

21 Farmers' had proposed that the examinations and the documentary productions be filed on consent at the Tribunal. The plaintiffs and the defendants said no. Mr. Forget argues that "by opposing the application, it was clear that the Coopers were more concerned with securing their coverage than having the action brought against them dismissed."

22 Mr. Forget argues that the Coopers acted against their own interests by taking the position that they did before the Tribunal. In addition they acted against their obligation under the policy. Effectively Mr. Forget says the Coopers were arguing in favour of the position of the plaintiffs which was directly in conflict with their own interests. Farmers' argues that it acted reasonably throughout.

23 The hearing itself took considerable time, namely three days, to complete. At the hearing the Coopers produced further material in support of their claim that Ms. Boyd was an independent contractor. Farmers' called no witnesses.

24 Farmers' notes that the *WSIAT* does not confer jurisdiction to award costs. Farmers' however argues that the proceedings before the *WSIAT* were necessary in the context of this action. It is therefore a proper step in the proceedings that can be recoverable in costs. Farmers' argues that costs are payable by the plaintiffs and the defendants. For the plaintiffs the argument distils to the proposition that the action was dismissed. For the defendants the argument is that the Coopers acted against the interests of their own insured. It is argued therefore that costs at least as it relates to the Application before the Tribunal, are recoverable.

25 In response to Coopers' argument that Farmers' was compelled to defend, and therefore should not get costs, Farmers retorts that the decision not to plead a defence, namely the applicability of the section 31 of the *WSIA*, and the concomitant steps prior to that process, post duty to defend, are all part of the action. Had Farmers' not asserted the *WSIA* defence, the Coopers would have faced judgment at the hands of the Boyds, a position which would have been much worse than the result that was achieved, and achieved all because of the position of Farmers.

26 Farmers' argues that it is therefore entitled to costs. It was an intervenor "in name only." It was granted standing as an interested party. That standing was essential. Farmers says it acted fully in accord with its interests and the interest of the defendant Coopers. The defendants were in breach of the duty to co-operate. Costs should follow the event.

27 As for quantum of costs, Farmers reminds that the plaintiff had sought in excess of $750,000.00 in costs. A full set of arguments premised on *Rule 57* of the *Rules of Civil Procedure* is set out in the factum of Farmers. Costs are sought for the Tribunal work up and attendance, only.

Position of the Plaintiffs

28 Ms. Chun does not argue against dismissal of the action, nor could she. She argues that Karen Boyd was amply justified in bringing the action, as she was an independent contractor. Ms. Chun argues that Farmers' is engaged in a vilification of the Boyds. The court must drive itself at the truth of the situation.

29 In addition counsel argues that Karen Boyd had a reasonable expectation in her claim. It is further argued that an analysis of the reasonableness of costs must also be considered in light of the reasonable expectations of the parties, not simply the reasonableness of quantum.

30 It is further argued that Farmers' really stands in the classic shoes of an intervenor. As a result the normal rule is no costs are awardable. The Coopers claim that Farmers' hijacked the litigation. There is no reason to derogate from the usual rule that costs do not go to an intervenor. Awarding costs would be to punish the plaintiff and the Coopers. Ms. Boyd was under the litigation cloud for 10 years, and is still awaiting benefits.

31 Given that *WSIAT* has no costs jurisdiction, neither does this court. As a result although the costs said to have been incurred are not unreasonable, there is simply no basis on which payment is allowable.

Position of the Defendants

32 Mr. Grayson says that there is no authority to award costs against a non insured. Once the duty to defend is triggered, costs should not follow. There is in any event no entitlement to *WSIAT* costs. Farmers' is trying to recover *WSIAT* costs. They cannot. The fact pattern in this case is very unique. The defendants were entitled to take the position that they did. The history is one rife with opposed positions from the start. Costs were not ordered in the Superior Court before MacDonald J. or at the Court of appeal in favour of Farmers'. Neither court suggested that costs would go to Farmers if they had success going forward.

33 Mr. Grayson also argues that there should be no expectation of costs. This litigation finds life over a 10 year span. Farmers' never indicated that they would be seeking costs earlier. The argument that the *WSIAT* proceeding is part of the action is an attempt to end run the forbiddance of a costs award at *WSIAT*. Mr. Grayson says that the decision in *Cantlon v. Timmins (City)*, [2006] O.J. No. 4666 assists the defendants. In that case Ferguson J. held that *WSIAT* cost claims had to be discounted as they were not "part of the action".

34 Counsel also references *P.C.L. Constructors Canada v. Lumbermen's Casualty Co. Kemper Canada* [2009] O.J. No. 2664. It is argued that the ratio there in relation to costs, is equally applicable to the case at bar. Once the duty to defend was in place the proceedings engaged are a matter of course. In addition it is submitted that the argument of Farmers' is a 20/20 hindsight position. The defendants argue that prior to the *WSIAT* decision it was not plain and obvious that Ms. Boyd was an employee.

35 Finally, Mr. Grayson argues even if costs are awardable, they are not reasonable in this case. It is submitted that Farmers' is simply seeking to punish the Coopers. There was no offer to settle. It was fully in the hands of Farmers', The ratio in *Boucher v. Public Accountants Counsel for the*

Province of Ontario, [2004] O.J. No. 2634 (C.A.) speaks to the expectation of the parties. There is no realistic expectation to suggest that the defendants should face cost consequences. Indeed Farmers' should pay the costs.

COSTS

Overview

36 The history of this matter, is thankfully, not likely to repeat. The passage of in excess of ten years from injury to resolution, albeit not on the terms that the defendants and plaintiffs wanted, is unfortunate. That is not however a function of Farmers' or any intransigence, laches, or unreasonableness.

37 Save and except for the attempt by Farmers' to deny its duty to defend, all actions post the Court of Appeal decision in 2002, essentially rest at the feet of the plaintiff and defendants. Farmers acted, I find, reasonably, in its position as insurer. It noted a potential defence, a defence that proved to make the action moot. That defence was that the plaintiff Ms. Boyd, was an employee and therefore covered by the *Workplace Safety and Insurance Act*.

38 For some reason the defendants did not want to engage all of their possible defences. There also appears to have been some potential acquiescence in the plaintiff's approach to the defendant's position. I am puzzled in the extreme as to why the defence was not plead. The success of the defence was for another day. The correspondence trail suggests that the defendants were not prepared to be defended to the full extent, even though they had initially vigorously, and successfully, opposed the position of Farmers'.

39 Farmers' Insurance suffered the costs consequences of it unsuccessful attempt not to defend the action. Post the Court of Appeal's dismissal of the appeal from MacDonald J., Farmers' acted fully in accord with its interests and those of the defendants. They simply sought to have all of the information to determine what defences were available, including the defence of the operation of a complete statutory bar that negated the tort action.

40 I am satisfied on the argument of Mr. Forget, fully supported by the history of this action, post 2002, that Farmers was well within its rights to become involved in the action, and to take the position that it subsequently took. The head-on resistance by the plaintiffs and defendants to the very appropriate actions of Farmers' is best described as bizarre. However that does not end the matter.

Are the WSIAT Proceedings Stand Alone or Part of the Action

41 First I need consider whether the fact that WSIAT does not have a costs regime acts to foreclose the request of Farmers' for costs.

42 In the **WSIAT PRACTICE DIRECTION**, Representatives' Fees and Costs, the following is noted:

> 1.0 **This Practice Direction**:
>
> - discusses the meaning of the word "costs"
>
> - explains that the Tribunal has no authority to award legal costs.
>
> 2.0 Costs

> 2.1 Costs means the money a party spends on a lawyer or a representative to prepare and attend a Tribunal hearing, including charges or expenses such as photocopying.
>
> 3.0 No Authority to Award Legal Costs
>
> 3.1 Parties who retain a representative, whether a lawyer or consultant, are responsible for paying the fees and expenses of that representative,
>
> 3.2 The Tribunal has no authority to award costs against another party under *Workplace Safety and Insurance Act*. Decision Nos. 99/91A, 927/89, 1058/00.
>
> Dated at Toronto, Ontario, this first day of October, 2007.
>
> Workplace Safety and Insurance Appeals Tribunal I.J. Stachan, Tribunal Chair

43 I note that the direction refers to a party who retains a representative. Farmers' was the applicant. It retained counsel. Farmers' had to initiate the proceeding over the objections of both the plaintiffs and defendants. Farmers' sought a declaration pursuant to section 31 of the *WSIA*.

The relevant portion of Section 31.1 of the Act reads:

Decisions re rights of action and liability

> 31.(1) A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the Insurance Act may apply to the Appeals Tribunal to determine,
>
> (a) whether, because of this Act, the right to commence an action is taken away

44 Although there is some attraction to the argument that the *WSIAT* proceedings are a part of this action given the history of this case, I find the argument cannot be sustained. There is no valid reason to end run the clear rule of the WSIA, The *WSIAT* engaged its jurisdiction. It resulted in a cessation of the action.

45 I am sympathetic that but for Farmers' vigorous approach, an approach entirely appropriate in defence of its insured, that the action may very well have survived. But it didn't. It didn't because of the Tribunal's ruling. In the face of a no costs regime, no costs can follow because of that intervening event, and conclusive event.

Intervenor Status

46 I need not engage in an analysis of the ability of an intervenor to seek costs. Had I done so I would have been inclined to agree with Farmers' that in the circumstances of this case, Farmers was in that very limited class of intervenor had the action proceeded, where costs could have been sought.

The Action is Dismissed

47 The *WSIA* Tribunal had the statutory jurisdiction to assume jurisdiction as it did here, on the basis that the plaintiff was an employee and not an independent contractor. It did so in February 2009. No appeal was taken. Neither the plaintiffs nor the defendants suggest that the action can remain extant. There is no contest on that issue. This action is therefore dismissed.

48 I am inclined to the view that this motion is not a case where costs should be awarded. However if costs are demanded counsel for the plaintiffs and the defendants shall file their respective bills of costs and submissions, not to exceed 4 pages, within 15 days of release of this endorsement. Counsel for Farmers' shall respond 10 days after receipt of both of the plaintiffs and defendants materials, restricted in the same manner as to length.

H.K. O'CONNELL J.

cp/e/qlrpv/qlvxw/qljxr

1 1997, S.C. 1997, C. 16 Sch. A.