COURT FILE NO.: 14330/02
DATE: 2004/09/29

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Ian Gardner v. Gerardus DeBruijn and Johanna DeBruijn

BEFORE: Minden J.

COUNSEL: Ramona S. Abraham, for the Plaintiff

Martin P. Forget, for the Defendants

ENDORSEMENT

[1] I have considered the parties' written and oral submissions as to costs.

[2] In my view, this case had all of the hallmarks of a typical Simplified Procedure matter. It was a short, straightforward trial involving a dog bite incident, witnessed only by the plaintiff. The medical evidence was brief and uncomplicated.

[3] At two stages of the proceedings, including at a time when the precise nature of the claim must have been readily apparent, the defendants requested that the case be moved from ordinary procedure to Simplified Procedure. The defendants specifically drew the plaintiff's attention to Rule 76.13. Nevertheless, and despite the fact that the jurisprudence overwhelmingly supported the defendants' position that an award of damages to the plaintiff was unlikely to exceed $10,000.00, the plaintiff refused.

[4] Moreover, the plaintiff's offers to settle were within the ambit of Simplified Procedure. Recovery was $4,941.00.00, an amount falling within the jurisdiction of the Small Claims Court.

[5] Even assuming it was reasonable to commence this action under the ordinary procedure, a matter not free from doubt, I am not satisfied that it was reasonable for the plaintiff to have continued this action under the ordinary procedure as opposed to the Simplified Procedure.

[6] Accordingly, this case falls squarely within Rule 76.13(3), a rule which requires strict interpretation and application: see *Wonderland v. Electric Colourfast Printing Corp.* (1999), 43 O. R. (3d) 799.

[7] The plaintiff is, therefore, denied his costs.

[8] I have considered the provisions of Rules 49.10 and 49.13.

[9] The plaintiff says that none of the defendants' three offers to settle was as favourable or more favourable than the judgment. His only submission on this point is that had he accepted the defendants' offers, he would have actually received less than the amount ultimately awarded having regard to "what would remain after disbursements and O.H.I.P. was paid". The plaintiff provided no authorities in support of his position that these were factors that should be taken into account when Rule 49 comes into play. In any event, it is clear that these costs are a constant factor that he will ultimately have to address and therefore, as it seems to me, are not relevant when comparing the amount of the offer to the amount of the judgment. I cannot accede to this argument.

[10] The plaintiff did not otherwise contend that the offers did not fall within Rule 49.10.

[11] The plaintiff rejected three offers to settle. Even the first offer, presented shortly prior to examinations, was slightly more favourable than the amount of the judgment. I agree that this is a case in which Rule 49.10(2) applies. The defendants are entitled, in the least, to partial indemnity costs from that date.

[12] Relying upon Rule 49.10(2) and Rule 76.13(6) the defendants seek substantial indemnity costs from the date of either their second or third offer to settle if not for the entire duration of the litigation.

[13] Apart from those matters giving rise to the operation of Rule 76.13(3) and Rule 49.10(2), I am unable to say that the plaintiff's conduct during the litigation was such as to render this one of those rare occasions requiring an award of substantial indemnity costs to mark the court's disapproval of a party's conduct: *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 215 D.L.R. (4th) 31, 60 O. R. (3d) 474 (C.A.).

[14] Having given to the matter my careful consideration, I cannot conclude that all of the circumstances call for an award of substantial indemnity costs against the successful plaintiff.

[15] Finally, in exercising my discretion under Rule 57.01, in addition to the various factors delineated by the Rule, I take into account that the defendants' position that they bore no responsibility whatsoever for the actions of their dog in injuring the plaintiff tended to lengthen unnecessarily the duration of the trial. Apart from that issue, the plaintiff does not dispute the applicable rates or that the time spent was reasonably incurred.

[16] In all of the circumstances, I would award costs on a partial indemnity basis payable by the plaintiff to the defendants, fixed in the amount of $12,000.00 plus disbursements of $884.45 plus G.S.T.

Edwin B. Minden J.

Minden J.

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ENDORSEMENT

The Hon. Mr. Justice E. Minden

DATE: September 29, 2004