CITATION: Aristorenas v. Comcare Health Services, 2007 ONCA 99
DATE: 20070215
DOCKET: C42475 & C42461

COURT OF APPEAL FOR ONTARIO

RE: **JENNIFER ARISTORENAS (Plaintiff/Respondent) – and – COMCARE HEALTH SERVICES and DR. JEFFREY GILMOUR (Defendants/Appellants)**

BEFORE: **ROSENBERG, MACPHERSON and ROULEAU JJ.A.**

COUNSEL: **Paul L. Seitz for the respondent**

Colin S. Jackson for the appellant Comcare Health Services

Kirk F. Stevens and Brian T. Butler for the appellant Dr. Jeffrey Gilmour

HEARD: **May 10, 2006**

On appeal from the judgment of Justice Sidney N. Lederman of the Superior Court of Justice dated September 7, 2004.

E N D O R S E M E N T R E T R I A L COSTS

[1] Following the issuance on November 21, 2006 of our costs endorsement dealing with the costs of the appeal, the parties sought clarification of the impact of this court's decision and costs endorsement on the trial costs.

[2] At the conclusion of the trial, the parties reached an agreement as to costs and, therefore, did not take out a formal order. The appellants had agreed to share equally the respondent's costs fixed at $115,000, subject to the proviso that the payment would not be made in the event that the appeal was successful.

[3] The appellants maintain that they were largely successful on appeal having reduced the amount of the award from $55,000 to $1,000 and that it would, therefore, be contrary to the intention of the parties to require payment of the agreed upon sum. They submit that the modest damage award is akin to the respondent having proven a breach of the standard of care but having failed to prove that the breach caused any damages. They submit that in the circumstances the appropriate disposition would be no award of costs of the trial.

[4] The appellants also argue that, had the respondent sought only $1,000 at trial, the claim would have proceeded in Small Claims Court and would likely have settled. The appellants also rely on rules 57.05(1) and 76.13(3). These provide for cost consequences where an action ought to have been brought in the Small Claims Court or under the simplified procedure.

[5] The respondent argues that negligence was the central issue at trial and was strongly denied. The finding of negligence has not been set aside on appeal and despite the substantially reduced recovery a damage award remains. In the circumstances, it would be just and appropriate to leave intact the quantum of trial costs agreed to by counsel.

[6] We agree with the respondent's position. The respondent was successful at trial and, in our view, it was reasonable for her to have brought the claim under the ordinary procedure. I would not, therefore, apply the costs consequences set out in rules 57.05(1) and 76.13(3). The appeal did not reverse the finding of negligence and an award of damages, although modest, has been upheld in this court. We consider it just and reasonable in the circumstances to award the respondent costs of the trial and see no basis for varying the amount that the parties had considered fair. While it is true that the appellants had substantial success on appeal, that success did not absolve the appellants of liability. The appellants were awarded costs of the appeal but should nonetheless be liable to the respondent for costs of the trial.

[7] As a result, we award the respondent costs of the trial fixed at $115,000.

"M. Rosenberg. J.A."
"Paul Rouleau J.A."