CITATION: Rider v. Dydyk, 2007 ONCA 687
DATE: 20071010
DOCKET: C47115

COURT OF APPEAL FOR ONTARIO

MACPHERSON, SHARPE AND JURIANSZ JJ.A.

BETWEEN:

DONALD W. RIDER, RANDELL KENT, KIM RIDER, and REGINA KENT

Respondents (Plaintiffs)

and

ANDREW N. DYDYK

Appellant (Defendant)

Chris G. Paliare and Emily Lawrence for the appellant

Kurt Pearson for the respondents

Heard: September 14, 2007

On appeal from the order of Justice W. J. Lloyd Brennan of the Superior Court of Justice dated January 30, 2007.

JURIANSZ J.A.:

[1] This appeal decides that the deductions from a plaintiff's assessed damages in a motor vehicle negligence case, which are mandated by s. 267.5(7) of the *Insurance Act*, R.S.O. 1990, c. I.8, are not to be taken into account in determining whether the defendant is presumptively entitled to costs pursuant to Rule 49 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[2] The respondents brought this action for injuries suffered in a motor vehicle accident on December 28, 1999. On January 19, 2004, the appellant made a Rule 49 offer to settle the action by paying $5,000 to each of Mr. Rider and Mr. Kent plus prejudgment interest and costs and dismissing the family law claims of their spouses without costs.

[3] The appellant admitted liability at the beginning of trial, which began on December 5, 2005. At the end of the 11-day trial, the jury awarded $15,000 damages to Mr. Kent, $1,000 damages to his spouse, $20,000 damages to Mr. Rider, and $500 to his spouse. Rule 3 of s. 267.5(7) provides that the amount of damages awarded to a plaintiff for non-pecuniary loss shall be reduced by $15,000 generally and by $7,500 for such loss under the *Family Law Act*, R.S.O. 1990, c. F.3. After these awards were reduced by the amounts stipulated by s. 267.5(7) of the *Insurance Act*, judgment was entered only for Don Rider in the amount of $5,000.

[4] All parties claimed costs. The Riders delivered a bill of costs in the amount of $95,131.94. The Kents delivered a bill of costs in the amount of $81,056.46. The appellant delivered a bill of costs in the amount of $119,083.34.

[5] The appellant claimed costs under Rule 49. As the judgment the plaintiffs received was as favourable as or less favourable than the terms of the appellant's offer, the appellant argued that rule 49.10(2) entitled him to costs on a partial indemnity scale from January 19, 2004 (the date of his offer to settle) "unless the court orders otherwise".

[6] The trial judge refused to award the appellant costs because in his view "the saving provision in the *Insurance Act* [i.e. section 267.5(9)] would be thwarted if the defendant were to recover costs as contemplated by subrule 2 [rule 49.10(2)]. This case is one in which the court should 'order otherwise' as the rule allows".

[7] Section 267.5(9) of the *Insurance Act*, the "saving provision", provides the following:

> In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the determination of a party's entitlement to costs shall be made without regard to the effect of paragraph 3 of subsection (7) on the amount of damages, if any, awarded for non-pecuniary loss.

[8] The appellant was granted leave to appeal to this court.

Issues

[9] The appellant submits that the trial judge erred in two respects:

1. By using the jury award rather than the issued judgment to determine whether Rule 49 applied, he misinterpreted and failed to apply the decision of the

Divisional Court in *Wicken v. Harssar* (2004), 73 O.R. (3d) 600, aff'g 24 C.P.C. (5th) 164 (S.C.J.);

2. In exercising his discretion to depart from the application of Rule 49 and "rule otherwise" he considered two irrelevant factors: first, that he would have awarded substantially greater damages had he been the trier of fact, and second, his view that reasonable counsel would not have advised the plaintiffs to accept the appellant's offer.

Issue 1: Application of *Wicken*

[10] While the conclusion of Stinson J., the trial judge in *Wicken*, regarding the application of s. 267.5(9) to settlement offers might have been considered *obiter*, the Divisional Court dealt with the question because of the importance of providing certainty to the personal injury bar.

[11] The Divisional Court stated that s. 267.5(9) does not apply to Rule 49 offers to settle and that the determination of a defendant's entitlement to costs under Rule 49 should proceed after deducting from the plaintiff's assessed damages the amounts required by s. 267.5(7). While the appellant is correct that the trial judge failed to apply the Divisional Court's decision, I am of the view it is wrong and the trial judge used the correct approach.

[12] In *Wicken*, a jury assessed the damages of a cyclist who was injured in a motor vehicle accident at $20,000 ($25,000 less 20 percent for contributory negligence). After the subtraction of the amount required by s. 267.5(7), the judgment including interest was $9,966.67. The defendants claimed partial indemnity costs from the date of a settlement offer, which had proposed paying the plaintiff $15,000. The defendants also submitted the plaintiff should not recover costs in any event because the amount recovered fell within the monetary jurisdiction of the Small Claims Court or, alternatively, because the amount fell within the monetary limits provided for the simplified procedure.

[13] Justice Stinson awarded the plaintiff partial indemnity costs. He found as a fact that the defendants' offer was not a Rule 49 offer because it was not sufficiently "fixed, certain and understandable" to allow the plaintiff to "contemplate and accept" it, following *Yepremian v. Weisz* (1993), 16 O.R. (3d) 121 at 123 (Gen. Div.). Moreover, he concluded that the plaintiff's success at trial had exceeded the defendant's offer because s. 267.5(9) applied and the plaintiff's assessed damages before the subtraction of the statutory deductible were greater than the offer. Using the same reasoning, Stinson J. also found that the judgment obtained by the plaintiff should not be regarded as falling within the monetary jurisdiction of the Small Claims Court. He disposed of the question of the simplified procedure on other grounds.

[14] The Divisional Court concluded, notwithstanding its finding that the words of s. 267.5(9) are "clear and unequivocal", that the mandatory deductibles are to be taken

into account in applying the cost consequences of Rule 49. The Divisional Court reached this conclusion because, in its view, absurdity would result if s. 267.5(9) were applied to situations with enforceable offers to settle. The Divisional Court's concern focused on the fact, as the trial judge concluded, that defendants would have to add a $15,000 "cushion" to their offers in order to trigger Rule 49 cost consequences. The court said at paras. 47-48:

> With respect, there is no factual or legal basis for this conclusion. This interpretation fails to recognize the context of the statutory deductible. It was introduced, and enhanced to eliminate the small costly cases in the system, in an attempt to reduce escalating insurance costs. Rule 49.10 of the Rules of Civil Procedure was enacted to ensure that plaintiffs are reasonable, with adverse cost consequences if they refuse to accept a defendant's offer, and do not achieve a better result at trial.
>
> If the reasoning of Stinson J. were to apply, the context and purpose of both statutory provisions would be undermined. In our view, a most unfair situation would be created that does not accord with practical reality.

[15] In particular, the Divisional Court worried that the trial judge's ruling would provide the plaintiffs with an incentive to litigate, in direct opposition to the purpose of s. 267.5(7). It foresaw an "arbitrary benefit to plaintiffs [that] would not be offset by any corresponding duty on plaintiffs to modify their offer to settle. This may encourage them to litigate": para. 49. Overall, "The objective of culling the modest cases less than $15,000 from the system would be compromised, and much counter-productive uncertainty would be created in the settlement process during litigation": para. 50.

[16] The Divisional Court also attached significance to the fact that s. 267.5(9) refers to the amount "awarded" to the plaintiff and Rule 49 applies to the "judgment" obtained by the plaintiff. On the basis of this distinction, the Court found that s. 267.5(9) "does not apply to a situation with an enforceable offer to settle."

[17] Leaving aside that in the case of irreconcilable conflict the statute would prevail over the rule, and that there is no irreconcilable conflict as the clear words of the statute provide an ample basis for a judge to order "otherwise" as the rule allows, my view is there is no absurdity. Applying s. 267.5(9) when implementing Rule 49 can be reasonably seen to support the statute's objectives.

[18] On one hand, there is no doubt that the Divisional Court's premise is correct. Section 267.5(7) has the objective of eliminating small cases from the system and so takes away the first $15,000 of a plaintiff's recovery for non-pecuniary damages actually

suffered. Claims worth $15,000 or less are eliminated entirely. This creates a powerful disincentive to proceeding to trial with a small claim.

[19] On the other hand, the Divisional Court failed to recognize that s. 267.5(9) works in tandem with s. 267.5(7)'s disincentive by providing an incentive to settle early, as I explain at greater length below. Moreover, the object of s. 267.5(7) should not be allowed to overshadow the purpose of s. 267.5(9). Section 267.5(9) was enacted in 1996 when the statutory deductible was increased from $10,000 to $15,000. As the Divisional Court observed, this section's purpose seems to be to protect plaintiffs from the more onerous cost consequences resulting from the enhanced statutory deduction. Section 267.5(9) ensures the section as a whole is balanced and fair.

[20] When this is kept in mind, interpreting s. 267.5(9) to require that insurance companies "cushion" their offers to plaintiffs by $15,000 in order to rely on Rule 49 is not, as I see it, an "arbitrary benefit" to plaintiffs. Rather, such an interpretation encourages insurance companies to make offers of settlement that are based on an assessment of the damages actually suffered by the plaintiff. Offers of settlement that fairly reflect the plaintiff's actual damages, without deduction, will encourage settlement. Plaintiffs with small claims who have received such offers will be faced with the choice of proceeding to trial where the statutory deductible of $15,000 will reduce any judgment they might obtain and settling and avoiding the certain elimination of all or a large part of their damages.

[21] Certainly, the plaintiff's disincentive to proceed to trial would be greater if the Rule 49 consequences were more severe. But that is no reason to conclude that s. 267.5(9) is incompatible with s. 267.5(7) and the rule. Section 267.5(9) supports the objective of s. 267.5(7) by discouraging litigation, while at the same time bringing balance and fairness to the system by shielding plaintiffs from cost consequences unless they have refused an offer that exceeds an accurate assessment of their actual damages.

[22] Thus it cannot be said, in my view, that allowing s. 267.5(9) to operate in the context of offers to settle leads to absurd results.

[23] I agree with the appellant that the trial judge failed to apply the decision of the Divisional Court in *Wicken*. However, I would dismiss the appeal because the *Wicken* decision was wrong in its interpretation of the interaction between ss. 267.5(7) and 267.5(9) and Rule 49. The correct interpretation is in accordance with the clear words used – the statutory deductions from a plaintiff's assessed damages are not to be considered in determining a party's entitlement to costs. Since the amount of the award before the s. 263.7 deduction was more favourable than the appellant's offer to settle, the appellant was not presumptively entitled to costs from the date of his settlement offer.

Issue 2: Relevance of Factors to Exercise of Discretion

[24] In view of these findings, it is not necessary to address the appellant's arguments that the trial judge considered irrelevant factors in exercising his discretion to depart from the strict application of rule 49.10(2).

Disposition

[25] I would dismiss the appeal with costs fixed in the amount of $15,000.00 including disbursements and GST.

"R.G. Juriansz J.A."
"I agree J.C. MacPherson J.A."
"I agree Robert J. Sharpe J.A."

RELEASED: October 10, 2007