

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Simpson Estate v. Cox, 2006 NSSC 116

Date: 20060407
Docket: SN 202431
Registry: Sydney

Between:

Walter Simpson, representative of the
Estate of Sayde Simpson

Plaintiff

v.

Carolyn Cox

Defendant

Judge: The Honourable Justice Frank Edwards

Heard: February 20, 21, and March 10, 2006 in Sydney, Nova
Scotia; and March 3, 2006 in Halifax, Nova Scotia

Counsel: Hugh R. McLeod, Counsel for the Plaintiff
Dennise Mack, Counsel for the Defendant

By the Court:

[1] This is further to my written decision dated March 17, 2006, wherein I invited Counsel to make written submissions on costs. I have now received and reviewed those submissions.

[2] First, I acknowledge that the special damage figure of \$8,696.00 is in error. The correct figure is \$7,373.83. Consequently, the total figure for the award *exclusive of prejudgment interest and costs* is as follows:

| | |
|---|-----------------|
| Claim for loss of care, guidance and companionship to Walter Simpson | \$10,000.00 |
| Less 60 % contributory negligence | (6,000.00) |
| Total | \$4,000.00 |
| | |
| Loss of care, guidance and companionship to Emma Simpson | \$10,000.00 |
| Less 60 % contributory negligence | (6,000.00) |
| Total | \$4,000.00 |
| | |
| Special Damages as agreed to between the parties | 7,373.83 |
| Less 60 % contributory negligence | (4,424.30) |
| | <u>2,949.53</u> |
| Total | \$10,949.53 |

[3] The Defendant made four formal offers to settle:

- (1) July 27, 2005 - \$13,000.00 all inclusive;
- (2) November 1, 2005 - \$10,000.00 exclusive of prejudgment interest and costs;

- (3) February 13, 2006 - \$12,000.00 exclusive of prejudgment interest and costs;
- (4) March 1, 2006 - \$20,000.00 all inclusive.

[4] The Plaintiff rejected these offers and counter offered:

- (1) August 11, 2005 - \$30,000.00 plus disbursements of \$6,514.32;
- (2) November 14, 2005 - \$25,000.00 plus \$5,000.00 disbursements.

[5] The trial proceeded in Sydney on February 20 and 21, 2006, and then adjourned until March 3 in order to hear the expert evidence in Halifax. The Defendant's offer of February 13, 2006 thus fails to comply with the "at least seven days" requirement of Rule 41A.09(2). Despite that fact, I have discretion under Rule 41A.11 to take *any* offer into account. Rule 41A.11 reads:

"Notwithstanding the provisions of this rule, the court, in exercising its discretion as to costs, may take into account any offer to settle made in writing, the date the offer to settle was served, the terms thereof and any other relevant matters."

[6] Accordingly, it is appropriate that I consider both the February 13 and the March 1 offers. These offers demonstrate that the Defendant made reasonable efforts to avoid this costly litigation. It would appear that the Plaintiff failed to recognize the likelihood that Mrs. Simpson would be found at least 50 percent liable for the accident. With respect, given the evidence of the Plaintiff's own

expert that Mrs. Simpson could have avoided the collision, the Plaintiff's position was unrealistic.

[7] I therefore accept the Defendant's submission that costs of \$2,250.00 (Tariff A Scale 3) be split between the parties. The Defendant claims disbursements of \$1,745.20 to cover Counsel's expenses to attend trial. I do not allow this claim. The Defendant chose to use out-of-town Counsel for a Sydney case. The Defendant thus bears that expense.

[8] The Defendant submits that certain disbursements by the Plaintiff be disallowed. I agree that the \$143.75 to C.R. Tyner, an accident reconstructionist not used at trial, be disallowed. Counsel also says that \$700.48 in fees from Dennis Miller should be denied. The measurements and sketch done by Mr. Miller no doubt reduced the time spent at the scene by Mr. Zwicker. I would allow \$350.00. I also agree that the \$122.95 regarding David Campbell and \$52.40 to serve Mr. Zwicker should not be allowed. The \$500.00 witness fee to Ken Zwicker, paid after the February 13 offer, is also denied.

[9] The Plaintiff's disbursements are allowed at \$6,206.97 (\$7,3676.55 - \$1,169.58), and 40 percent of that amount is \$2,482.78. In summary, the final calculation is as follows:

| | To Plaintiff | To Defendant |
|--|--------------------|--------------|
| Judgment | \$10,949.53 | |
| Costs | 1,125.00 | 1,125.00 |
| Disbursements | 2,482.78 | 1,050.00 |
| Interest on loss of care, guidance and companionship (\$8,000.00 x 2.5% x 3.3 years) | 660.00 | |
| Interest on special damages (\$2,949.53 x 5% x 3.3 years) | 486.67 | |
| Total | \$13,528.98 | |

Order accordingly.

J.