CITATION: *Armstrong v. Lakeridge Resort Ltd.*, 2017 ONSC 6565
COURT FILE NO.: CV-13-81933
DATE: 20171106

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Kyle Armstrong and Koreen Armstrong Plaintiffs	)	D. Harvey and P. Esfandiari, for the Plaintiffs
– and –	)	
Lakeridge Resort Limited Defendant	)	E. Chadderton, for the Defendant
	)	**HEARD:** October 11 2017

SALMERS, J.

RULING ON COSTS

[1] After a jury trial, the plaintiffs recovered damages of $68,250. Both counsel concede that there are no offers to settle that engage Rule 49 and that the plaintiffs are entitled to their partial indemnity costs. The dispute is over the amount of those costs.

[2] The plaintiffs' ultimate position was that their costs should be fixed at $128,617 all-inclusive, being approximately $74,000 plus HST for fees and approximately $39,500 plus HST for disbursements.

[3] Relying on Rule 76.13(2) and (3), the defence firstly submitted that because the amount recovered was less than $100,000, no costs should be awarded because it was not reasonable for

the plaintiffs to proceed with this action using the ordinary procedure instead of the simplified Rules. For the following reasons, I reject this submission.

[4] While the jury award was less than $100,000, the award would have been far greater than $100,000 if the jury had awarded rather modest damages for the plaintiff Kyle Armstrong's loss of income claim. This loss of income claim was supported by the evidence of three expert witnesses called by the plaintiffs, namely, Dr. Fern, Joel Kumove, and Ian Wollach. Further, there was some evidence of experts called by the defence that could have been used by the jury to support an award for loss of income. Although, after hearing the evidence, it was open to the jury to dismiss the loss of income claim, it also would have been reasonable for the jury to find that there was a very significant loss of income claim. If the jury had awarded damages for loss of income, the award would have been far greater than $100,000. In these circumstances, I am satisfied that it was reasonable for the plaintiffs to commence and continue the action using the ordinary procedure. Accordingly, Rule 76.13(3) is not engaged in this case.

[5] In the event of this ruling, the defence position was that the plaintiffs' partial indemnity costs and disbursements should be fixed at $85,000 all-inclusive, being $60,000 all-inclusive for fees and $25,000 all-inclusive for disbursements.

[6] The Rule 57.01 factors must be considered. However, before doing so, there are matters on which I must comment.

[7] Assessment and fixing of the plaintiffs' costs were made very difficult by the fact that plaintiffs' counsel did not docket their time as work was being done. Instead, it was only during preparation for this costs hearing that plaintiffs' counsel estimated the time spent on some items of work, and even this estimation was often very vague. Assessment and fixing of costs was further complicated by the fact that plaintiffs' counsel did not prepare a costs outline as is required by the Rules.

[8] This was a straightforward personal injury trial that involved only average legal and factual complexity.

[9] Compensation for physical injuries and loss of income-earning capacity are always important to a plaintiff. Money payable for such claims is similarly important to a defendant, particularly if, as in this case, the amount claimed is substantial.

[10] Both counsel conceded that no party's conduct was improper as contemplated in Rule 57.01(g).

[11] Contrary to the defence submission, I do not fault the plaintiff, Kyle Armstrong, for refusing to admit that he suffered no loss of income-earning capacity. That was a central issue, and subject of the trial. As stated earlier, there was substantial evidence to support his position on that claim.

[12] I will next consider the rates charged, the work done, and disbursements. In this analysis, I will by necessity consider the success at trial and apportionment of liability.

[13] Both plaintiffs and the defence employed two lawyers at trial. Accordingly, I am satisfied that it was reasonable and necessary for the plaintiffs to have employed two lawyers at trial.

[14] However, there are several factors that give rise to deductions from the amounts claimed by the plaintiffs. Some, but certainly not all, of these may have been taken into account by plaintiffs' counsel when he stated the plaintiffs' ultimate position on costs at the costs hearing.

[15] At the costs hearing, plaintiffs' counsel acknowledged that the rate claimed for junior trial counsel was a little too high. Accordingly, there must be some reduction in the amount claimed by the plaintiffs for costs.

[16] Also, I am not persuaded that it was necessary for either party to have further support personnel assisting at trial. Therefore, the amount claimed by the plaintiffs for Vera Johnson's trial time will not be allowed.

[17] Plaintiffs' counsel also acknowledged that there had been some duplication of work done due to the transfer of the file from the solicitor having carriage, Jane Conte, to the trial counsel, Don Harvey.

[18] Since the commencement of this action and at trial, a significant amount of work and time was spent by plaintiffs' counsel dealing with Kyle Armstrong's loss of income-earning capacity claim. That claim was totally dismissed by the jury. Accordingly, there must be an adjustment from plaintiffs' counsel fees to take this into account.

[19] I am not satisfied that Dr. Fern's fees were excessive. However, no costs will be awarded for expenses relating to Joel Kumove and Ian Wollach. Their expert evidence solely supported Kyle Armstrong's loss of income-earning capacity claim that was entirely denied by the jury.

[20] Considering what transpired in this case, and after examining the disbursements, I am satisfied that there were some excessive claims for fax, photocopies, file storage, scanning, and software for which the disbursements must be reduced. Further, the travel expenses are not allowed.

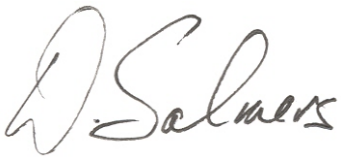
[21] Relying on *Markovic v. Richards et al*, 2015 ONSC 6983 (CanLII), defence counsel submitted that the plaintiffs' disbursement for costs insurance should not be allowed. With respect, I disagree. In this case, the costs of advancing even the claims on which the plaintiffs were successful were extremely large. Also, in general, even the strongest claim of a plaintiff may not be successful depending on how the evidence comes out and how it is perceived by a trier of fact. Without costs insurance, the fear of a very large adverse costs award would cause many plaintiffs of modest means to be afraid to pursue meritorious claims. It is in the interests of justice that plaintiffs be able to pursue meritorious claims without fear of a potentially devastating adverse costs award. Additionally, I am satisfied that it was reasonable for the plaintiffs to have advanced their claims as they did because there were genuine triable issues on all claims that were advanced. Accordingly, the claim for the costs insurance premium will be allowed.

[22] Lastly, I must consider the fair and reasonable amount, in all the circumstances, that the defendant, as the unsuccessful litigant, could expect to pay for the plaintiffs' costs of the action, including the trial. Considering all of the reasons and factors discussed above, I find that the fair and reasonable amount payable by the defendant for the plaintiffs' costs of the action, including the trial, is as follows:

a) For fees $58,000 plus HST; and

b) For disbursements $28,000 plus HST.

Judgment to go accordingly.



Justice D. Salmers

Released: November 6, 2017