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COURT FILE NO.: 97-CU-125433CM
DATE: 20030331

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: EDWARD VAN DYKE and DOROTHY VAN DYKE v. THE GREY BRUCE REGIONAL HEALTH CENTRE, ALEXANDER MARSH, J. OSTRANDER, JOHN DOE, GREY-BRUCE HOME CARE PROGRAM and VICTORIAN ORDER OF NURSES

BEFORE: MacKENZIE J.

COUNSEL: Mr. M. Solmon, Mr. H. David, for Mr. Bogoroch, of trial counsel for plaintiffs/responding party

Mr. D. Cormack, for Mr. Brown, of trial counsel for Defendant VON moving party

Mr. T. Forbes, for Mr. J. Lisus and Mr. T. Sutton of trial counsel for Defendants, Marsh and Ostrander

E N D O R S E M E N T R E C O S T S

[1] By endorsement dated the 29th of October, 2002, (the Ruling on the *Mary Carter* agreement), I dismissed a motion in which the VON sought a finding as to the existence and enforceability of an alleged *Mary Carter* agreement between the VON and the plaintiffs.

[2] In an earlier endorsement dated the 4th of October, 2002, (the Ruling on Privilege Issues) I addressed the question whether certain documents – affidavits of counsel for the plaintiff and some data stored in the computer hard drive of

one of the plaintiff's counsel – were subject in whole or in part to non-disclosure on the basis of solicitor/client and litigation privilege. I ruled that some of the information and data for which privilege was claimed was subject to disclosure in order that the hearing of the question on the existence and enforceability of the *Mary Carter* agreement could proceed. In paragraph 14 of the Ruling on Privilege Issues, I dealt with costs as follows:

> The costs of this component of the hearing will be addressed at the same time as the costs of the hearing in the *Mary Carter* agreement issue. The costs claimed by Mr. Forbes on behalf of the defendants counsel, Messrs. Lisus and Sutton, will be the subject of written submissions, following the conclusion of the hearing on the *Mary Carter* agreement issue.

[3] In the Ruling on the *Mary Carter* agreement, I directed that written submissions on costs be made from the parties to the issue and from Mr. Forbes on behalf of Messrs. Lisus and Sutton according to a schedule set out in paragraph 55 of the Ruling. I subsequently received from Mr. Forbes a letter dated the 13th of November, 2002 wherein he requested that the costs of the defendant physicians issue "be left to the discretion of the learned trial judge".

[4] Upon further reflection, I decline to leave that aspect of the costs issues with the trial judge; I believe that I am in the best position to deal with those issues and I shall do so on the terms set out hereunder.

[5] I have received voluminous submissions from counsel on behalf of the plaintiffs' trial counsel and from counsel on behalf of the VON's trial counsel. I have reviewed these submissions, including the Bills of Costs and the authorities cited by the parties. I have also re-read my Rulings on Privilege issues and the *Mary Carter* agreement.

[6] I have concluded that notwithstanding a dismissal of the VON's motion seeking a finding as to the existence and validity of the *Mary Carter* agreement, this is a situation in which each party should bear its own costs on the Privilege and the *Mary Carter* agreement issues. The reasons for this conclusion are set out below, in detail.

[7] I have reviewed in detail my bench book notes and both the Ruling on Privilege issues and the Ruling on the *Mary Carter* agreement. I find the circumstances outlined in paragraphs 6, 7, 21, 24 and 31 of the latter Ruling to be compelling in reaching my conclusion.

[8] I find that Mr. Bogoroch on behalf of the plaintiffs "jumped the gun" on the question of a settlement, i.e. a *Mary Carter* agreement with VON, and that Mr. Brown on behalf of VON was also "too quick off the mark" in treating the comments of Mr. Bogoroch as indicating a settlement had been reached. In this latter regard, Mr. Brown's misapprehension was understandable. Mr. Lisus, on

behalf of the defendant doctors although not directly involved in the negotiations, was also of the view that a *Mary Carter* agreement between the plaintiffs and the VON had been "reached". This view was derived from information obtained from Mr. Bogoroch and his associates: see paragraph 12 of the Ruling on the *Mary Carter* agreement.

[9] I am thus left with the impression that both Messrs. Bogoroch and Brown, together with their respective associates, were in the early stages of the discussions and negotiations on the morning of September 26th, 2002 and they were on the verge of concluding a *Mary Carter* agreement. I am further left with the impression that following the verbal exchanges between Messrs. Bogoroch and Brown at approximately 11:45 a.m. on September 26th Mr. Brown and his associate, erroneously or not, continued to be under the mistaken impression that a consensus had been achieved until their return from the luncheon break at approximately 2:00 p.m. when Mr. Brown was told unequivocally that there was no *Mary Carter* agreement from the viewpoint of the plaintiffs.

[10] In these circumstances, Mr. Brown's motion for a ruling on the existence of a *Mary Carter* agreement is perfectly understandable. The fact that the motion was not successful does not necessarily engage the customary disposition that costs follow the event. It must be remembered that the conduct of Mr. Bogoroch

was the catalyst for the position taken on behalf of Mr. Brown on the motion. When one takes into account the understanding of Mr. Lisus, derived from information supplied by Mr. Bogoroch and/or his associates, that there had been a *Mary Carter* agreement reached between the plaintiffs and the VON, Mr. Brown's position on the motion becomes all the more tenable.

[11] I am persuaded the factual background to the VON motion outlined above and in my Ruling on the *Mary Carter* agreement operates to displace the normal result of costs following the event. As previously noted, both Messrs. Bogoroch and Brown by their conduct at the material time contributed to the motions respecting both the Privilege and the *Mary Carter* issues proceeding in the fashion that they did. I am satisfied that this is an appropriate case in the exercise of the court's discretion respecting costs under s.131 of the *Courts of Justice Act* to direct there be no costs of the motions. I deem it appropriate that each of the parties should bear their own costs.

[12] I make this ruling despite the submission on behalf of Mr. Bogoroch that there was a Rule 49 offer extant at the material time. I accept the VON submissions that the plaintiffs' written offer to settle did not comply with the provisions of Rule 49.10(1)(a) and that the terms of the offer were not "fixed, certain and understandable". In any event, I consider this case to have such

exceptional circumstances that the interests of justice require a departure from the consequences of failure to accept an offer to settle set out in R.49.10(1).

[13] I have referred above to the position of Mr. Forbes respecting the costs issues on behalf of Messrs. Lisus and Sutton who testified on the hearing of the *Mary Carter* agreement issue.

[14] As I have noted, it is inappropriate to have the costs issues disposed of by the trial judge. I shall deal with those issues. In this regard, I will entertain a brief written submission by Mr. Forbes, to be delivered within 10 days following the date of issuance of this endorsement; written response(s) by the party/ies against whom any claim for costs is made shall be delivered within 7 days of the date of receipt by such parties/ies. Mr. Forbes' submissions; and reply, if any, to such responses shall be delivered within 7 days following the date of receipt of response(s).

MacKENZIE J.

DATE: March 31, 2003

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ENDORSEMENT RE COSTS

MacKENZIE J.

DATE: March 31, 2003