COURT FILE NO.: 97-CU-135410
DATE: 20041104

ONTARIO

SUPERIOR COURT OF JUSTICE

2004 CanLII 35085 (ON S.C.)

B E T W E E N:	
JENNIFER-ANNE COWLES, JESSE COWLES, a minor by his Litigation Guardian, Jennifer-Anne Cowles, QUINTON COWLES, a minor by his Litigation Guardian, Jennifer-Anne Cowles and ANNE KELLY	*L. Craig Brown*, for the Cowles Family Members as Plaintiffs
Plaintiffs	
- and -	
DAVID BALAC, RANKO BALAC and THE AFRICAN LION SAFARI & GAME FARM LTD.	*J.A. Soule*, for David Balac and Ranko Balac, as Defendants *Douglas Wright* and *Martin Smith*, for The African Lion Safari & Game Farm Ltd.
Defendants	

COURT FILE NO.: 98-CV-139448

BETWEEN:	
DAVID BALAC, RANKO BALAC, SLAVA BALAC and SANDRA BALAC	*B. Haines, Esq., Q.C.*, *D. Christie* and *O. Jasen*, for the Balac Family Members as Plaintiffs
Plaintiffs	
- and -	
AFRICAN LION SAFARI & GAME FARM LTD. and LIBERTY MUTUAL INSURANCE COMPANY	
Defendants	

COURT FILE NO.: 98-CV-139448A

2004 CanLII 35085 (ON S.C.)

BETWEEN:	)	
	)	
DAVID BALAC, RANKO BALAC, SLAVA BALAC and SANDRA BALAC	)	
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
AFRICAN LION SAFARI & GAME FARM LTD. and LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Defendants	)	
	)	
- and -	)	*D. Rollo*, for Jennifer-Anne Cowles as Defendant-by-Counterclaim and Third Party
JENNIFER-ANNE COWLES	)	
	)	
Third Party	)	
	)	**HEARD:** November 2, 2004

MacFarland J.

RULING

[1] The defendant ALS moves for leave to introduce the evidence of Dr. Jacques Kaandorp, Mr. Raymond Sutton and Mr. Barry Raftery at trial. Leave is required because the reports of these three experts were not served at least sixty days before the commencement of the trial as is required by Rule 53.03(2).

[2] The Kaandorp and Sutton reports dated respectively October 20, 2004 and October 24, 2004 were prepared in response to the plaintiffs' expert report of Robert Lawrence which is dated November 26, 2001 and served on the defendant ALS by letter dated January 6th, 2004.

[3] These reports are liability reports that consider the required standard of care in the operation of facilities such as the ALS theme park, give opinions with respect to tiger behaviour and comment on the appropriateness of the response made to the incident by the park's employee, Dawn Kedge.

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[4] In April 2004, Mr. Wright on behalf of ALS retained Brian Hunt to respond to the Lawrence report. Mr. Wright followed up from time to time and was assured a report would be in his hands by the end of August, 2004 when it would be required to comply with Rule 53.03(2). In fact Mr. Hunt never did deliver a report. It is thought he may have had health problems.

[5] By July or August 2004, according to the affidavit of Martin Smith, sworn November 1, 2004, Mr. Wright became concerned and began to look for an alternative expert. At the beginning of September 2004 he was made aware of Dr. Kaandorp, who lives in Holland, and soon after retained him. Dr. Kaandorp's report is dated October 20, 2004 and was served on October 27, 2004.

[6] According to Mr. Smith's affidavit, about the time Mr. Wright began to look for an alternate expert in place of Mr. Hunt, Mr. Hunt arranged for his associate Mr. Sutton to attend the ALS site on August 23, 2004 to prepare a report for ALS. Mr. Smith further states that Mr. Wright had difficulty communicating with Mr. Sutton who did not deliver his report until October 24, 2004.

[7] It is not clear whether or not Mr. Wright was aware of Mr. Hunt's request to Mr. Sutton, sometime before August 23, 2004, to do the report that he (Hunt) had been asked to do.

[8] In any event, it appears that Dr. Kaandorp was retained in place of Mr. Hunt and to do the report Mr. Wright feared Mr. Hunt would or could not complete.

[9] The Raftery report is responsive to a report prepared on behalf of the plaintiffs by Walters Forensic Engineering dated November 29th, 1996. The Walters report offers an opinion for how the tigers could have gained access to the interior of the vehicle without either of the plaintiffs' windows having been open. Raftery delivered an initial report dated August 14, 1998 in response to the Walters report. There is no difficulty in respect of the earlier report.

[10] After the close of court on Monday, November 1st, 2004 Mr. Raftery delivered to counsel for ALS a supplementary report dated November 1st, 2004. Mr. Wright in response to my direct question stated that he did not solicit the report from Mr. Raftery.

[11] While the gist of the Raftery report may generally be described as confirmatory of his earlier report, it is far more than that. The November 1, 2004 report details of specific testing done on October 25th, 2004 all of which was recorded. A car door from a vehicle of the same year and model of vehicle as the plaintiffs were in, had been acquired by Mr. Raftery from an auto wrecker and various tests were conducted.

[12] The report details the discovery evidence of both David Balac and Jennifer-Anne Cowles in relation to the windows – both passenger and driver side before, during and after the attack.

[13] In his initial report dated August 14, 1998 Mr. Raftery describes his assignment to include:

1. How does the power window system in the vehicle in question operate, and does it operate as it is designed to do?

2. Is it possible for the tigers to open the windows of this vehicle if the windows were fully-closed or partially open?

3. Is there any physical evidence to suggest that the tiger(s) could have pulled a (fully-closed or partially open) window down from the exterior of the vehicle?

4. How was the window (were the windows) of the vehicle in question lowered, at the time of the April 19, 1996 incident?

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[14] In his report he answers these questions. In the November 1st report he describes the recent testing on similar doors, the results of which confirm his earlier opinion.

[15] The difficulty here arises because of the lateness of the delivery of these reports.

[16] The case was originally scheduled to proceed to trial in November, 2003. It was adjourned on consent to accommodate a scheduling conflict which Mr. Wright, counsel for ALS had. The earliest next date was November 1st, 2004.

[17] Counsel for the plaintiffs while objecting to the defendants' ability to deliver these reports all say that an adjournment is "absolutely" out of the question and even if I grant leave they do not under any circumstances want an adjournment. The two primary plaintiffs I am told have been diagnosed with post-traumatic stress syndrome as the result of this incident. It is particularly difficult for them to re-live the experience as they must during a lawsuit. They have had to endure the "re-living" at examinations for discovery and have had to do so in preparation for trial. Any adjournment would represent extreme hardship for them. In addition this matter is now some eight and one half years after the incident and any adjournment, because of the anticipated required trial time, would necessarily be a lengthy one.

[18] Rule 53.08 provides that where evidence is admissible only with leave of the trial judge such leave

> …shall be granted on such terms as are just and with an adjournment if necessary unless to do so will cause prejudice to the party or will cause undue delay in the conduct of the trial.

[19] This rule has been interpreted to mean

> …a trial judge must grant leave unless to do so would cause prejudice that could not be overcome by an adjournment or costs.

See *Marchand (Litigation Guardian of)* v. *Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97 (C.A.).

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[20] There is obvious prejudice to the plaintiffs occasioned by the late delivery of these reports. They are faced with three very recent reports which contradict the opinions of their experts. The obvious remedy is to afford the plaintiffs the necessary time to consider these reports with their own experts and determine their course of action. They may wish to solicit responding opinions from their experts and/or to retain an additional expert. Any additional or extra expense to which the plaintiffs' are put in responding to the "late" reports is compensable in costs payable by the defaulting party ALS.

[21] The fact that the plaintiffs do not "under any circumstances" want the trial of this action delayed, while understandable, cannot be the basis for refusing leave in circumstances where it would otherwise be granted.

[22] Ordinarily, I would give leave to ALS to serve the late reports and adjourn the trial to permit the plaintiffs an adequate time to respond and award them costs thrown away. The reality, which the plaintiffs appreciate, is that any adjournment of this case – on the present state of the long trial list at Toronto – is likely to be a considerable one. The case is already old and the plaintiffs' mental health will not be helped by a delay.

[23] I will grant leave to ALS to introduce the evidence of Mr. Raftery and either Dr. Kaandorp or Mr. Sutton. It appears that Dr. Kaandorp was retained in place of Mr. Hunt. Although not perfectly clear on the record before me, it seems it was Mr. Hunt who retained Mr. Sutton. It further seems ALS were unaware that Mr. Hunt had done so until after they had engaged Dr. Kaandorp. As I say the record could and should have been clearer. The reports of both Sutton and Kaandorp cover the same area and are in essence duplicative. One expert to contradict the plaintiffs' one expert on this aspect is sufficient. I leave it to counsel for ALS to choose which expert they will proceed with and they are to make their choice known to counsel for all plaintiffs by 4:00 p.m. Friday, November 5th, 2004.

[24] In addition, the following terms will apply:

1. The defendant ALS is to forthwith provide to all other parties a copy of the report of Steve Ashbee, Head Game Warden of ALS dated February 17, 2004 which report is referenced in both Mr. Sutton's and Dr. Kaandorp's reports;

2. The plaintiffs shall have leave to serve a responding report or reports to the ALS expert reports which are the subject of this motion, if so advised;

3. All reasonable costs associated with the production of such responding reports prepared on the plaintiffs' behalf including all reasonable travel expenses shall be for the account of the defendant ALS. Such costs will be fixed by me at the conclusion of this trial and will be awarded to the plaintiffs in any event of the cause and will include the costs of this motion.

[25] Any other terms that may be required and become apparent as the trial progresses as the result of this ALS transgression, may be addressed if and when they arise.

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Released: November 4, 2004