

CITATION: Osman v. Ghanizada, 2014 ONSC 4199
COURT FILE NO: CV-10-409225
DATE: 20140717

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Farhia Osman, Plaintiff

AND:

Abdulmatin Ghanizada, Defendant

BEFORE: Madam Justice L.B. Roberts

COUNSEL: Mohamed Doli and Davies Bagambiire, for the Plaintiff

Brian Yung, for the Defendant

COSTS ENDORSEMENT

Overview:

- [1] This Endorsement disposes of the costs of this action.
- [2] On June 16, 2014, following a trial by jury, the plaintiff's action was dismissed.
- [3] The defendant seeks his costs of this action on a partial indemnity basis. As acknowledged by plaintiff's counsel, the defendant having been successful in his defence of this action, there is no reason to depart from the usual rule that costs should follow the event and be awarded to the successful party, in this case, the defendant. The plaintiff took no issue with the hourly rates claimed by the defendant.
- [4] The question is the amount of partial indemnity costs to be awarded to the defendant.

General Principles:

- [5] In conjunction with the general principles set out in rule 57.01 of the *Rules of Civil Procedure*, the overarching criteria to be applied in the exercise of the court's discretion to award costs under section 131 of the *Courts of Justice Act* are that costs should be fair, reasonable and proportionate in the particular circumstances of the particular case.
- [6] Further, the purpose of an award of partial indemnity costs is not to provide full costs indemnification to a successful party but indemnification for only a part or a proportion of the fair, reasonable and proportionate expense of the litigation, which is within the reasonable contemplation of the parties.
- [7] With these basic directives in mind, I turn to the actual costs claimed in this action by the defendant,

Defendant's Costs and the Plaintiff's Position:

[8] In his costs outline, the defendant's costs are \$100,036.97 for fees (including a counsel fee for appearance at trial) and \$48,059.19 for disbursements, plus the applicable HST.

[9] The plaintiff argues that the defendant's costs are excessive and should be reduced, for the following reasons:

- i. There was duplication of effort by the lawyers, law clerks and students in carrying out certain steps in these proceedings and too much time spent on certain tasks.
- ii. No costs should be awarded for the first two days of trial which were spent on the plaintiff's motion for late admission of experts' reports and the bifurcation of the trial on the issues of liability and damages.
- iii. The defendant's costs should be reduced by 50% to account for the additional expense caused by the defendant's conduct concerning his different versions about the motor vehicle accident in issue in these proceedings.

[10] With respect to the interlocutory motions for which the defendant claims costs in his costs outline, upon review of the respective orders of Masters Hawkins and Abrams, there was no dispute that the costs of these motions were disposed of in accordance with the terms of the orders:

- i. By his Order dated May 11, 2012, Master Hawkins ordered that there be no costs of the respective motions brought by the plaintiff and the defendant because of the divided success achieved on these motions. Accordingly, the defendant withdrew his request for costs of these motions. Any costs related to these motions, including research, are therefore not allowed.
- ii. By her Order dated March 27, 2014, Master Abrams ordered that the costs of the defendant's motion to obtain an abridgment of time for service of expert reports and to compel the production of documents from non-parties be in the cause. The plaintiff conceded that, given the defendant's success at trial, the defendant is entitled to his reasonable partial indemnity costs of that motion. The defendant asked for \$500.00 plus disbursements of \$138.00, to which plaintiff's counsel did not object. That amount is fair and reasonable and is granted to the defendant.

Analysis:*Duplication of Effort and Excessive Time:*

[11] Over the course of this matter, there were eight lawyers, plus law clerks and students-at-law, whose time is recorded in this matter on behalf of the defendant.

[12] The delegation of effort to more junior lawyers in relation to appearances on motions and scheduling court, and to law clerks and students-at-law in the discovery process, was completely appropriate and necessary, because these are tasks within their ability and do not justify the higher rates of more experienced lawyers.

[13] There is, however, the unexplained time of lawyers and staff on steps that do not appear to warrant their additional presence. In particular, the junior law clerk's time in the initial file opening category seems to be administrative or overhead, which should be captured in the lawyers' hourly rates; the junior law clerk's time on the mediation and pre-trial conference seems duplicative and unnecessary; and similarly, on the pre-trial conference, there is no explained necessity for two lawyers' attendance.

[14] One of the explained reasons for the number of lawyers on this file, in particular, with respect to the five lawyers who assisted in trial preparation, was because the initial lawyer who had carriage of the defendant's file had two personal leaves from the firm. While the leaves were completely appropriate and legitimate, they necessarily resulted in duplication of effort in that the other lawyers had to familiarize themselves with and maintain the file during Ms. Chandler's first absence, Ms. Chandler had to bring herself up to date when she returned to the firm and re-assumed carriage of the file, and then Mr. Yung, as trial counsel, had to prepare the file for trial.

[15] This duplication of effort was not caused by the plaintiff and the plaintiff should not be obliged to pay any costs related to it. The defendant's costs should be reduced to account for the unnecessary duplication among the lawyers on this file.

Preliminary Trial Issues:

[16] At the opening of the trial of this action on June 2, 2014, the plaintiff brought a motion for the late filing of experts' reports and for leave to call more than three experts. The defendant also sought leave to file the reply report of one of his experts, Sam Kodsi, and to render Dr. Soric's reports compliant with the provisions of rule 53 of the *Rules of Civil Procedure*.

[17] With the exception of Dr. Shane's report, by the end of the day, the parties, to their great credit, had resolved the plaintiff's and defendant's motions on consent. I did not allow Dr. Shane to be called as an expert witness for the reasons given orally on June 2, 2014.

[18] These motions could have been brought before the opening of trial. If I had heard these motions before trial, given the outcome, I would have awarded costs in the cause because they were heard and resolved in the manner of a mediated case conference. As a result, the defendant is entitled to the costs of the first day of trial, as it was a necessary part of the trial process.

[19] The second day of trial, June 3, 2014, was taken up with the parties' discussions of the bifurcation of the issues of liability and damages. The catalyst for these discussions was my assessment that the parties had greatly underestimated the time required for trial and that it was not possible to have the matter tried by a jury in 14 days. Again, to their great credit, the parties proposed bifurcating the issues of liability and damages.

[20] The discussions of June 3, 2014 were in the nature of an extended trial management case conference. As such, the time spent on the second day of trial was part of the trial process. The defendant is entitled to his reasonable costs of June 3, 2014.

Defendant's Conduct:

[21] Pursuant to rule 57.01(1)(e) of the *Rules of Civil Procedure*, the conduct of any party that tended to lengthen unnecessarily the duration of the proceeding may be considered in the exercise of the court's discretion to award costs.

[22] The evidence at trial revealed that the defendant had given different versions about where he said that the accident with the plaintiff occurred.

[23] Defendant's counsel fairly conceded that the confusion over the defendant's versions about where he said that the accident occurred did result in some additional time and expense which would not have been incurred had the defendant's version of events given at trial been asserted clearly from the beginning of this matter. Mr. Yung proposed a 5 to 10% reduction in the defendant's costs to account for the additional time and expense.

[24] Mr. Yung submitted that the clarification of the defendant's evidence had negligible effect on Mr. Kodsi's fees because the change in the defendant's evidence did not affect the expert's opinion, which remained the same in both versions of the September 25, 2012 report. Mr. Yung estimated that only 1 hour of the expert's time was required to correct the narrative of the defendant's evidence in the expert's report.

[25] While the confusion over the defendant's version of events was likely caused by the defendant's limited English ability, the defendant's different versions about where the accident occurred increased the time and expense of this action beyond the estimate suggested by defence counsel.

[26] The credibility of the plaintiff and defendant was crucial in this case. The contradictions in the defendant's versions of events rendered useless much of his examination for discovery and necessitated a lengthy cross-examination at trial by plaintiff's counsel. Although the change in the defendant's versions about where the accident occurred did not ultimately affect the opinion of the defendant's accident reconstruction expert, the change in the factual underpinnings of his report had to be explored in an extensive cross-examination by plaintiff's counsel.

[27] While I agree that the defendant's different versions about where the accident occurred increased the time spent in this action before and at trial, putting the effect of the defendant's different versions into context, it must be remembered, however, that the defendant prevailed in this action. This means that the jury must have accepted or at least not completely rejected the defendant's version of events at trial, notwithstanding the earlier contradictory versions.

[28] In consequence, I find that, while a significant reduction of the defendant's costs should be made, it would not be fair, reasonable or proportionate to reduce the defendant's overall costs by 50% because the costs of this action were not increased by 50% as a result of the defendant's different versions about where the accident took place.

[29] For all of these reasons, I find that the amount of \$50,000.00 for the defendant's claimed fees, including HST, is fair, reasonable and proportionate in the circumstances of this case.

Disbursements:

[30] As already noted, the plaintiff's action was dismissed. As a result, there will be no trial with respect to the issue of damages. The defendant is entitled to all of his reasonable and

necessary disbursements for the entire action, which include disbursements related to the issue of damages.

[31] With respect to "Appendix A – Disbursements", I note that the applicable HST has been mistakenly added twice to some of the disbursements, for example, "Dr. Richard Herschberg Addendum - \$500.00". I have made the correction where applicable.

[32] I do not allow the amount of \$4,937.70 incurred for "Investigation/surveillance". There was no stated intention of calling any witness with respect to any investigation or surveillance that was undertaken by the defendant. As a result, this expense was not necessarily incurred for this action.

[33] The amount for photocopying of \$1,213.50 includes photocopying of materials used on the motions before Masters Hawkins and Abrams. I would allow \$600.00 plus HST.

[34] I reduce to \$224.00 the amounts claimed for official transcripts and court reporting and I deduct the amount of \$220.00 from the cost of interpretation services for Mr. Ghanizada's examination for discovery to reflect the effect of the defendant's incorrect version of events.

[35] The process serving and motion filing fees for the motions are reduced to \$138.00 to reflect the Orders of Masters Hawkins and Abrams and the agreement of counsel. I allow filing and process serving fees for the statement of defence in the amount of \$500.00.

[36] The plaintiff takes particular issue with the amounts claimed for the defence medical experts' fees for their examinations of the plaintiff, where conducted, and their reports, and in relation to Mr. Kodsi's fees for his reports and his attendance at trial.

[37] I do not find the fees charged by the defence medical experts to be excessive. The medical experts reviewed a considerable amount of documentation and conducted a full examination of the plaintiff. Their reports were thorough and well-written. I allow the costs claimed in full.

[38] With respect to the accounts submitted by Kodsi Engineering, it would have been helpful if the expert's fees had been particularized in the accounts.

[39] First, there is no explanation as to the meaning of "administrative services" or "reimbursable expenses". While they were undoubtedly incurred, without further particulars, I am unable to assess whether they are properly compensable as expert's fees as part of a party's partial indemnity costs. As a result, I do not allow these items.

[40] Further, there are no particulars in the Kodsi Engineering account statement of the \$15,776.25 in fees charged in the July 16, 2014 account, which are almost 3 times the amount of the September 27, 2012 account. Mr. Yung advised that the July 16, 2014 account is comprised of the expert's fees for the preparation of Mr. Kodsi's addendum report dated May 30, 2014, including another attendance for the purposes of accident reconstruction, as well as 4 days' attendance at trial. He also advised that Mr. Kodsi's hourly rate was \$250.00 in 2012 and \$300.00 in 2014.

[41] Mr. Bagambiire submitted that the amount of the July 16, 2014 account seems excessive given that the fees for the September 25 and 26, 2012 reports and the 2 to 3 attendances for accident reconstruction purposes were \$4,653.13 and Mr. Kodsi's hourly rate was \$250.00 in 2012 and \$300.00 in 2014.

[42] Given the work carried out, it is a reasonable assumption that the fees for the addendum and additional attendance should not have exceeded the fees for the September 25 and 26, 2012 reports and 2 to 3 previous attendances and should likely have been less. This would leave approximately \$12,000.00 for 4 days of trial attendance or about \$3,000.00 per day. At Mr. Kodsi's \$300.00 hourly rate, this would amount to 10 hours of attendance per day.

[43] In considering what expert fees would be fair, reasonable and proportionate, I am also mindful that Tariff A, section 28, provides that a reasonable amount for an expert's attendance, not exceeding \$350.00 a day, should be awarded, subject to increase in the court's discretion.

[44] Without any other particulars having been provided, the amount claimed in the July 16, 2014 Kodsi Engineering account seems excessive. I therefore reduce the Kodsi fees by \$3,600.00 plus HST.

[45] There must also be a reduction in the costs allowed to the defendant as a result of the increased time in Mr. Kodsi's cross-examination because of the defendant's different versions about where the accident took place. I reduce the fees by \$1,500.00 plus HST.

[46] As already noted, Mr. Yung fairly conceded that there would have been about 1 hour of time required by Mr. Kodsi to revised the defendant's incorrect version of events in Mr. Kodsi's second September 25, 2012 report. A reduction of \$250.00 plus HST should also be made to the Kodsi fees claimed.

[47] For all of these reasons, I allow the amount of \$30,034.78, including HST, for the defendant's disbursements for this action.

Conclusion:

[48] I find that the amounts of \$50,000.00 for fees and \$30,285.68 for disbursements, including HST, are fair, reasonable and proportionate, and should have been within the reasonable contemplation of the parties in this action.

[49] The plaintiff shall pay to the defendant the amount of \$80,285.68 within 60 days of today's date.



L.B. Roberts J.