CITATION: Dunk v. Kremer, 2017 ONSC 1547
COURT FILE NO.: CV-12-140
DATE: 20170307

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MEAGHAN DUNK and SHELBY DUNK, Plaintiffs

AND:

GEOFFREY MICHAEL KREMER, MATTHEW RUSHTON and ROBERT RUSHTON, Defendants

BEFORE: THE HONOURABLE MADAM JUSTICE S. E. HEALEY

COUNSEL: Robert Littlejohn and Marc Lemieux, Counsel for the Plaintiffs

Mary Teal, Counsel for the Defendants

HEARD: January 20, 2017

COSTS ENDORSEMENT

[1] The Court is required to award costs of this action and determine related matters, following a jury verdict rendered after a trial lasting three full weeks in May, 2016. The action arose from a motor vehicle accident that took place on July 4, 2010.

[2] The plaintiffs are sisters, the passenger and driver of the motor vehicle involved in the subject accident. The action is a consolidation of their initially separate claims, consolidated by court order on January 20, 2015. The trial began on May 16, 2016.

[3] Shelby Dunk's claim settled for $207,000.00 plus disbursements on May 17, 2016, the day after jury selection, but no agreement has been reached regarding disbursements. The defendants submit that her disbursements should be assessed by an assessment officer rather than being fixed by this court, relying on Rule 57.04. That Rule does not make an assessment mandatory in the event of a settlement. Further, by correspondence dated May 17, 2016, her counsel specifically referenced his understanding of an agreement between counsel whereby disbursements would be assessed by the trial judge if not agreed upon. The defendants' counsel has never challenged that understanding prior to raising it in the context of her argument on costs. In these circumstances, the most expeditious and least costly process of having the trial judge adjudicate on the disbursements relating to Shelby Dunk will be followed, which is also in keeping with the understanding reached by counsel at the time of settling her claim last year.

[4] The issues to be decided by the Court are:

(1) The amount of pre-judgment interest on the jury's general damage award for Meaghan Dunk;

(2) the amount, if any, of any deduction for collateral benefits to be made from Meaghan Dunk's award;

(3) the scale and quantum of costs to be awarded to Meaghan Dunk, plus disbursement; and

(4) the quantum of disbursements to be awarded to Shelby Dunk.

Pre-Judgment Interest

[5] Rule 53.10 prescribes a pre-judgment interest rate of 5 percent for non-pecuniary damages. The jury's general damage award for Meaghan Dunk was $225,000. The pre-judgment interest calculated by her counsel differs slightly in comparison to the defendants' calculation, but Ms. Teal stated her willingness to accept the figure provided by Mr. Lemieux. The pre-judgment interest award calculated to the date of the jury verdict shall be $64,541.

Deduction for Collateral Benefits

[6] Future health care is the only item for which the defendants seek a deduction under s. 267.8 of the *Insurance Act*, R.S.O. 1990, c. I.8.

[7] The jury made an award of $41,494.00 for future health care. It is the position of the defendants that that award should be reduced by $27,500.00 ($23,500.00 for past and future medical rehabilitation benefits and $4,000.00 for past and future attendant care benefits). These figures arise from Meaghan Dunk's settlement of her statutory accident benefits claim, reached on October 14, 2014, which amounts are set out in the resulting Settlement Disclosure Notice. It is the position of Meaghan Dunk that the defendants are not entitled to deduct these amounts from the final judgment awarded by the jury for future health care expenses.

[8] In seeking deductions under s. 267.8, the defendants have the onus of establishing beyond dispute that a deduction should occur: *Bannon v. Hagerman Estate,* [1998], 38 O.R. (3rd) 659 at para. 74 (C.A.).

[9] The most recent case regarding the interpretation of s. 267.8 of the *Insurance Act* is *Gilbert v. South*, 2014 ONSC 3485, aff'd 2015 ONCA 712. Although the defendants' counsel referred the court to the Divisional Court's ruling in *Mikolic v. Panguay*, 2016 ONSC 71, there is no indication in that Court's reasons of the fact that the decision of Justice Leach in *Gilbert v. South* had been commented upon favourably and affirmed by a unanimous panel of the Court of Appeal. *Gilbert v. South* is binding on this Court.

[10] Just as was the case in *Gilbert v. South*, the record does not allow this Court to conclude that Meaghan Dunk's future medical care benefits overlap with the jury's award for future care cost. As in *Gilbert*, as Meaghan Dunk has not claimed to be catastrophically impaired, her entitlement to medical and rehabilitation benefits could not extend beyond the earlier of the receipt of benefits totalling $100,000.00 or ten years from the accident date. In awarding damages for future health care, the jury was not asked to differentiate between medical and rehabilitation benefits and attendant care benefits, and was further not asked to quantify those expenses that might fall outside the prescribed limitation period for each benefit.

[11] Accordingly, I am unable to reach the conclusion that the defendant has satisfied the very strict onus as described in *Cowles v. Balac,* 2005 CanLII 2038, at para. 205, aff'd (2006) 83 O.R. (3d) 660 (C.A.) that the benefits received under the statutory accident benefits settlement truly overlap with the amounts awarded by the jury for future health care.

Costs and Disbursements to be Awarded to Meaghan Dunk

[12] The jury's verdict was for a total of $975,060, comprised of general damages in the amount of $225,000, future loss of income of $601,804, future healthcare expenses of $41,494, and housekeeping/home maintenance of $106,762.

[13] Meaghan Dunk has filed a detailed Bill of Costs, calculated on a partial indemnity scale to May 15, 2016, and on a substantial indemnity basis from May 16, 2016 onward, corresponding with the first day of trial. The fees, inclusive of HST, total $427,200. The position advanced on her behalf during argument was that she is seeking $350,000 plus HST, for a total of $395,500.

[14] The first issue is whether any of Meaghan Dunk's offers are to be taken into account. The defendants submit that there are no Rule 49 offers that would attract the cost consequences prescribed by Rule 49.10.

[15] On May 4, 2016 the plaintiffs served an offer to settle their combined claims for the sum of $975,000, plus prejudgment interest, costs and disbursements in an amount to be agreed upon or assessed. This offer withdrew all previous offers. The following day, the plaintiffs served an amended offer to settle their combined claims for the sum of $975,000 inclusive of prejudgment interest, with cost/disbursements to be agreed upon or assessed (the "Amended Offer"). This offer withdrew all previous offers.

[16] Meaghan Dunk's final offer was served on May 12, 2016, four days before the commencement of trial. She offered to settle her general damage claim for $120,000 and her special damage claim for $630,000, both inclusive of prejudgment interest, with costs and disbursements to be agreed upon or assessed (the "May 12 Offer"). The May 12 Offer did not revoke all previous offers, but instead included the following phrase: "This Offer to Settle is part of a breakdown of the plaintiffs' previous Amended Offer to Settle dated May 5, 2016, and is intended to run concurrently with this previous Amended Offer to Settle and the plaintiffs' previous Offer to Settle dated July 30, 2015." I do note that

the July 30 offer to settle was withdrawn by the offer of May 4, 2016, but this fact does not, in my view, affect the ultimate result.

[17] Shelby Dunk also delivered an offer to settle on May 12, 2016, in which she offered to settle her pecuniary and non-pecuniary claims for the total amount of $225,000, plus costs and disbursements to be agreed upon or assessed. It contained the same phrase referenced in the preceding paragraph and contained in Meaghan Dunk's May 12 Offer.

[18] The two separate offers of May 12, 2016 were sent to the defendants' counsel under cover of correspondence that stated:

> Please find enclosed two separate Offers to Settle (one for Shelby and one for Meaghan) which are intended to clarify and breakdown our previous Amended Offer to Settle, dated May 5, 2016, which combined the claims of both Plaintiffs. It is our intention that these Offers run concurrently with our previous Amended Offer to Settle and our Offer to Settle dated July 30, 2015.

[19] Notably, the separate offers made by Shelby and Meaghan Dunk on May 12, 2016 are the mathematical equivalent of their joint Amended Offer.

[20] In the normal course, an original offer does not continue to remain open for acceptance once a new offer is served by the same party: *Mills v. Raymond*, 1997 CarswellOnt 4075 (C.A.), at para. 6. Germane to the situation now before this Court, part of the majority's deliberations in *Mills v. Raymond* was set out at para. 7:

> Defence counsel herein, and any independent third party, could not in my view interpret the new offer by the plaintiffs other than as a replacement for the original offer. This is particularly true here, when there was a two-year interval between the offers, with changes in plaintiff's counsel and with settlement discussions taking place in the intervening time.

[21] That is not so here. The wording contained in Meghan Dunk's May 12 Offer explicitly drew to the defendants' attention that the Amended Offer remained operative and in full effect. This, in combination with the explicit wording in the covering letter, could leave no doubt about the plaintiffs' intentions. Unlike the situation in *Mills v. Raymond*, there was a time lapse of only five days between the offers. In this situation, I find that the explicit qualification contained in the May 12 Offer had the effect of not revoking the Amended Offer, as would otherwise be the situation.

[22] The defendants also rely on *Matejevic v. Young*, 1996 CarswellOnt 2549 (Gen. Div.) for the proposition that the withdrawal of a joint offer to settle by one of the offerees does not require the knowledge or consent of the other offeree, and the effect of such unilateral withdrawal is that the offer is no longer open for acceptance. The argument of the defendants is that their acceptance of Shelby Dunk's offer of May 12 means that the

Amended Offer was no longer operative. This argument does not assist the defendants because Shelby Dunk never withdrew her offer of May 12, or the Amended Offer, prior to the time of acceptance. Her offer was not accepted until after the trial had commenced, and accordingly Meaghan Dunk's May 12 Offer, which incorporated the Amended Offer, remained open for acceptance of the commencement of trial.

[23] Last, the defendants rely on *Onisiforou v. Rose* (1998) 41 O.R. (3d) 737 (C.A.) in support of their argument that the judgment obtained by Meaghan Dunk cannot be compared with the terms of the joint, Amended Offer for the purposes of Rule 49.10 given that no breakdown as between the two plaintiffs was provided in it. The reason that *Onisiforou* is distinguishable from the particular facts of the case before this Court is that Meaghan Dunk's jury award exceeded the total sum contained in the Amended Offer. Accordingly, unlike the plaintiff in *Onisiforou*, Meaghan Dunk is able to meet the burden of showing that her award was as favorable to her as the joint Amended Offer.

[24] Although Meghan Dunk's counsel requested that this Court consider those offers made at mediation and pretrial, I agree with defence counsel that to do so is contrary to Rule 50.09 and the without prejudice nature of mediation. In any event, there is no reason to consider any offers other than the May 12 Offer, in conjunction with the Amended Offer, to determine that they should work together to attract the resulting cost consequences. Rule 49.10 applies, such that Meaghan Dunk's costs shall be calculated at a substantial indemnity rate following May 12, 2016, and at a partial indemnity rate for the preceding period.

[25] The Court has wide discretion in fixing costs, bearing in mind the factors set out in Rule 57.01(1) and the principles enunciated in the leading Ontario cases such as *Anderson v. St. Jude Medical Inc.* (2006), 264 D.L.R. (4th) 557 (Ont. Div. Ct.), *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), and *Clarington (Municipality) v. Blue Circle Canada Inc.*, 2009 ONCA 722, 100 O.R. (3d) 66.

[26] The submissions of Meaghan Dunk's counsel primarily focused on conduct on the part of the defendants or their counsel that unduly prolonged the trial or caused costs to be incurred unnecessarily. I am unable to accede to these submissions. It was obvious to this Court during the trial that there has been a low level of cooperation and trust between counsel, which created a sub-optimal litigation dynamic. Costs were driven up on both sides due to this environment. The Court will not engage in a forensic analysis of the strikes and counterstrikes engaged in by either side in order to determine costs in this case. Suffice it to say that it is not readily apparent that either side took steps that rose to the level of being "unreasonable", and, if anything, the late introduction of Ms. Teal to this file enhanced the orderliness of the litigation.

[27] The exercise for this court comes down to examining the additional factors set out in Rule 57.01(1). I bear in mind that I am fixing rather than assessing costs and, as Eberhard, J. stated in *Yetman v. Marzec*, 2014 ONSC 4624 (S.C.J.), "relying in my exercise of discretion on the Court's collective experience with personal injury litigation,

particularly in the motor vehicle context, and with the cost of litigation in bringing a matter to trial by jury over 12 days".

[28] The primary objection to the fees sought by Meaghan Dunk is that the time spent is excessive having regard to the comparative time spent by the defendants' lawyers on the file, with the litigation being equally complicated for each side, and the number of lawyers assigned to the case being equal. The defendants' counsel has provided the Court with a Bill of Costs reflecting fees of $251,190 inclusive of HST. Ms. Teal provided a comparison of the amount of time spent by each firm for file handling, trial preparation and attendance, and all clerk and articling student involvement, showing total hours for the plaintiff's file of 1,600 and total hours for the defendants' file of 903 hours.

[29] The problem with such a comparison is that it fails to recognize the additional work that accompanied the onus that rested on the plaintiff to prove her claims. This included the issue of liability, which was not settled until three days before the commencement of trial. Until liability was settled, the plaintiff had to expend time on those aspects of her case, including the preparation of many liability witnesses. And as is usual in personal injury litigation, the plaintiff provided significantly more evidence than the defendants on the issue of damages. As recognized by Wilson J. in *Hoang v. Vicentini*, 2014 CarswellOnt 14913 (S.C.J.), at para. 78 "the Plaintiff must build the case before the jury and this requires expending more hours than the defendants have to do to defend the case." In the case before me, there is nothing surprising about the amount of hours expended by the plaintiff's lawyers to complete the trial, or that the hours involved were almost twice that of the defendants' lawyers.

[30] Issue was also taken with the hourly rates applied to Mr. Littlejohn and Mr. Lemieux, as being in excess of the maximum hourly rate that lawyers of 20+ years' experience and lawyers with between 10 and 20 years' experience may demand as partial indemnity rates. In 2005 the Costs Subcommittee of the Civil Rules Committee published guidelines for maximum partial indemnity rates that should be sought and applied in fixing costs. Those rates are now 12 years old, and are typically adjusted for inflation: see, for example, *First Capital (Canholdings) Corporation v. North America Property Group*, 2012 ONSC 1359 (CanLII). Using the Bank of Canada's inflation calculator, the comparative maximum 2016 rates, adjusted for inflation, are as follows: law clerks - $97.90/hr; student-at-law - $73.28/hr; lawyer (less than 10 years) - $274.79/hr; lawyer (10 or more and less than 20 years) - $366.38/hr; lawyer (20 years or more) - $427.45/hr. These maximum hourly rates are intended to provide guidance and are not mandatory.

[31] The hourly partial indemnity rate applied by Mr. Littlejohn, who has in excess of 20 years' experience, is $330. The hourly partial indemnity rate applied by Mr. Lemieux, who has in excess of 10 years' experience, is $210. These rates are well within the parameters of the guidelines. The work of a student-at-law was utilized at a rate of $39/hr, and law clerks at a maximum of $65/hr., both on a partial indemnity rate.

[32] The Bill of Costs submitted by Meaghan Dunk shows a total of $69,300 in fees on a partial indemnity costs basis up until trial preparation. For trial preparation, substantial

indemnity rates have been applied to arrive at a figure of $101,655. The Bill of Costs is unclear, and therefore it is assumed by this Court that trial preparation encompasses all of the time until May 12, 2016. A partial indemnity rate should be applied to this work. The year of call of the two associates included in this calculation is unknown; a partial indemnity rate of $150 per hour has been applied, reducing the total fees for trial preparation to $71,640. All trial time from May 16, 2016 onward should be calculated on a substantial indemnity basis as previously determined. That sum is $175,293. Administrative staff and clerk time has not been broken down as between these two time periods, and no description has been provided for the work done by nine law clerks utilized on the file. Criticism for inflating bills of costs by charging staff time separately, which should be included in a lawyers overhead, can be found in *Beerthuizen v. West Arthur Place*, 2008 CanLII 716 (Ont. S.C.J.). However, Tariff A provides that where students-at-law or law clerks have provided services of a nature that the Law Society of Upper Canada authorizes them to provide, fees for the services may be allowed. The Bill of Costs includes total staff time calculated on a partial indemnity basis in the amount of $26,674, and on a substantial indemnity basis in the amount of $36,934.

[33] Excluding the time set out in the Bill of Costs for administrative staff and clerk time, the fees when recalculated as in the preceding paragraph, exclusive of HST, are $316,233, and $357,343 including tax. Recognizing that some, if not all, of the services provided by the plaintiffs' lawyers staff will have been necessary and of the type that they are authorized to provide, the sum of $30,000 inclusive of HST will be added to account for such work.

[34] The quantum of costs ordered by the court must be governed by the reasonable expectations of the unsuccessful party. The defendants retained a firm specializing in insurance defence work, Hughes Amys LLP. The actual hourly rates of the most senior counsel working on this file was $395. But the client funding the defence is not unsophisticated and would understand the range of billing rates and possible costs of litigation. The defendants would have had explained to them the costs consequences of rejecting the plaintiff's offers. I find that the cost expectations on both sides would necessarily be similar.

[35] Taking into account all of the above, I fix costs payable to Meghan Dunk by the defendants in the amount of $387,343 inclusive.

[36] The disbursements sought for Meaghan Dunk total $152,039.94. There were numerous challenges to the disbursements. It is clear that several items were included that are simply office overhead costs that should not be passed on to the defendants: stationary supplies, internet searches and emails, long distance charges, CDs, postage, and a banking fee for a stop payment, but none of these are significant amounts. The amount of $21,900 has been charged for photocopies, without no indication of the cost per page. There are several payments shown to experts that have no supporting invoice: a charge for MEA in the amount of $1,267.50; a charge for Dr. Waseem at $4,900, and a charge for supplementary reports from Dr. Daniels in the amount of $530. The defence also takes issue with a charge of $8,000 paid to Dr. Stephen, who did not testify as a Rule 53

expert, and total charges of $3,850 to Dr. Zakzanis, a psychologist, whose reports were not used because psychological issues were not pursued at trial. Other objections include charges totalling $1,480 for preparing Dr. Springle for trial, a fee paid to a witness who did not attend, a cancellation fee of $1,750 paid to the chiropractor whom the plaintiff did not call as a witness, and a charge for a functional abilities evaluation in the amount of $750 that was not produced to the defendants. A significant amount associated with medical illustrations is included in the disbursements. The defendants request that a reduction equivalent to the amount of $2,995 be made because two of the five drawings were not permitted to be used in front of the jury. Also in issue is an amount paid for court transcripts during the trial in the amount of $2,178, which the case law indicates should only be included as a disbursement in exceptional circumstances where the need for real-time reporting is justified: *Romfo v. 1216393 Ontario Inc*., 2008 Carswell BC 840 (B.C.C.A.).

[37] If all of the above costs were to be deducted, and the photocopying charge reduced to $10,000 as requested by the defendants, the disbursements would reduce by approximately $41,395. This may not be a wholly accurate figure but no alternative amount was suggested by Ms. Teal. By way of resolution, Mr. Lemieux suggested during argument that the disbursements be discounted by 15 percent "across the board", amounting to a reduction of $22,806.

[38] The most significant costs associated with the disbursements objected to by the defendants arise from monies paid to healthcare professionals who were retained by Meaghan Dunk's counsel to advance her claims. Even where they are not testifying as a Rule 53 expert, as was the case with Dr. Stephen, these professionals cannot be expected to provide their expertise, work product and time, even if that means scheduling time away from their practice that ultimately is not needed for the trial, without ample compensation. The plaintiff's counsel would not volunteer to provide these payments were they not demanded and necessary at the time they were incurred. Accordingly, some of the defendants' objections involving larger sums cannot be sustained. Others are legitimate. Recognizing that rough justice is being applied in order to attempt to strike fairness to both parties, I find it reasonable to reduce the disbursements for Meaghan Dunk by the sum of $30,000 inclusive, resulting in total disbursements in the amount of $132,040.

Disbursements to be Awarded to Shelby Dunk

[39] The total amount claimed for disbursements incurred on behalf of Shelby Dunk is $91,174. The same objection was made to the inclusion of office overhead costs, and excessive photocopying charges in the amount of $13,196. Without individually listing all of the other disbursements objected to, those identified by Ms. Teal total $9,356. The overhead charges, including copying medical documents onto CDs, total $1,956, for a total of $11,312. Again, Mr. Lemieux suggested a 15 percent reduction for Shelby Dunk's disbursements, which would amount to a reduction of $13,676. That being the case, Mr. Lemieux's proposal would capture all of the objections made by defence counsel, including a reduction in some of the photocopying charges. For plaintiff's counsel,

photocopying is a significant cost of an action because of the need to provide extensive medical records to experts. A reduction by one-half or one-third of the amount claimed, as suggested by Ms. Teal, is not a realistic approach and I find, contrary to the requirement of indemnification for the successful party.

[40] In summary, this Court orders:

1. The defendants shall pay prejudgment interest to Meaghan Dunk on her damage award in the amount of $64,541;

2. No amount shall be deducted from Meaghan Dunk's award for collateral benefits;

3. The defendants shall pay Meaghan Dunk's costs in the amount of $387,343 and disbursements in the amount of $132,040, both inclusive of HST; and

4. The defendants shall pay Shelby Dunk's disbursements in the sum of $77,498 inclusive of HST.

HEALEY J.

Date: March 7, 2017