

CITATION: Barr v. Zahavy, 2011 ONSC 5381
COURT FILE NO.: 05-CV-297524 PD3
DATE: 20110916

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: KLARA BARR v. EVA MORGENSTERN and YEHESKEL ZAHAVY

BEFORE: Grace J.

COUNSEL: *H.A. Swartz*, for the Plaintiff

A. Kraiden, for the Defendants

HEARD: By written submissions

COSTS ENDORSEMENT

[1] Ms Barr's action was dismissed following the reading of the jury's answers to the questions posed. Most notably the jury concluded that Ms Barr had not proven the May 17, 2005 incident on which she relied occurred.

[2] The defendants seek costs on a partial indemnity basis to March 5, 2010 when an offer to settle was served (the "Offer"). Given the date and terms of the Offer, they seek costs on a substantial indemnity basis thereafter. The defendants ask for the aggregate all-inclusive amount of \$124,444.45.

[3] Mr. Swartz, counsel for Ms Barr, asks that there be no order as to costs due to Ms Barr's financial position and the circumstances of the case. If costs are awarded, Mr. Swartz submits the amount claimed "is totally excessive" and "should be discounted substantially."

[4] While the Court has broad discretion under s. 131 of the *Courts of Justice Act* and rule 57.01 of the *Rules of Civil Procedure*, an award of costs is usually made in favour of a successful party: *St. Jean v. Cheung*, 2009 ONCA 9.

[5] There is no reason to depart from that general rule in this case. Nothing in the evidence before me reveals conduct or circumstances which should deprive the defendants of the benefit or relieve the plaintiff of the burden of the general rule.

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[6] The result at trial suggests Ms Barr's evidence was not accepted in key respects. Simply put Ms Barr's effort to satisfy the jury she was injured as a result of anything done or not done by the defendants failed.

[7] While the parties did not provide me with a copy of the offers they exchanged, counsel for the defendants, Mr. Krajden, submitted the defendants offered to pay Ms Barr a meaningful sum (\$30,000) plus other amounts including interest and costs pursuant to rule 49 of the *Rules of Civil Procedure*. In his response, Mr. Barr accepted Mr. Krajden's summary of the parties' offers.¹

[8] I agree with Mr. Krajden that where a defendant makes an offer in accordance with rule 49.10 (2) and the plaintiff is wholly unsuccessful, there is jurisdiction to award costs to the successful defendant(s) on a partial indemnity basis to the date of the offer and costs on a substantial indemnity basis thereafter: *S & A Strasser Ltd. v. Richmond Hill (Town)* (1990), 1 O.R. (3d) 243 (C.A.) at para. 11; rules 49.13 and 57.01 (1); *H.L. Staebler Co. v. Allan*, [2008] O.J. No. 5001 (S.C.J.).

[9] Should that principle be applied? In my view it should. The Offer was a reasonable one. The deficiencies in the plaintiff's case were plentiful, glaring and substantial.

[10] Mr. Swartz relies on *Byers (Litigation Guardian of) v. Pentex Print Master Industries Inc.*² In that case the plaintiff's claims were dismissed after less than an hour of deliberation by the jury. Yet, Sachs J. made no order as to costs because of the plaintiff's tragic circumstances³ and the modest means of her parents who acted as litigation guardians.

[11] That case – and others relied on by the parties – evidence that the exercise of discretion is largely fact specific. Suffice to say that this case is not analogous to the one with which Sachs J. was faced. Ms Barr sought hundreds of thousands of dollars in damages based on a theory which was not accepted by the jury.⁴ Tragic circumstances were not proven. Nor was blameworthiness on the part of either defendant. The risks and possible adverse cost consequences of a negative result at trial should have been well understood.

[12] Mr. Swartz submits that any sizable costs award will go unsatisfied. Evidence at trial suggests Ms Barr is not working and receives income support from the Ontario Disability Support Program. I do not remember other evidence concerning her assets or liabilities. While I agree "the issue of impecunious litigants...is a complex and multifaceted one,"⁵ on this record financial hardship has not been proven. Even if established, the fact an unsuccessful party is impecunious should have little, if any, relevance where the action stood very little chance of success.⁶

¹ I have therefore assumed the offer was not withdrawn and did not expire before the commencement of the trial.

² (2002), 59 O.R. (3d) 409 (S.C.J.).

³ An asthma attack left her brain damaged, unable to work and in need of constant care.

⁴ On January 11, 2011 an offer to settle was made on her behalf. It sought payment of \$636,731.65.

⁵ Per Feldman J. (as she then was) in her dissent in *Myers v. Toronto (Metropolitan) Police Force* (1995), 125 D.L.R. (4th) 184 (Ont. Div. Ct.).

⁶ See the majority decision in *Myers*, *supra*, note 5.

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[13] In determining quantum I have reviewed the factors listed in rule 57.01 and place particular importance on the following:

- a) While the matter involved hundreds of thousands of dollars, the proceeding was not legally complex. However, given the nature of Ms Barr's complaints a significant amount of time was and should have been expended by counsel for the defendants in carefully reviewing Ms Barr's medical and dental history. Mr. Krajden's cross-examination of Ms Barr was effective and put her credibility in substantial doubt;
- b) Trial occupied parts of eight days but given the illness of a juror and the limited availability of some of the defendants' witnesses, the trial really only occupied five and a half days;
- c) Subject to the preceding paragraph, the parties conducted the trial efficiently and it appeared, cooperatively;
- d) Initially the defendants had separate counsel. A cross claim had been asserted. That changed part way through and the defendants ended up being represented by the same counsel. Their lawyers recorded 735 hours. Undoubtedly Mr. Krajden had to familiarize himself with the issues affecting Mr. Zahavy who was not, originally, his client. In doing so Mr. Krajden and his staff would have had to duplicate some of the time spent by Mr. Zahavy's former counsel;
- e) The billing summaries evidence charges relating to an attendance before Frank J. I am not aware that costs of that attendance were reserved to the trial judge;⁷
- f) The billing summaries also include time expended in preparing evidentiary arguments made and rejected at the first trial;
- g) As already noted, the trial was capably conducted by Mr. Krajden who was well prepared with the assistance of various members of his office. However, the time expended seems, with respect, excessive. The billing summaries evidence time being spent on routine administrative matters (billing related activities), time relating to the cross claim, to motions and other steps I know nothing about (for example a meeting with a Mr. Kozluk. No witness by that name was called);
- h) It is difficult to say more about the amounts claimed as I do not appear to have been given any statement of the experience of the various persons who charged time to this matter. The calculations are difficult to follow since I was not given a summary of the bills by date, amount charged, amount billed or activity.⁸ I cannot tell whether counsel for the defendants had regard to the fact some of the

⁷ In fact, it appears from the summary costs were ordered and paid.

⁸ I was simply given copies of various billing statements. The last bill is dated August 15, 2011, is in the amount of \$89,665.32 and the invoice number reads "sample". If an invoice in that amount was rendered, it appears the aggregate amount billed by the lawyers who acted for the defendants approximated \$150,000 inclusive of disbursements and applicable taxes.

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accounts seem to have been rendered on a "flat fee" basis rather than on the time recorded.

[14] In my view taking all of the matters I have mentioned and rule 57.01 into account a substantial award of costs is appropriate. However, the amount claimed by the defendants is not fair or within the reasonable expectation of Ms Barr to pay if unsuccessful.

[15] Doing the best I can with the materials provided to me Ms Barr shall pay to the defendants costs fixed in the all inclusive amount of \$75,000.


GRACE J.

DATE: September 16, 2011