CITATION: Ananthamoorthy v. Ellison, 2013 ONSC 4510
COURT FILE NO.: 07-CV-340541PD3
DATE: 20130702

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Anna Ananthamoorthy, by her litigation guardian, Hanahidevy Ananthamoorthy, Janahidevy Ananthamoorthy, personally and Ananth M. Kandiah, Plaintiffs

AND:

Rebecca Ellison and Ride Management Limited, Defendants

BEFORE: Madam Justice Darla A. Wilson

COUNSEL: David S. Wilson, Counsel for the Plaintiffs

Reine Elizabeth Reynolds, Counsel for the Defendants

HEARD: By Written Submissions and Oral Argument June 26, 2013

ENDORSEMENT

[1] This is a claim for damages sustained by the Plaintiff, Janahidevy Ananthamoorthy ["Jana"], arising from a motor vehicle accident that occurred September 28, 2005. The claim of her daughter, Anna, is asserted pursuant to the *Family Law Act* ["*FLA*"] for loss of care, guidance and companionship as a result of the injuries sustained by her mother. Anna was born in 1992 and has Down Syndrome and as a result, she has severe disabilities and requires constant supervision. According to the medical evidence, she is incapable of granting a Power of Attorney for Property.

[2] This matter was scheduled to proceed to trial in front of me on February 19, 2013, but it was reported settled and consequently, the trial did not proceed. I was advised by counsel that costs needed to be fixed and that there was a disagreement about the quantum of the *FLA* claim of Anna and I agreed to deal with these matters.

The *FLA* claim

[3] The Defendants made an offer to settle on February 5, 2013 for the sum of $385,000.00 plus costs and disbursements to be agreed or assessed. Ms. Reynolds broke down how that figure was arrived at and this included a sum of $30,000.00 for the *FLA* claim of Anna, net of the deductible and a further sum of $20,000.00 for future care of Anna. Counsel for the Defendants takes the position that the sum of $58,250.00 should be paid into court for the claim of Anna

because those funds were meant to be for her benefit and she states the "$20,000.00 does not form any part of the settlement involving Jana." The solicitor for the Plaintiff is of the view that the correct amount is $38,250.00.

[4] In my view, based on the wording of the Offer to Settle, there was a sum of $385,000.00 for all claims and interest plus costs that was offered to the Plaintiffs. While Ms. Reynolds provided a breakdown of how that figure was arrived at, it does not follow that the solicitor for the Plaintiffs is bound to allocate to a party under a disability the amount that is suggested by defence counsel. Counsel is free to allocate a figure that accurately reflects the value of the *FLA* claim in his or her estimation and then apply to the court for approval, in accordance with the provisions of Rule 7. It goes without saying that the court must be satisfied based on the affidavit material submitted that the proposed figure is proper and fair.

[5] More problematic, however, is the argument of the solicitor for the Defendants that the *FLA* plaintiff is entitled to assert her own claim for the cost of future care. She is not an injured party; she has a claim pursuant to the *FLA* that arises out of her losses because of the injuries suffered by her mother and the impact of those injuries on their relationship. As a party under a disability Anna cannot, for example, make a claim for the cost of services in the future she will have to pay which her mother used to provide but can no longer because of her injuries. She could assert a claim for the cost of services that she provided to her mother, but that is not the case before me. If Ms. Reynolds wished the $20,000.00 to be included as part of the *FLA* claim of Anna to be used to pay for future expenses, then that sum should have been included so the settlement offer was in the sum of $50,000.00 for the *FLA* claim of Anna.

[6] I am satisfied based on the affidavit material before me that settlement of the *FLA* claim of Anna in the sum of $30,000.00 net of the deductible plus interest of $8,250.00 is appropriate and is in the best interests of Anna and approval is hereby granted.

The Issue of Costs

[7] I advised counsel that if they were unable to agree on costs, I would fix them. Written materials have been submitted and I heard oral argument. Counsel for the Plaintiff requests fees of $122,652.93 plus disbursements of $44,534.29. Mr. Wilson advised that the disbursement figure is net of the amount received from the accident benefits insurer of $12,268.08. It is submitted that the amount in fees paid by the accident benefits insurer has been deducted from the Bill of Costs. The solicitor for the Plaintiff argues that the case settled just prior to trial so trial preparation was necessary and the amount requested is reasonable.

[8] Counsel for the Defendant in her materials submits that the amount sought is excessive and a more appropriate figure is $69,000.00 plus HST for fees and $42,000.00 for disbursements for a total of $119,970.00 for costs.

[9] I pause at this juncture to note that when I agreed to fix the costs, I asked counsel to submit brief written submissions. I received: a motion record from the solicitor for the Plaintiff dealing with the amount of the *FLA* settlement and his demand for costs; a responding motion record from the solicitor for the Defendant which was followed very quickly by an objection

from Mr. Wilson concerning the propriety of the contents of the affidavit, so I did not read it; a further affidavit from the law clerk for the solicitor for the Plaintiff responding to the allegations in the material from the defence concerning refusal to make productions; and a responding affidavit from defence counsel which I gather is essentially a re-worked version of the first affidavit. This affidavit included allegations about lack of co-operation of counsel, necessity for production orders, non-compliance with these orders and other matters that allegedly occurred during the course of the litigation.

[10] In my view, when the court is fixing costs, I am guided by the principles set forth by the Court of Appeal in *Boucher v. Public Accountants Council for the Province of Ontario* 2004 CanLII 14579 (ON C.A.), (2004), 71 O.R. (3rd) 291 (C.A.), specifically that the overall objective of fixing costs is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular circumstances, rather than an amount fixed by actual costs incurred by the successful litigant. Including material in written submissions concerning production issues during the case or the alleged lack of co-operation of opposing counsel and what transpired at various pre-trials is not of any particular assistance to the court in the task at hand. Ms. Reynolds submits in her materials that there is a concern that some of the fees and disbursements Mr. Wilson is seeking in the tort action were paid by the no fault insurer and further, that she disputes the claims for items such as correspondence. If the defence wished an item by item determination, a formal assessment of the costs ought to have been requested.

[11] In any event, during oral submissions, Mr. Wilson identified the outstanding costs issues as follows: whether the solicitor for the Plaintiff can claim for time expended in dealing with accident benefits issues, specifically attending an arbitration and securing payment of outstanding benefits; quantum of disbursements; and whether interest ought to be payable from March 2013 since the Defendants have not delivered settlement funds. In addition to these three issues, Ms. Reynolds submitted that the issue of quantum of time being claimed needed to be addressed.

[12] In the case before me, the matter was settled just prior to trial. The solicitor for the Plaintiff requests a certain sum which the solicitor for the Defendants believes is excessive. I would have preferred to have received submissions addressing why each party felt the quantum they suggested was appropriate. Nowhere does Mr. Wilson indicate why his proposed figure of fees of $122,652.93 is fair, apart from calculating hours spent which is not particularized. Ms. Reynolds does not indicate how she arrived at her figure of $69,000.00 for fees. In any event, I will deal with costs on the basis of the material that has been submitted by counsel as well as their oral argument.

[13] I have been provided with the Statement of Claim and Statement of Defence, but I have not read any medical documentation concerning the Plaintiff. In her material, Ms. Reynolds has included a copy of the pre-trial memorandum submitted by the Plaintiffs's counsel. Quite apart from the issue of whether a pre-trial memo ought to be given to a judge fixing costs, I do not understand of what value it is to me, apart from setting out the Plaintiffs's theory of the case and the evidence intended to be called at trial.

[14] I am aware the Plaintiff was involved in a motor vehicle accident on September 28, 2005 which appears to have been a rear end collision. Following the accident, the Plaintiff suffered various injuries for which she was assessed by a variety of physicians. Loss of income claims were advanced as well as future care costs claims.

Disbursements

[15] Initially, there was a dispute about the quantum of disbursements, but that has been corrected. In his supplementary materials, Mr. Wilson has included the invoices for the disbursements and he confirms that none of the disbursements claimed have been paid for by the accident benefits insurer.

[16] On the issue of disbursements, it is not suggested by defence counsel that the reports were not served in accordance with the Rules and it was not disputed that the various experts would have testified on the Plaintiff's behalf if the matter went to trial. Ms. Reynolds suggested that the amount for the interpreter was excessive and that the disbursements ought to be in the $30,000.00 range. No analysis was provided to support this figure.

[17] From my review of the disbursements included in the Plaintiffs's Bill of Costs, it appears that these are items which properly form disbursements in a claim under the tariff and I see no duplication. There are various amounts claimed for interpreter's fees including the sum of $1,150.44 for trial preparation. As I understand it, the Plaintiff does not speak English well and it appears that she required an interpreter for various proceedings in the litigation such as attending examinations for discovery, medical appointments, mediation and preparing for trial. All of the invoices have been produced and I have reviewed them. In my view, these amounts are not excessive. I have considered the invoices for the various expert reports. While they may be on the high side, there are numerous expert reports and given the nature of the injuries alleged and the types of damages claimed, I do not find the quantum of the report costs unreasonable nor can the solicitor for the Defendants be surprised by the quantum of these disbursements, given the proximity to trial. The Defendants shall therefore pay the Plaintiffs's disbursements in the sum of $44,534.29.

Fees

[18] I turn to the issue of fees. Mr. Wilson has provided a Bill of Costs which sets out various hours spent by Mr. Wilson and another solicitor in his firm on this file. The action settled days before the commencement of trial. There were several attendances for discoveries, a mediation, several pre-trials and trial preparation. The action settled for $385,000.00 on the eve of trial. The solicitor for the Plaintiffs requests fees of $122,652.93 on a partial indemnity basis. The hourly rate ranges from $290/hour in 2005 to $390/hour more recently. These rates are reasonable for a solicitor called in 1972. Ms. Reynolds points out that according to the Bill of Costs, Mr. Wilson has 326.5 hours of docketed time while the junior counsel has 41. It is submitted that the number of hours are excessive.

[19] During oral submissions, counsel disagreed about whether the solicitor for the Plaintiff could include time spent dealing with accident benefits issues as time necessitated for the tort

action. Mr. Wilson argued that he had to pursue the Plaintiff's entitlement to accident benefits, including attending an arbitration at FSCO in 2007. Following the arbitration, various benefits were paid to the Plaintiff and continue to be paid. As a result of the resolution at FSCO, Mr. Wilson received some payment of costs, $15,741.00, which has been taken off the amounts claimed in this action.

[20] Ms. Reynolds argued that the Plaintiff cannot claim in the tort action for fees expended recovering accident benefits as there is a statutory scheme for recovery of benefits which provides for the payment of costs. The accident benefits claim, it was argued, is not an "action" within the meaning of the Rules and therefore costs associated with such a claim cannot be sought in a tort action. No case law was provided to support this position.

[21] I do not accept the argument put forth by the solicitor for the Defendant. In cases where a Plaintiff claims for damages occasioned by a motor vehicle accident, there is a comprehensive scheme that provides for payment of accident benefits, including loss of income benefits, which includes procedures for dispute resolution that must be followed. However, the payment of these accident benefits is inextricably linked to the action against the driver because the defendant insurer can claim a deduction for amounts the Plaintiff receives from her own insurer. Thus, the solicitor for the Plaintiff is bound to pursue his client's entitlement to various benefits or face the argument at trial from the tort insurer that the Plaintiff could have and should have received benefits from the no-fault insurer.

[22] In *Moodie v. Greenaway*[1] Justice Morin considered a similar argument from defence counsel when fixing costs after a trial. The solicitor for the Defendants in that case argued that the fees sought by Plaintiff's counsel ought to be reduced because some of this time was spent dealing with the long term disability insurer, accident benefits insurer and underinsurer. In rejecting this argument, Justice Morin stated, "In my view such pursuits are part and parcel of the Plaintiff's obligations in an action against the tortfeasor by reason of the releases available to the tortfeasor under the Insurance Act and only in any compelling circumstances should the unsuccessful tortfeasor escape responsibility to indemnify the Plaintiff for the costs of such pursuits…" I agree. In the case before me, it was the obligation of Mr. Wilson to pursue the Plaintiff's entitlement to various benefits and this inured to the credit of the defendant tortfeasor. Had he not done so, it would have been exceedingly difficult to argue at trial that the Plaintiff was totally disabled from working as a result of the injuries from the accident when her own insurer denied payment of benefits based on inability to work. Mr. Wilson has taken off the sum that he received from the first party insurer, which is appropriate to avoid double recovery of fees.

[23] Included in fees are 770 pieces of correspondence indicated as "undocketed" for which 12 minutes of time at $485.00 per hour and $545 per hour is claimed for a sum of $51,130.00.

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[1] *Moodie v. Estate of Delores Greenaway*, [1997] O.J. No. 6525

This is in addition to the other time claimed for various work done on the file. It is unclear to me why the time for reviewing correspondence is charged on a solicitor/client rate and I do not know what this correspondence relates to or why it was necessary for a senior solicitor to review it as opposed to a clerk or junior lawyer.. In any event, in my view it is excessive, given that 41 hours are claimed for attending discoveries and mediation, plus the further 80 hours after the mediation in July 2011. Without further particularization, this amount of time is excessive for a solicitor of Mr. Wilson's seniority and expertise in the area of personal injury.

[24] I was not provided with anything to suggest that this case was unusual or that there were exceptional circumstances that ought to be taken into account when considering costs. I have reviewed the briefs submitted by counsel as well as the oral submissions. I have considered the factors enumerated under Rule 57, including the time spent, the results achieved, and the complexity of the matter, as well as the application of the principle of proportionality: Rule 1.04(1). I agree with the comments from the Court of Appeal in *Zesta Engineering Ltd. v. Cloutier et al*[2], where it was stated:

> Our reasons can be briefly stated. We have considered the bills of costs submitted by the appellant. However, we make no specific finding with respect to the amount of time spent with the rates charged by counsel. In our view, the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant.

[25] Taking all of the circumstances into consideration, I am of the view that fees in the sum of $100,000.00 plus HST is reasonable and proportionate and I fix fees in that sum, plus the disbursements of $44,534.29 together with HST . This amount is to be paid forthwith by the Defendants to the Plaintiffs for costs of this action.

Interest

[26] The case settled in early February. It is now the end of June and the Plaintiff is not in receipt of funds. The solicitor for the Defendants advised the Court that because of the dispute about the quantum of the *FLA* claim, there is no order for payment as anticipated by section 129 of the *Courts of Justice Act*. Furthermore, her client preferred to wait until the outstanding issues were determined by the Court and make payment at that time.

[27] In my view, a reasonable time for delivery of funds is within a month following settlement. While I appreciate that there was a dispute about the amount of Anna's claim, in my opinion, that ought not to have affected the right of the main Plaintiff to have her funds from the settlement in a timely fashion. No settlement of an infant's claim or of a party under a disability

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[2] *Zesta Engineering Ltd. v. Cloutier et al*, 2002 CanLII 25577 (ON C.A.)

is finalized until the Court grants its approval. The prudent course of action after settlement, given the dispute over costs and the *FLA* claim, would have been for Ms. Reynolds to forward the funds for claims and interest to Mr. Wilson and request that sufficient funds be held in trust pending resolution of Anna's claim. In that fashion, Jana would have had the benefit of her settlement funds and Anna would have been protected. In my opinion, the Plaintiff is entitled to interest on the settlement funds from March 15, 2013 to the date of payment.

Other Costs

[28] Mr. Wilson submits a costs outline and requests costs of attending today and preparing the written submissions be fixed in the sum of $3,734.15. In my view, the Plaintiff is entitled to its costs on a partial indemnity scale as the Plaintiff was successful on the issue of quantum of the *FLA* claim. I fix costs of today in the sum of $3,000.00 inclusive of taxes and disbursements to be paid by the Defendant.

D.A. Wilson J.

Date: July 2, 2013