NOVA SCOTIA COURT OF APPEAL
Citation: Y*oung v. Hayward*, 2013 NSCA 65

Date: 20130522
Docket: CA 386760
Registry: Halifax

Between:

Matilda Young

Appellant

v.

Craig Hayward

Respondent

Judge: The Honourable Mr. Justice Jamie W.S. Saunders
The Honourable Justice Duncan R. Beveridge (Dissenting)

Appeal Heard: January 21, 2013

Subject: **Costs. Standard of Review. Deference. Settlement Offers. Civil Procedure Rule 10. Establishing the "Finish Date". Recovery of Disbursements. Apportioning Success. Pre-Judgment Interest.**

Summary: This decision disposes of costs and is a companion decision to the Damages decision, CA 388940 where the appeal was dismissed and the cross-appeal allowed.

This decision concerns an appeal brought by the defendant claiming a series of errors by the trial judge in her disposition of costs. Among other things, the defendant/appellant said the judge had erred by failing to take into account the appellant's formal offer to settle prior to trial; erred in designating the "finish

date" when deciding costs; and otherwise erred in her treatment of costs and disbursements which had the effect of rewarding the "loser" and punishing the "winner" of the litigation.

Held: Per Saunders, J.A. (with Hamilton, J.A. concurring): Leave to appeal granted and appeal allowed, in part. After a 9-day trial the judge was well placed to decide whether and how success was "divided". Her decision to, in effect, set off each of the party's costs as a "wash" by not awarding costs to either of them was well within her discretion and ought not to be disturbed. So too was her decision establishing the "finish date"; setting and applying a pre-judgment interest rate; and permitting the plaintiff/respondent to recover some of his out-of-pocket expenses. The judge did make certain errors in arithmetic and those mistakes were corrected. Having, effectively, treated the parties' respective costs as a "wash", the trial judge erred in permitting the plaintiff to recover some of his disbursements while denying – without explanation – the defendant/appellant a chance to recover any of her disbursements. Thus, the judge erred by either missing the point or failing to explain why the defendant/appellant should be denied any recovery of her sizeable disbursements. Recognizing that the principle objective in setting, awarding or refusing costs should always be to do justice between the parties having regard to all of the circumstances, the fairest and most principled solution to adopt in this case is to take a fresh and necessarily arbitrary view of the record and award the defendant/appellant a percentage of her expenditures in an amount which would equal (and effectively be set off against) the plaintiff/respondent's award of disbursements.

Beveridge, J.A. (dissenting): The trial judge's determination that success was divided was driven by her damage award of $120,000. This award was reduced on appeal to what the appellant had said at trial he was deserving of. By any measure, the appellant was successful. Absent explanation, she should have been awarded her costs, especially in light of her settlement offer. The trial judge erred by ordering, without sustainable cause, the appellant to pay some of the respondent's disbursements. Having erred, it falls to this Court to make an appropriate costs award. I would order the respondent to pay

lump sum costs of $40,000 plus her disbursements.