SUPREME COURT OF NOVA SCOTIA
Citation: Farrell v. Casavant, 2010 NSSC 46

Date: February 4th, 2010
Docket: Hfx No. 244203
Registry: Halifax

Between:

Bernard Farrell

Plaintiff

v.

Richard Casavant and Mary Casavant

Defendants

Judge: Deborah K. Smith, Associate Chief Justice

Revised decision: The text of the original decision has been corrected according to the erratum dated February 8, 2010. The text of the erratum is appended to this decision.

Decision on Costs: February 4th, 2010

Written Submissions received from the Plaintiff: November 25th, 2009

Written Submissions received from the Defendants: October 30th, 2009 & December 4th, 2009

Counsel: Kevin A. MacDonald, Esq.
Solicitor for the Plaintiff

Michael E. Dunphy, Q.C. and Ashley P. Dunn
Solicitors for the Defendants

[1] This is a decision on costs arising out of an action that was heard over six days in January and February of 2009. The Plaintiff, Bernard Farrell, brought an action against Richard and Mary Casavant as a result of a motor vehicle accident that occurred on January 9th, 2004. In my decision, I found that the Defendants' vehicle slid on a patch of ice into the Plaintiff's lane of travel causing the collision. However, I also found that the Defendant driver had been operating his vehicle with the ordinary care, caution and skill which a driver would be expected to exercise in the circumstances and that the accident occurred without negligence on his part. I concluded that this was an unfortunate accident for which no one was legally liable and I dismissed the Plaintiff's claim. Damages were provisionally assessed in the total amount of $10,879.48 which included $2,200.00 for a *quantum meruit* claim advanced by the Plaintiff's wife.

[2] In my provisional assessment of damages, I concluded that the Plaintiff's non-pecuniary general damages were limited to the $2,500.00 "cap" provided for in the **Automobile Insurance Reform Act** and the **Automobile Insurance Tort Recovery Limitation Regulations** which came into effect just months prior to this collision. While the constitutionality of this legislation had been challenged in Nova Scotia prior to this case being heard – to my knowledge this was the first case in the province in

which this legislation and its regulations were analyzed and applied in an assessment of damages.

[3] The matter now returns to me to deal with the issue of costs. Counsel have been unable to agree as to what costs should be awarded in this proceeding (if any) and have therefore filed written submissions on the issue.

[4] The successful Defendants' seek costs and disbursements from the Plaintiff in the amount of $27,315.26 which is broken down as follows:

Basic amount per Tariff A on Scale 2 with an "amount involved" of $107,500.00	$ 12,250.00
"Length of trial" addition of $2,000.00 per day x 6 days	12,000.00
Disbursements	3,065.26
Total	$ 27,315.26

[5] The Plaintiff submits that despite the Defendants' success no costs should be awarded or, alternatively, a modest amount should be ordered not exceeding $1,500.00. Additional details concerning each parties' position are set out below.

THE DEFENDANTS' POSITION

[6] The Defendants' take the position that as they were successful at trial – they are entitled to costs. They invite the court to set the "amount involved" under Tariff A of the **Costs and Fees Act** at $107,500.00 and award basic costs of $12,500.00 based on Scale 2. They have raised a number of factors in support of their position including:

> (a) The fact that in the Plaintiff's pretrial brief claims were advanced in amounts ranging from $88,127.48 to $135,127.48. This was significantly more than the $10,879.48 provisionally assessed by the court as well as the amount that was actually awarded by the court – which was nil;
>
> (b) The fact that the trial was more complex and important than an average case in light of the fact that this was the first case in Nova Scotia to apply our province's minor injury legislation in an assessment of damages;
>
> (c) The fact that the Defendants' made two formal written Offers to Settle neither of which was accepted. The first Offer was in the amount of $16,269.48 (inclusive of prejudgment interest and costs) and was forwarded to the Plaintiff's solicitor on November 28th, 2005. The second Offer was in the amount of $40,000.00 (inclusive of prejudgment interest and costs) and was forwarded to the Plaintiff's solicitor on October 10th, 2008.

[7] In addition, as per Tariff A, the Defendants' seek an additional $12,000.00 which represents $2,000.00 per day for each day of trial and disbursements totalling $3,065.26.

THE PLAINTIFF'S POSITION

[8] The Plaintiff submits that notwithstanding the usual rule that costs follow the cause, this is one of those rare and exceptional cases where it is just to deny the Defendants their costs. The Plaintiff asks the court to order that each party bear their own costs and has raised a number of factors in support of this position including:

(a) The case was novel and involved the interpretation of new legislation;

(b) the case was of significant public importance and was a "test case" on behalf of the "insurance industry". According to the Plaintiff — one of the key reasons the matter proceeded to trial was to obtain a precedent relating to the interpretation of the new legislation;

(c) The Plaintiff is a man of modest means who has already incurred disbursements in excess of $12,000.00 to bring the case to trial. The Plaintiff submits that an award of costs in these circumstances would compound the financial hardship that he has suffered as a result of the accident and, in the circumstances, would not be in the interests of justice.

[9] The Plaintiff suggests that if the court is inclined to award costs to the Defendants, it should consider awarding a modest lump sum not exceeding $1,500.00 payable within 90 days of this decision.

ANALYSIS AND CONCLUSIONS

[10] Both counsel have referred me to the new Civil Procedure Rules and have suggested that it does not matter whether costs are determined under the 1972 Rules or under the present Rules as I have a discretion under either set of Rules to take into account the same considerations. For the purpose of this decision, I will refer to the present Civil Procedure Rules.

[11] My analysis begins with Civil Procedure Rule 77.02 which provides:

> **77.02** (1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.
>
> (2) Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 – Settlement.

[12] Rule 77.03 provides:

> **77.03** (1) A judge may order that parties bear their own costs, one party pay costs to another, two or more parties jointly pay costs, a party pay costs out of a fund or an estate, or that liability for party and party costs is fixed in any other way.
>
> .....
>
> (3) Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.

[13] Rule 77.06(1) provides:

> **77.06** (1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of this Rule 77.

[14] The Tariffs provide:

> In these Tariffs unless otherwise prescribed, the "amount involved" shall be:
>
> .....
>
> (b) where the main issue is a monetary claim which is dismissed, an amount determined having regard to
>
> (i) the amount of damages provisionally assessed by the court, if any,
>
> (ii) the amount claimed, if any,
>
> (iii) the complexity of the proceeding, and
>
> (iv) the importance of the issues;
>
> .....

[15] Rule 77.07 provides:

> **77.07** (1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.
>
> (2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:
>
> (a) the amount claimed in relation to the amount recovered;
>
> (b) a written offer of settlement, whether made formally under Rule 10 – Settlement or otherwise, that is not accepted;

> (c) an offer of contribution;
>
> (d) a payment into court;
>
> (e) conduct of a party affecting the speed or expense of the proceeding;
>
> (f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;
>
> (g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;
>
> (h) a failure to admit something that should have been admitted.
>
> .....

[16] In my view, of the examples listed above, only the factors referred to in Civil Procedure Rule 77.07(2)(a) and (b) are germane to the costs of this action.

[17] I must begin my analysis by determining the "amount involved" in the case. As this proceeding involved a monetary claim which was dismissed, I must consider the amount of damages provisionally assessed ($10,879.48), the amount claimed by the Plaintiff (between $88,127.48 and $135,127.48), the complexity of the proceeding and the importance of the issues (**Costs and Fees Act**.)

[18] The first two factors speak for themselves. In my opinion, the complexity and importance of the proceeding was enhanced due to the fact that this was the first case in the province in which the **Automobile Insurance Reform Act** and the **Automobile**

Insurance Tort Recovery Limitation Regulations were analyzed and applied in an assessment of damages. Taking all of these factors into account, I have determined that the "amount involved" should be set at $65,000.00 and that costs should be determined based on Scale 2. That results in basic costs of $7,250.00.

[19] I must then determine the length of trial. Tariff A provides:

> In applying this Schedule the "length of trial" is to be fixed by a Trial Judge.
>
> The length of trial is an additional factor to be included in calculating costs under this Tariff and therefore two thousand dollars ($2,000) shall be added to the amount calculated under this tariff for each day of trial as determined by the trial judge.

[20] The trial was heard over a six day period but the court actually sat for only five and a half days. I conclude that the length of trial was 5 ½ days and that according to Tariff A an extra $11,000.00 ($2,000.00 per day x 5 ½ days) should be added to the costs award.

[21] In addition, the Defendants are claiming disbursements in the amount of $3,065.26. Rule 77.10 provides:

> **77.10** (1) An award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award.
>
> (2) A provision in an award for an apportionment of costs applies to disbursements, unless a judge orders otherwise.

[22] The Defendants have provided a detailed list of all disbursements being claimed and have offered to provide additional particulars or proof of disbursements if required by the Plaintiff. No issue has been taken by the Plaintiff with the specific disbursements being claimed by the Defendants and I am satisfied that the disbursements were necessary and reasonable in the circumstances.

[23] That takes me to Civil Procedure Rule 77.07(1) and (2) which provides for an amount to be added to or subtracted from tariff costs based on any factors that the court considers relevant – examples of which are set out in the Rule. Both parties have provided the court with additional factors that they submit are relevant to the issue of costs.

[24] The Plaintiff submits that he is a man of modest means and asks the court to deny costs on this basis. It is important to note that the Plaintiff has not applied pursuant to Civil Procedure Rule 77.04 (former Rule 5.17) to be relieved from liability

for costs because of poverty. In addition, no evidence has been filed with the court setting out the Plaintiff's financial circumstances (while I had evidence at trial concerning his annual income, I have not been provided with a statement of assets and liabilities.)

[25] While there have been occasions in this province (predominantly in the family law context) in which the court has considered a party's financial circumstances when dealing with the issue of costs, this factor is not usually taken into account by the court. As indicated by Goodfellow, J. in **Gilfoy et al. v. Kelloway et al.** (2000), 184 N.S.R. (2d) 226 (N.S.S.C.) at ¶ 25:

> More importantly, the determination of costs with the rare exception of some exceptional family law situations has never been influenced by wealth, lack of wealth or impecuniosity of a party. The Registry of Deeds contains many judgments for and including costs and the collectability of costs is not a factor to be considered in the proper exercise of judicial discretion as to *entitlement to costs or indeed the quantum of costs*.....
>
> [Emphasis in the original]

[26] While there have been a few non-family law cases since **Gilfoy et al. v. Kelloway, et al.**, *supra*, where the court has taken into account the financial circumstances of the unsuccessful party when awarding costs (see for example: **Windsor v. Poku**, 2003 NSSC 95) that practice is certainly the exception in this

province rather than the rule. I am not satisfied that the Plaintiff's financial circumstances should affect my costs award in this proceeding.

[27] The Plaintiff has also referred to the fact that this case involved the interpretation of new legislation and was a case of significant importance. He suggests that the case was a "test case" on behalf of the "insurance industry" and submits that one of the key reasons why the matter proceeded to trial was to obtain a precedent relating to the interpretation of this new legislation.

[28] If the Plaintiff means to suggest that the Defendants took this case to trial to obtain a precedent, with the greatest of respect, I do not accept that submission. It is clear that the Defendants attempted to settle this case and made what turned out to be very generous offers in order *not* to go to trial. Having said that, it is also clear that this case did involve the interpretation of new legislation and, in my view, was a case of significant public importance. The Defendants basically acknowledge this fact when they state at ¶ 20 of their initial submissions on costs:

> With regards to the second issue, quantification of damages, the case was of great importance. It was the first case in which our courts applied Nova Scotia's minor injury legislation to a set of facts. This was a case of first instance regarding the interpretation of the minor injury legislation.

[29] In Mark M. Orken, **The Law of Costs**, 2d. ed., looseleaf, vol. 1 (Aurora: Ont.: Canada Law Book, 2009) it is stated at pp. 2-77 to 2-79:

> .....An action or motion may be disposed of without costs when the question involved is a new one, not previously decided by the courts on the theory that there is a public benefit in having the court give a decision; or where it involves the interpretation of a new or ambiguous statute; or a new or uncertain or unsettled point of practice; or law; or in a case of first instance; or where there were no previous authoritative rulings by courts; or decided cases on point.....
>
> [citations omitted]

[30] An example of this is seen in the Ontario Court of Appeal decision in **Meyer v. Bright et al**. (1993), 110 D.L.R. (4th) 354 (leave to Appeal to the Supreme Court of Canada dismissed) where the court was considering Ontario legislation which limited the rights of those involved in a motor vehicle accident to maintain a tort action against the tortfeasor. The court stated ¶ 72:

> .....We agree with Browne J. that this action is in the nature of a test case requiring the interpretation of important of new legislation. It is therefore appropriate that the parties bear their own costs. There will be no costs of the appeal.

[31] Similarly, at ¶ 97the court stated:

> .....this case, like *Meyer v. Bright*, is a test case which required the interpretation of important new legislation. We think it is appropriate therefore that the parties bear their own costs throughout. There will be no order of costs in this Court or in the courts below.

[32] In the case at Bar, we have a situation where the Plaintiff was unsuccessful on the issue of liability but the court went on to interpret and apply new legislation when provisionally assessing damages. In my view, the fact that the Plaintiff did not succeed on the issue of liability must be taken into account when determining costs.

[33] In the initial cost submissions filed on behalf of the Defendants it is acknowledged that one of the primary issues at trial was the interpretation and application of the minor injury legislation (¶ 15(b)) and that the determination of liability was only a moderately important issue (¶ 19). In the circumstances, and subject to my comments below, I have concluded that since one of the primary issues at trial was the interpretation and application of new legislation and since I am satisfied that the case was of significant public importance, the Plaintiff should be responsible to pay the Defendants only 25% of their costs and disbursements which I calculate to be $5,328.82 (basic costs of $7,250.00 + “length of trial” addition of $11,000.00 + disbursements of $3,065.26 = $21,315.26. 25% = $5,328.82.)

[34] That takes me to Civil Procedure Rule 77.07(2)(a) and (b). I have decided that in the circumstances of this case it is appropriate to deal with these factors *after* taking into consideration the fact that this case involves the interpretation of new legislation and was of significant public importance.

[35] I have concluded that an additional $5,000.00 should be added to the $5,328.82 referred to above to take into account the amount claimed in relation to the amount recovered – but more importantly to take into account the two formal Offers to Settle made by the Defendants but not accepted by the Plaintiff. Litigation in this day and age is extremely expensive. No party is guaranteed success in court and all parties should be encouraged to make and accept reasonable offers of settlement. In the case at Bar, the Defendants filed two formal Offers which, at the end of the day, turned out to be most reasonable. Neither of these Offers were accepted by the Plaintiff.

[36] Litigants are free to reject any offer of settlement put to them and take their chances in court – but there are risks inherent in doing so including cost consequences. In this case, I am satisfied that it is appropriate to award the Defendants an additional $5,000.00 to take into account the amount claimed in relation to the amount recovered and, more importantly, to take into account the two

written Offers to Settle both of which were not accepted. I should indicate that in arriving at this figure I have not followed the formulas referred to in Civil Procedure Rule 10.09 (2) as that Rule was not in effect when either of the Offers were made.

[37] The Defendants are hereby awarded costs and disbursements in the total amount of $10,328.82 ($5,382.82 + $5,000.00 = $10,328.82) to be paid on or before the 4th day of May, 2010.

Deborah K. Smith
Associate Chief Justice

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Richard Casavant and Mary Casavant

Defendants

Revised decision: The text of the original decision has been corrected according to the attached erratum (February 8th, 2010)

Judge: Deborah K. Smith, Associate Chief Justice

Written Decision: February 4th, 2010

Counsel: Kevin A. MacDonald, Esq.
Solicitor for the Plaintiff

Michael E. Dunphy, Q.C. and Ashley P. Dunn
Solicitors for the Defendants

E R R A T U M

[1] At paragraph 28 - first sentence - second line - replace the word “except” with “accept”.