SUPREME COURT OF NOVA SCOTIA
Citation: *Blenus v Fraser*, 2021 NSSC 158

Date: 2021-05-12
Docket: Ken No. 441592
Registry: Kentville

Between:

Donald Blenus

Plaintiff

v.

Charles Fraser

Defendant

Judge:	The Honourable Justice Gregory M. Warner
Final Written Submissions:	April 1, 2021
Counsel:	Ali Imran Raja and Angeli Swinamer, counsel for the Plaintiff Joshua Martin and Chad Horton, counsel for the Respondent

By the Court:

[1] This costs decision relates to the trial decision reported at 2021 NSSC 79.

[2] Before trial, the Defendant Charles Fraser ("**Defendant**") admitted liability for a collision between his motor vehicle and the Plaintiff Donald Blenus ("**Plaintiff"**)'s motorcycle. The parties' pretrial positions and the Court's award at trial are as follows:

	Plaintiff Brief	**Defendant Brief**	**Trial Decision**
General Damages	$150,000	$75,000	$100,000
Housekeeping/LVS	$125,000	$12,500	$25,000
Cost of future care	$200,000	$0	$25,000
Wage Loss	$1,357,973	$0	$0
TOTAL	**$1,852,973**	**$97,500**	**$150,000 (less 25% mitigation)**

[3] The Court held that the largest claim by far - for the loss of income when the Plaintiff closed his profitable construction business 3½ years after the accident, was not caused by the Defendant's negligence. Furthermore, the Plaintiff failed to follow medical advice; therefore, he failed to properly mitigate his losses.

[4] The parties exchanged the following settlement offers in the month before trial:

1. On December 7, 2018, at a mediation session, the Plaintiff offered to settle for $950,000.00 and the Defendant offered $500,000.00. The mediation failed.

2. On December 7, 2018, the Defendant forwarded a formal offer to settle in the amount of $500,000.00 plus costs.

3. On December 11, 2018, the Plaintiff revoked his offer made at mediation.

4. On December 14, 2018, the Plaintiff offered to settle in the amount of $1,000,000.00 plus costs.

5. Later, on the same day, the Defendant increased his formal offer to $600,000.00 plus costs.

6. On December 27, 2018, the Plaintiff made a formal offer to settle in the amount of $900,000.00, inclusive of costs and disbursements (all in).

Plaintiff's Submission

[5] The Plaintiff submits that Rule 10 respecting formal settlement does not apply as all of the formal offers were made after the Finish Date agreed to at the Date Assignment Conference of October 31, 2017; that is, September 28, 2018,. The Plaintiff acknowledges that the Defendant obtained a "favourable judgment" pursuant to Rule 10.09(1). He argues that the Defendant was not fully successful (Rule 10.09(2)), but was rather partially successfully (Rule 10.09(3)), and therefore cannot benefit under Rule 10.

[6] The Plaintiff refers the Court to the Court to *McKeough v. Miller*, 2010 NSSC 172, for its discretion to not reduce a party's costs where another party obtained a more favourable judgment than an offer made after the Finish Date.

[7] The Court has substantial discretion under Rule 77 to do justice between the parties. The starting point for the analysis is Tariff A. Based on the Court's damage award in favour of the Plaintiff, Tariff A, Scale 2, produces a cost award of $12,250.00 plus $2,000.00 per day for seven days, or a total of $26,250.00. Rule 77.07 provides that a judge may or may not adjust Tariff A based on the amount claimed in relation to the amount obtained, whether or not written offers are accepted.

[8] The Plaintiff seeks costs of $26,250.00, plus disbursements of $62,296.25.

Defendant's Position

[9] The Defendant submits that Rule 10 applies. He submits that the conduct of both parties in filing late financial expert reports by agreement after the predetermined Finish Date created a new *de facto* Finish Date. In this case, the Plaintiff's first financial expert report was filed on August 2, 2018; the Defendant's report was provided on November 9, 2018; the Plaintiff's updated report was filed on November 19, 2018; the Plaintiff's rebuttal report was provided on November

19, 2018; and, the Defendant's rebuttal report was provided on November 20, 2018. All of the expert reports related to the largest claim – the unsuccessful loss of income claim were filed or provided long after the deadlines in Rule 55.03.

[10] The Defendant submits that if the Court finds that it was fully successful pursuant to Rule 10.09(2)(d), that it is entitled to costs based on Tariff A for the amount claimed; that is, $120,443.00 plus 25%, plus $12,000.00 for six days, plus disbursements of $30,712.15, or a total of $193,266.15.

[11] If the Court decides that he was not fully successful, but that he made an offer after the trial was set down but before the Finish Date (which he submits should be the *de facto* Finish Date), the Court should award costs per Rule 10.09(3)(c) of 60% of the Tariff amount for a total award $110,177.95.

[12] Alternatively, if the Court finds that the Defendant did not fully succeed and that all offers were made after the Finish Date, neither party is entitled to costs. He refers the Court to *Young v. Hayward*, 2013 NSCA 65 ("***Young***").

Analysis

[13] Rule 77 gives the Court the discretion to award costs that will do justice between the parties. The starting point is Tariff A. The Court's discretion is not unlimited but is circumscribed by rational principles of law.

[14] The analysis of the Defendant's claim begins with Rule 10.09, which reads as follows:

> **10.09 Determining costs if formal offer not accepted**
>
> (1) A party obtains a "favourable judgment" when each of the following have occurred:
>
> (a) the party delivers a formal offer to settle an action, or a counterclaim, crossclaim, or third party claim, at least one week before a trial;
>
> (b) the offer is not withdrawn or accepted;
>
> (c) a judgment is given providing the other party with a result no better than that party would have received by accepting the offer.

> (2) A judge may award costs to a party who starts or who successfully defends a proceeding and obtains a favourable judgment, in an amount based on the tariffs increased by one of the following percentages:
>
> > (a) one hundred percent, if the offer is made less than twenty-five days after pleadings close;
> >
> > (b) seventy-five percent, if the offer is made more than twenty-five days after pleadings close and before setting down;
> >
> > (c) fifty percent, if the offer is made after setting down and before the finish date;
> >
> > (d) twenty-five percent, if the offer is made after the finish date.
>
> (3) A judge may award costs in one of the following amounts to a party who defends a proceeding, does not fully succeed, and obtains a favourable judgment:
>
> > (a) the amount that the tariffs would provide had the party been successful, if the offer is made less than twenty-five days after pleadings close;
> >
> > (b) seventy-five percent of that amount, if the offer is made more than twenty-five days after pleadings close and before setting down;
> >
> > (c) sixty percent of that amount, if the offer is made after setting down and before the finish date;
> >
> > (d) nothing, if the offer is made after the finish date.

[15] It is not contested that the Defendant obtained a favourable judgment pursuant to Rule 10.09(1).

[16] The first contested issue is: what was the Finish Date.

[17] In *Young*, there was no formal Finish Date fixed before the trial so there was some room for argument after the trial respecting the trial judge's fixing of a Finish Date.

[18] In this case, the Finish Date of September 28, 2018 was agreed to at, and set out in, the Date Assignment Conference Report of October 31, 2017. No motion, nor agreement, was made to change the date by either party. The fact that the parties both agreed to extend the timeline for filing the financial expert reports does not automatically or inferentially mean that the Finish Date has changed. This Court

does not have discretion, after the fact, to arbitrarily redefine that term, and I decline to do so.

[19] The purpose of the time for filing expert reports in Rule 55, and the setting of a Finish Date, is reduce the risk that the resolution of proceedings before the trial does not occur, relatively speaking, at the last minute. Playing with the concept of a "*de facto*" Finish Date that differs from the formal predetermined Finish Date, would defeat the Court's purpose of encouraging efficient use of limited Court trial dates, limited Court facilities, and limited judges and human resources. It is a discouragement to early settlement discussions in civil proceedings to ignore the timelines. It interferes with access to justice by others. There is little benefit to the Court, and none to litigants in other proceedings, when parties settle at the last minute. While the Court does not discourage settlement discussions at any time, the judicial system and access to justice benefit when timelines have meaning.

[20] The short answer to the first issue is that the Defendant's settlement offers were all made less than a month before trial and long after the Finish Date.

[21] The second issue relates to whether the Defendant fully succeeded - if so, Rule 10.09(2) applies - or partially succeeded, Rule 10.09(3) applies.

[22] The Court's assessment of non-pecuniary damages, valuable services and cost of future care exceeded the Defendant's pretrial position. These three heads of damages amounted to about 25% of the Plaintiff's total claim. It was in respect of the claim for loss of income and failure to mitigate that the Defendant succeeded.

[23] The Defendant did not fully succeed even though he obtained a favourable judgment. His formal offers to settle was made long after the Finish Date.

[24] This case falls squarely within Rule 10.09(3)(d).

[25] There are no circumstances related to this case that should cause the Court to deviate from application of plain meaning of Rule 10.09(3)(d).

[26] The Court awards no costs to either party.

[27] A possible third issue relates to the parties' party and party legal disbursements. If disbursements are not clearly included in the term "costs" in Rule 10, I conclude that there is no principled reason that the same analysis that applies to costs should not apply to disbursements.

[28] The court was referred to *Young*. It is not helpful. The Court of Appeal's analysis was complicated by the fact that the trial judge appeared to award appeared to be legal disbursements under the heading of "special damages" and "out-of-pocket expenses". The Court of Appeal effectively determined that these heads of damages constituted a claim for legal disbursements of about $30,000.00. At the same time, the Trial Judge did not offset this award of legal disbursements with the legal disbursements of the partially successful defendant. The Court of Appeal corrected this oversight by offsetting 77% of the defendant's disbursements against the plaintiff's "out-of-pocket expenses" and "special damages".

[29] That is not the matrix in this case.

[30] In this case, the Plaintiff's affidavit claims disbursements of $62,296.25. They included: (a) three invoices for the reports and evidence of Jarrett Reaume, of MDD Financial Consultants, totalling $27,825.00, all of which related to the Plaintiff's unsuccessful loss of income claim, (b) four invoices from the Plaintiff's bookkeeper for providing financial information to MDD that totalled $1,005.00, and (c) three invoices (each of one-line, describing neither the time nor dates or nature of the services provided) of Dr. Kleinman. Dr. Kleinman's evidence was not entirely accepted by the Court. Dr. Kleinman's three invoices totalled $21,415.00.

[31] Eliminating the disbursements related to the loss of income claim and reducing the invoices of Dr. Kleinman would result in reasonable disbursements of less than $25,000.00.

[32] The Defendant's disbursements totalled $30,712.15. They included $18,457.50 for the expert reports from KPMG regarding the Plaintiff's loss of income claim. These reports were never filed, nor produced at trial, nor was any witness called in relation to reports produced long after the Finish Date.

[33] The Court of Appeal in *Young* appeared to have awarded the partially successful defendant most of its disbursements only because the unsuccessful plaintiff had been awarded disbursements under other heads of damages. That matrix does not apply here.

[34] I apply the same principle to party-and-party legal reasonable disbursements as I applied to the party's respective claims for party-and-party costs.

[35] In summary, no costs or disbursements are awarded to either party.

Warner, J.