

SUPREME COURT OF NOVA SCOTIA

Citation: Day v. Day, 2009 NSSC 237

Date: 20090806

Docket: Hfx. No. 225867

Registry: Halifax

Between:

Courtney Nicole Day and Joshua James Day

Plaintiffs

- and -

Marilyn Day

Defendant

- and -

Tory Day and Betty Laverne Day

Third Parties

DECISION ON COSTS

Judge: The Honourable Justice Gerald R.P. Moir

Heard: November 17 and 18, 2008, in Halifax, Nova Scotia

**Last
Submissions:** June 23, 2009

Counsel: Brian Casey for the plaintiffs
John DiCostanzo for the defendant
William MacInnes, Q.C. for Troy Day
Betty Laverne Day acting on her own

By the Court:

[1] I have to decide on costs to be paid in this proceeding.

[2] The plaintiffs argue they should receive solicitor and client costs because their claims were based on the defendant's breach of trust. They rely on *Barry v. Garden River Band of Ojibways*, [1997] O.J. 2109 (C.A.) and *Siemens v. Bawolin*, [2002] S.J. 398 (C.A.). As pointed out on behalf of the defendant, a breach of trust does not automatically lead to solicitor and client costs.

[3] This case involved two kinds of breach. The first, and far more substantial one, involved two payments of \$30,000 each consented to by the plaintiffs' mother. The consent leads me to conclude that solicitor and client costs would be unfair.

[4] The other breach involved the personal use of trust money. In my view, such a breach should, in most circumstances, lead to solicitor and client costs.

[5] The defendant made an offer to settle this case, but it was for an amount less than that recovered. In the circumstances, the offer does not influence my conclusions on costs.

[6] The defendant points out, rightly, that the old tariffs of costs apply in this case. The action was started in July of 2004 and the new tariffs came into effect in the following September. The new tariffs expressly provide that they are not retroactive.

[7] The old tariffs would provide only a \$4,125 indemnity. That would not begin to serve the purpose of the tariffs, to provide a partial but substantial indemnity. I would, therefore, depart from the tariffs and order lump sum costs.

[8] The action was started so close to the effective date that I would look to the new tariffs as one source of guidance for a lump sum. It would lead to an award of \$11,250, if it applied.

[9] I think it is fair to enhance the lump sum because of the second kind of breach of trust.

[10] The plaintiffs will have a judgment for costs against the defendant in the amount of \$16,000 plus \$1,250 for disbursements.

[11] Mr. Troy Day succeeded in his defence of the third party claim. His counsel argues for solicitor and client costs because of an offer for settlement, a release obtained by Mr. Day when he transferred his interest in his father's home, and his continuing legal expenses despite the offer and the release.

[12] The offer was not very appetizing, and I am doubtful that the release applied to the \$30,000 paid to Mr. Day. He received the money although he was not entitled to it. This is not a case for solicitor and client costs.

[13] Mr. Day received \$30,000 to which he was not entitled and that was the amount involved in the claim against him. On the other hand, he made an offer to settle, and he was successful in his defence. The amount suggested by his counsel for party and party costs is reasonable.

[14] The third party, Troy Day, will have a judgment for costs against the defendant for \$10,000 plus \$300 for disbursements.

[15] The third party, Laverne Day, acted on her own and, as no claim was proved against her, she would usually recover costs, but the circumstances are unusual. It was her consent that led to the two \$30,000 misappropriations, and much of the dispute turned on her account of how the consent document got signed, which account was rejected. Ms. Laverne Day will bear her own costs.

[16] Ms. Laverne Day sent me a submission that would lead me to reconsider two of my findings, increase the judgment in favour of the plaintiffs by \$3,082, consider new evidence, and provide a further increase of \$1,631. I decline to do so. I do not agree that the findings are wrong, and the threshold for admitting evidence after the case is closed has not been met.

J.