CITATION: Arteaga v. Poirier and Pro-Land Landscape Construction, 2016 ONSC 6628
COURT FILE NO.: CV-12-1238
DATE: 20161025

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
ELIANA ARTEAGA	)	
Plaintiff	)	Mark Elkin and Natasha Skupsky, for the Plaintiff
– and –	)	
MICHEL POIRIER and PRO-LAND LANDSCAPE AND CONSTRUCTION	)	Jonathan Schwartzman and Agatha Dix, for the Defendants
Defendants	)	
	)	**HEARD:** August 3, 2016

REASONS FOR DECISION ON MOTION FOR JUDGMENT AND COSTS

DiTOMASO J.

INTRODUCTION

[1] The Plaintiff, Eliana Arteaga (Ms. Arteaga) brought a motion for judgment following which submissions were made by both parties in respect of costs.

BACKGROUND

[2] This action arose out of a motor vehicle accident in Brampton, Ontario, which occurred on March 15th, 2011. The Defendants admitted liability. The jury trial was limited to the issue of causation of damages. The trial took place over three weeks at Barrie.

[3] On June 2nd, 2016, the jury awarded Ms. Arteaga $20,000 for general damages and nothing for future loss of income due to early retirement. The jury awarded Ms. Arteaga damages for future cost of care as follows:

i. Medical rehabilitation expenses - $11,000

ii. Driving desensitization - $0

iii. Occupational therapy - $0

iv. Medical/assistive devises - $150

v. Housekeeping expenses - $2,000

[4] Following my charge to the jury, the Defendants brought what is commonly referred to as a "threshold motion". The Defendants' motion was dismissed.

[5] Ms. Arteaga brought a motion for judgment.

[6] The parties agree that upon application of the relevant deductions, pursuant to the *Insurance Act* regarding the jury award, with the exception of housekeeping expenses, all of the amounts awarded by the jury were reduced to zero.

[7] The remaining and only issue is whether the housekeeping expenses award of $2000 is reduced by any collateral benefits received by Ms. Arteaga prior to trial.

[8] Ms. Arteaga's position is that this $2000 amount is not eligible for reduction by any collateral benefits received prior to trial, which occurred between May 17, 2016 and June 2nd, 2016.

[9] Ms. Arteaga received $3650 in housekeeping benefits from her accident benefits insurance carrier, Wawanesa Mutual Insurance (Wawanesa), as part of her accident

benefits settlement on or about July 9th, 2015. That total settlement was in the amount of $26,650.

[10] It is submitted on behalf of Ms. Arteaga that she was not a catastrophically impaired claimant insofar as her Accident Benefits Claim pertaining to the March 15th, 2011 motor vehicle accident. It is submitted that she was not eligible to receive any housekeeping benefits beyond 104 weeks post-accident. The 104 week mark in relation to the accident is March 15th, 2013.

[11] Ms. Arteaga submits that she received housekeeping benefits in her accident benefits settlement that were to be retroactively applied to the expenses she incurred for housekeeping expenses between March 15, 2011 and March 2013. She argues that the housekeeping benefits received by way of jury award on June 2nd, 2016 were to assist her with housekeeping expenses from the date of the verdict onwards.

[12] The Defendants' position is that Ms. Arteaga settled all claims, past, present and future for housekeeping expenses in the amount of $3650. They submit that the jury award of $2000 is to be reduced by the amount received by Ms. Arteaga by way of settlement for housekeeping expenses, leaving a zero award for housekeeping expenses and ultimately, a zero judgment overall.

THE MOTION FOR JUDGMENT

[13] In support of the motion for judgment, Ms. Arteaga tendered the affidavits of Deborah J. Lewis, sworn June 23rd, 2016, with exhibits and the affidavit of Sarah Mohan sworn June 23rd, 2016, with exhibits. Ms. Lewis was Ms. Arteaga's counsel in respect of Ms. Arteaga's Accident Benefits Claim. In her affidavit, Ms. Lewis sets out the chronology

of events in respect of Ms. Arteaga's Accident Benefits Claim with Wawanesa. This claim settled on or about July 2nd, 2015.

[14] The Accident Benefits Claim was settled for the global figure of $26,650. This figure represented $3000 for caregiver benefits, $20,000 for medical benefits and $3650 for housekeeping benefits. These figures are reflected in the Full and Final Release and Settlement Disclosure Notice that were part of the settlement and attached as Exhibit 'H' to Ms. Lewis' affidavit.

[15] Ms. Lewis also deposes that Ms. Arteaga sought payment of housekeeping and home maintenance benefits, solely for the time period of December 22, 2011 to March 15, 2013. The $3650 that she received from Wawanesa was to cover that period.

[16] Sarah Mohan is an Accident Benefits Adjuster with Wawanesa Mutual Insurance. She adjusted Ms. Arteaga's claim for accident benefits pertaining to the March 15th, 2011 motor vehicle accident. She deposes that Ms. Arteaga was put into the Minor Injury Guideline at the commencement of her claim following this accident. She received housekeeping benefits from April 2011 until the end of November, 2012, when these benefits were discontinued by Wawanesa. An application for arbitration was submitted on behalf of Ms. Arteaga by her counsel, Ms. Lewis, with the Financial Services Commission of Ontario (FSCO). One of the issues related to housekeeping benefits in a weekly amount of $100, from December 22, 2011 until March 15, 2013.

[17] In her affidavit, Ms. Mohan confirms the settlement with Ms. Arteaga was broken down for the same amounts as stated by Ms. Lewis. Ms. Mohan deposes that Ms. Arteaga was not catastrophically impaired as a result of injuries sustained from the March 15, 2011

motor vehicle accident, in accordance with the Statutory Accident Benefits Regime. Accordingly, Ms. Arteaga was unable to receive any housekeeping benefits beyond the 104 week mark, which is March 15th, 2013 in this case. At paragraph eight of her affidavit, Ms. Mohan deposes that the settlement amount regarding the housekeeping benefits, which was $3650, pertains to past housekeeping expenses incurred before March 15, 2013.

[18] The Defendants took issue in respect of the tendering of these affidavits. The Defendants could not offer or articulate any reasonable basis for exclusion of these affidavits. It was simply stated that the Defendants were "uncomfortable" with their admissibility.

[19] On behalf of Ms. Arteaga, it was submitted that these affidavits would assist the court in the determination of the issue of deductibility of collateral benefits, which determination would ultimately impact the issue of costs in a major way.

[20] Although counsel for the Defendants could not consent to the admission of these affidavits, he did not dispute the accuracy of the factual chronology. However, counsel for the Defendants did dispute Ms. Arteaga's assertion that the $3650 received by her was paid by Wawanesa only for past expenses and not future expenses. Defence counsel did not accept the evidence of either Ms. Lewis or Ms. Mohan that the settlement amount received for housekeeping expenses by Ms. Arteaga in the amount of $3650 was only for payment of past expenses and not for future expenses. The Defendants' position was that the jury award of $2000 was subject to deduction in the amount of $3650 received by Ms. Arteaga for past, present and future housekeeping expenses, leaving a zero jury award for

future housekeeping benefits and ultimately, a zero judgment. No reasonable objection was articulated to support the exclusion of the affidavits.

[21] Counsel for Ms. Arteaga also cited the decision of Mullins J. in *Trepkov v. Jaworski*, 2015 ONSC 1746 at para. 66, where the court directed further affidavit evidence be tendered to deal with the determination of the deductibility of collateral benefits from the jury award to the Plaintiff of $3500 for the cost of future care.

[22] There had been a settlement of past and future entitlements. In that case, as in the case at bar, the critical issue was to determine whether the amount the Plaintiff received in no-fault benefits ought to be deducted from the jury award. I adopted the reasoning of Mullins J. and ruled the affidavits were admissible evidence to assist the court in the determination of this critical issue.

[23] Indeed the affidavits of Ms. Lewis and Ms. Mohan were of assistance to the court in providing further facts on this issue

[24] While counsel for the Defendants did not agree with the admissibility of the affidavits, he did not contest the accuracy of certain facts consistent in both affidavits.

[25] However, counsel for the Defendants disagree that the sum of $3650 paid upon settlement of housekeeping expenses is for past housekeeping expenses only. Rather, it is submitted that Ms. Arteaga settled her housekeeping claim – past, present and future – for $3650. In support of this position, the Defendants rely upon the Full and Final Release dated July 9, 2015, signed by Ms. Arteaga and the Settlement Disclosure Notice

dated July 9th, 2015, also signed by Ms. Arteaga contained as exhibits in both the affidavits of Deborah J. Lewis and Sarah Mohan.

[26] As a result, counsel for the Defendants submits the whole amount; $3650, ought to be deducted from the jury award of $2000 for future housekeeping expenses leaving a zero judgment award.

[27] I agree with the position taken on behalf of the Defendants for the following reasons.

[28] I have reviewed the Full and Final Release executed by Ms. Arteaga. It releases Wawanesa, her accident benefit insurer, for all acts, causes of action, damages, claims and demands for Statutory Accident Benefits, *past, present and future*, pursuant to the relevant *Insurance Act* and Statutory Accident Benefit schedule provisions, as a result of the March 15, 2011 motor vehicle accident. The entire settlement was in the amount of $26,650. The Full and Final Release was signed not only by Ms. Arteaga, but also by her lawyer, Ms. Lewis, who acknowledged fully explaining the Release to Ms. Arteaga.

[29] Further, I have reviewed the Settlement Disclosure Notice, which forms an important part of the settlement documentation (Exhibit 38 at trial) under the heading **"Insurer's Offer to Settle Benefits"**. It provides:

> Housekeeping: you have been offered $3650 for all past and future benefits for other expenses.

...

> **Provide any other details:** this is a full and final settlement of all issues arising from the claim for accident benefits of Eliana Arteaga as a result of a motor vehicle (sic) accident of March 15, 2011.

[30] Counsel for Ms. Arteaga submits that while the Settlement Disclosure Notice does offer the sum of $3650 to settle all past and future housekeeping benefits, he submits that the word 'future' should have been struck. I do not agree. Certainly, Wawanesa insisted on a release of all future claims and would not have agreed to settle without an all-encompassing settlement of the past, present and future claims of Ms. Arteaga.

[31] I find the settlement was for payment of her outstanding housekeeping claim in return for the release of all such claims, past, present and future for which she received legal advice as well as the same regarding the Settlement Disclosure Notice.

[32] Ms. Arteaga also works in the insurance industry. She has dealt with and is familiar with SAB claims and these types of documents. There was no evidence contemporaneous with the settlement to suggest that the sum of $3650 was paid for past and not future housekeeping expenses.

[33] We have the affidavits of Deborah Lewis and Sarah Mohan authored in June of 2016 after the jury verdict. Their evidence as to the settlement for only past housekeeping expenses is inconsistent with the language set out in the Full and Final Release and Settlement Notice Disclosure documentation.

[34] I reject their evidence in this regard. I find the settlement documents are clear, unequivocal and mean what they say. They are not intended to be interpreted in the manner Ms. Arteaga, her counsel, Ms. Lewis and Ms. Mohan choose to characterize the settlement retrospectively. This interpretation is not supported by the evidence. I find Ms. Arteaga's housekeeping claims were settled for past, present and future expenses and not merely for past housekeeping expenses.

[35] In *Mikolic v. Tanguay* [1] counsel for the Plaintiff/Respondent submitted the Settlement Disclosure Notice provided only a "notional breakdown" benefits and did not reflect reality. The document was only prepared by the insurer and the lump sum settlement was not accurately reflected on the Settlement Disclosure Notice. The Divisional Court rejected this argument and ordered a deduction of the settled accident benefits from the jury's tort award for past and future income loss and future care costs. Similarly, the Settlement Disclosure Notice and the Full and Final Release documentation in our case do not reflect a "notional allocation." To the contrary, they reflect the identical settlement of $26,650 with the Settlement Disclosure Notice allocating and itemizing specific benefits being settled, including the housekeeping expenses.

[36] Section 267.8 of the *Insurance Act* creates several categories of Statutory Accident Benefits to be taken into account as possible reductions in a jury award for pecuniary losses, such as housekeeping costs (s. 267.8)(6) of the *Insurance Act*). This statutory scheme contemplates reductions on a benefit-by-benefit basis as required by s. 267.8 of the *Insurance Act*; *Basandra v. Sforza,* 2016 ONCA 251 at paras. 21-23.

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[1] Mikolic v. Tanguay et al., 2016 ONSC 71 at paras. 24, 25 &29

[37] In our case, I find the jury award for future housekeeping expenses shall be reduced by the housekeeping benefits paid to Ms. Arteaga in the settlement amount of $3650 of in accordance with s. 267.8(6) of the *Insurance Act*. To do so, does not over compensate Ms. Arteaga. This results in a zero judgment award for future housekeeping expenses.

[38] Ultimately, I find Ms. Arteaga is not entitled to judgment in the amount of $2000, or post-judgment interest thereon. The amount of her future judgment is zero.

COSTS

[39] I find the Defendants are the successful parties and are entitled to their costs on a partial indemnity scale. In this case, the general principle that costs should follow the cause applies. They successfully defended this action.

[40] By way of partial indemnity costs, the Defendants seek the following amounts rounded to $155,000:

Fees plus HST - $111,499.71

Disbursements plus HST - $43,416.42

Total $154,916.13 rounded to $155,000

[41] It is the position of the Defendants that they should be entitled to their costs; *Clark v. Zigrossi*, 2010 ONSC 6357, the jury awarded the Plaintiff $5000 for general damages, which resulted in a net-zero award after the deductible. The Defendant had offered to settle for a dismissal without costs, or $15,000 general damages less the $15,000 deductible or a net-zero dollar offer.

[42] In *Clark*, D. M. Brown J. awarded the Defendant costs because "Costs follow the cause" and the Defendant was the successful party. I agree the same principle applies in our case.

[43] It is the position of the Defendants in the case at bar that they are entitled their costs as they offered to settle the claim for dismissal without costs after the application of the deductible and were successful in meeting this offer.

[44] So far as the offers to settle were concerned there were no live offers extant at the commencement of this trial.

[45] Rather, the Defendants offered to settle this matter at mediation on June 2nd, 2014 for $36,000 all inclusive.

[46] On December 22nd, 2015, Ms. Arteaga was advised the offer of $36,000 all-inclusive would be open for acceptance until January 25th, 2016, after which time it would be revoked.

[47] On April 19th, 2016 the Defendants advanced an offer to dismiss her action against the Defendants on a without costs basis if accepted on or before April 22, 2016 at 5 p.m. Alternatively, if the offer was accepted after April 22, 2016 at 5 p.m., costs would be payable to the Defendants on a partial indemnity basis. This offer to settle expired one minute after the commencement of the trial, unless withdrawn by the Defendants first in writing.

[48] On April 28th, 2016, Ms. Arteaga offered to settle her claim for $125,000 inclusive of all claims and interest, net of any and all statutory deductions, and with costs to be agreed upon remaining open until the commencement of trial.

[49] The Defendants expired offer for $36,000 was more than the jury award and came at a much earlier date. Rule 49.13 of the *Rules of Civil Procedure* calls for a holistic approach to the determination of costs, having regard to factors including any offers to settle – regardless of whether or not they meet the requirements of Rule 49 – and where appropriate, do justice between the parties. In *König v. Hobza*[2], the *Court of Appeal* reviewed its prior decision in *Lawson v. Viersen*[3], and reiterated the conclusion at paragraph 49 that non-Rule 49 offers ought to be given "considerable weight in arriving at a cost award".

[50] In the case at bar, the Defendants attempted to settle this claim at mediation and then by subsequent offer. Ms. Arteaga failed to respond with a meaningful counter offer. In the end, I find the Defendants were compelled to proceed to trial and the result achieved was better than their offer of April 19th, 2016.

[51] I have considered the offers to settle when considering the issue of quantum and the exercise of my discretion to award costs under s. 131(1) of the *Courts of Justice Act*, RSO 1990 c.C. 33 and Rule 57.01 of the *Rules of Civil Procedure* to fix costs. In fixing costs, a court must arrive at a cost award that is a fair and reasonable amount to be paid by an unsuccessful party and that takes into account the expectations of the parties concerning

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[2] König v. Hobza, 2015 ONCA 885, 129 OR (3d) 57
[3] Lawson v. Viersen, 2012 ONCA 25, 108 OR (3d) 771

the quantum of a cost award, *Zesta Engineering Ltd. v. Cloutier*, [2002] OJ No. 4495 (CA) para. 4; *Boucher v. Public Accountants Council for the Province of Ontario,* [2004] OJ No. 2634 at para. 38. At *Davies v. Clarington (Municipality)*, [2009] OJ No. 4236, the *Ontario Court of Appeal* set out a helpful review of the guiding principles and authorities in determining costs.

[52] In reviewing a claim for costs, a court need not undertake a line by line analysis of the hours claimed, nor should a court second-guess the amount claimed unless it is clearly excessive or over-reaching. A trial judge must consider what is reasonable in the circumstances and, after taking into account all of the relevant factors, should award costs in a more global fashion; *Clark v. Zigrossi, supra* at para. 6, I have reviewed the hourly rates and I find that the rates are reasonable for fees claimed on a partial indemnity scale. I also have considered the hours spent by defence counsel and specifically refer to the Defendants' Bill of Costs at page 8. It sets out a chart entitled **"PERIOD CALCULATIONS FOR SETTLEMENT OFFERS OF DEFENDANTS"**. This chart sets out partial indemnity fees, disbursements and HST for four time periods which coincide with the dates of the various offers. It is clear from this chart and the supporting documentation that the costs incurred by the Defendants after April 22, 2016 increased significantly over the other prior three periods. After April 22, 2016, to date, the Defendants' costs were the amount of $106,262.19. Those costs, to a major extent, included the costs of preparing and attending at trial which took place over three weeks before a jury.

[53] I wish to address the reasonable expectation of unsuccessful parties. In fixing costs, the court must consider what Ms. Arteaga could have reasonably expected to pay in costs if

she was unsuccessful at trial. A cost award must be within the reasonable expectation of the unsuccessful party in order to preserve access to justice; *Moon v. Sher*, (2004), 246 D.L.R (4th) 440 at para. 28. I find that Ms. Arteaga was well aware that costs would be substantial. In open court, her counsel indicated that Ms. Arteaga was facing a potential adverse award in excess of $200,000. I also add that during costs submissions, counsel for Ms. Arteaga claimed that she was entitled to costs in the amount of $217,473. If this was her claim for partial indemnity costs, she most certainly was aware that defence costs would also be significant.

[54] In respect of delays occasioned by disorganization on the part of Plaintiff's counsel, I find that there were a number of instances at trial which needlessly wasted court time, as follows:

1. Plaintiff's counsel attended the first day of trial unaware that liability was admitted at pretrial. The first day was essentially lost waiting for a police officer to give evidence that was not key to the trial's outcome.

2. Plaintiff's counsel scheduled only two witnesses on one day of trial and then determined that one of the witnesses was not going to add anything to the proceedings, such that she was called off. Again, this was a waste of court time and needlessly escalated costs.

3. In all, at least one full day of trial was lost due to disorganization. Costs were needlessly incurred for at least one day. Such costs certainly offset any costs related to the 'threshold' motion.

4. Plaintiff's counsel also wasted a lot of court time by attempting to 'appeal' to the court's decision concerning the admissibility of the $107,500 slip and fall settlement. This included, but was not limited to, threatening a motion for a mistrial and to strike the jury, which was ultimately never brought. Nevertheless, preparation costs were incurred by opposing counsel (i.e. Factum and Brief of Authorities). Those costs thrown away are likely no less than the threshold motion costs.

5. Lastly, the Plaintiff's counsel refused to agree on a joint exhibits brief and did not come to trial prepared with copies of exhibits ready to be handed to the court and jurors in a seamless and organized manner. In doing so, Plaintiff's counsel wasted further time.

[55] I conclude that all of these incidents resulted in delays occasioned by disorganization. Such delays fall at the feet of Plaintiff's counsel. I find these offset any costs related to the success achieved by Ms. Arteaga on the 'threshold' motion.

[56] In relation to the hourly rate and hours spent, the Defendants are seeking compensation for time actually spent, the defendants' counsel submits that his office was efficient and there was no duplication of effort or "wheel spinning". At trial, both parties were represented by teams of two lawyers. While I have approved of the hourly rates and hours spent by the defence that is not to say that the calculation of costs is a mathematical exercise of simply hours times rate. While I agree there has not been any "wheel spinning" on the part of the defence, there has been some duplication which would cause me to reduce the amount of fees claimed. In addition to what is fair and reasonable is

also what is proportional. I would reduce fees to $95,000 from $111,499.71 on the basis of duplication. To do so is fair, reasonable and proportional.

[57] Accordingly, the fees inclusive of HST are fixed in the amount of $95,000. Disbursements and HST are fixed in the amount of $43,416.42 for total fees in the amount of $138,416.42.

[58] It is ordered that the Plaintiff, Eliana Arteaga shall pay the Defendants, Michel Poirier and Pro-Land Landscape Construction Inc., costs fixed in the amount of $138,416.42.

Released: October 25, 2016