

COURT FILE NO.: 99-1463

DATE: 20050823

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MARJORIE EPIFANO

v.

THE CORPORATION OF THE CITY OF HAMILTON

BEFORE: WHITTEN J.

COUNSEL: Robert J. Hooper, counsel on behalf of the Plaintiff

Gary J. Kuzyk, counsel on behalf of the Defendant

ENDORSEMENT RE: COSTS

[1] This matter was tried May 9 - 12, and on a portion of May 13, 2005. Judgment was rendered May 30, 2005 with supplemental reasons June 9, 2005. Costs submissions were requested.

[2] In those submissions, both parties made reference to the discretion of the court to award costs pursuant to section 131 of the *Courts of Justice Act*, the implications of an offer pursuant to Rule 49 of the *Rules of Civil Procedure*, and finally the cost provisions contained in Rule 76.13.

[3] In this matter, on about March 30, 2005, the parties agreed that the quantum of damages would be fixed at \$20,000.00

plus interest. Consequently, the trial scheduled for May 9, 2005 would only be with respect to liability. Within that agreement, the City reserved the right to make a Rule 76 argument. Throughout, the matter had been pursuant to the ordinary **Rules**. There were discoveries. There was the usual exchange of correspondence with respect to production and satisfaction of undertakings.

[4] The City had consistently come from the point of view that it would allow the plaintiff "to walk away" without costs.

[5] In May of 2001, the plaintiff had made a formal Rule 49 offer of \$25,930.00 inclusive of special damages. Costs would be paid to the plaintiff on a solicitor/client basis (i.e. full indemnity). The OHIP subrogated interest was to be paid.

[6] Therefore, although the agreed upon sum which became the judgment, with the effect of interest appears superficially similar to the formal offer, it is not the same and consequently the provisions of Rule 49 do not come into play.

[7] The focus then shifts to those factors enumerated in Rule 57.01. Factor (a) notes the amount claimed and the amount recovered in the proceeding. This factor reflects a desire for a degree of proportionality between that which is recovered and

that which is expended to achieve the result. To have otherwise would lead to abuses and inefficiencies in the administration of justice.

[8] Factor (c) speaks of the complexity of a proceeding. The matter at hand was not complex.

[9] Factor (d) refers to the "*importance of the issues*". Both sides had important issues at stake; the plaintiff seeking compensation from the City, which is responsible for the condition of the sidewalks in her neighbourhood; and the City maintaining an appropriate discretion with respect to such claims.

[10] Factors (e) and (f) allow a court to review the conduct of any party relative to the actual proceeding. What is proffered for scrutiny in this matter is not egregious. It must be kept in mind that this matter meandered through the court process over six years. It is quite likely that both sides had moments when the matter was not pursued with alacrity. As the trial date loomed, there was the usual flurry of activity in getting the matter ready for trial. The Agreement as to quantum and the determination of liability was entirely appropriate. This was a case which depended on the credibility of the plaintiff and the physical evidence. All in all, there is

nothing which cries out as requiring sanction in the conduct of the matter.

[11] The most significant issue that evolves in the cost determination is the fact that the agreed upon sum for damages, by virtue of the finding of liability, is a judgment within the range of the simplified procedure set out in Rule 76. Specifically rule 76.13(3)(b)(i) provides that a plaintiff shall not recover costs unless the court is satisfied that it was reasonable for the plaintiff to have both commenced and continued the action under the ordinary procedure.

[12] There is no real argument to the fact that it was reasonable for the plaintiff to commence the action under the ordinary **Rules**. Counsel for such a plaintiff, upon the commencement of an action, does not have the complete picture as to the extent of the injuries of the plaintiff. He or she would not know whether there are any long-term effects.

[13] Was it reasonable, however, to continue the action according to the ordinary **Rules** after the agreement of March 30, 2005? One must keep in mind that this was at a point just under six weeks from trial. In this narrow time frame should counsel have sought the consent from the City to a proceeding with the Rule 76 trial procedure, or moved to amend the pleadings to so

provide? On one hand, these steps would appear prudent especially since the City was reserving its right to make a Rule 76 argument. This latter reservation is somewhat ambiguous. Does it mean that the City will move for directions to have that procedure apply or will it argue the repercussions for costs? On the other hand, counsel may not consider such steps cost effective especially given the agreed upon quantum. Furthermore, because it is a credibility/physical evidence case, counsel may believe that an ordinary trial as opposed to a trial conducted in the main on affidavits, is the way to go to develop the case for the plaintiff in the most effective manner.

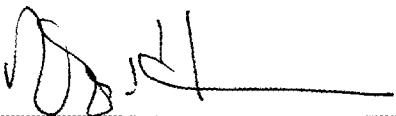
[14] The decision to continue was in many ways a judgment call. There was no specific warning that the City would seek to capitalize on that course of action by seeking the eclipse of costs. If anything the late-breaking disclosure, set out in Tabs 10 and 11, reveal counsel conscientiously working to have everything ready for an ordinary trial. Perhaps it is with hindsight that one would opine that costs dependent upon simplified versus ordinary procedure, should have been addressed in that March 30 agreement. In any event it cannot be said that the decision to continue with the ordinary procedure, even given the philosophy behind Rule 76 was *per se* unreasonable. It was

objectively reasonable to continue. Having said that, one harkens back to the factor (a) of Rule 57.01, the proportionality between the costs and the result. The fact that the matter could have proceeded in accordance with Rule 76 is an aspect of that quest for proportionality.

[15] This is not a result which justifies the imposition of costs on a substantial indemnity basis, which in this case, would be twice the agreed upon quantum.

[16] The Bill of Costs on a partial indemnity basis, is equally problematic from the point of view of proportionality. A claim for almost one and a half times the agreed upon quantum is not appropriate. Furthermore, the amounts claimed for pleadings, documents/affidavit of documents, offers and notices, trial record are too high for what was involved.

[17] It is the opinion of the Court that the appropriate sum payable to the plaintiff for her costs is the sum of \$18,000.00 inclusive of disbursements.



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