Court File No. CV-16-554230
DATE: 2023 02 13

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

MOHAMED LAKDAWALA

Plaintiff

and

AARON LIPTON, ERIN JOHNSTON, AVIVA INSURANCE COMPANY OF CANADA, ~~TAVERN COMPANY~~ 2439004 ONTARIO INC. operating as CAVA, ELKHOUND INVESTMENTS INC. operating as SCALLYWAGS BAR AND RESTAURANT, JOHN DOE 1, JOHN DOE 2, and JOHN DOE 3, JOHN DOE 4. JOHN DOE 5, and JOHN DOE 6

Defendants

BEFORE: Associate Justice Ilchenko

COUNSEL:

Sirus Biniaz, for the Defendants Aaron Lipton ("**Lipton**") & Erin Johnston ("**Johnston**") (collectively, the "**Moving Defendants**")

Sarah Naiman for Responding Party, Plaintiff Mohamed Lakdawala (the "**Plaintiff**")

Lawrence Reimer for Defendant Elkhound Investments Inc. operating as Scallywags Bar And Restaurant ("**Scallywags**") – Did not oppose Motions and not subject to Costs

MOTION HEARD: May 9, 2022

ORIGINAL ENDORSMENT RELEASED: May 20, 2022, costs submissions in writing to be produced within 40 days, but were not provided to me by the Court, costs submissions re-sent by parties and provided to me by Court on January 9, 2023

COSTS ENDORSEMENT

I) Nature of Relief Sought by the Moving Defendants on Motion

[1] The Moving Defendants brought an urgent motion, as ordered to by Glustein, J., to compel the Plaintiff to provide (and to continue to provide to trial) to the Moving Defendants answers to all allegedly outstanding undertakings and to compel the Plaintiff to attend additional physiatry and neurosurgical Defence Medical Examinations (a "**DME**" and collectively the "**DME's**") in this Action (the "**Action**"). I issued reasons on May 20, 2022 (my "**Endorsement**").

[2] My apologies to counsel and parties, I did not receive both sets of costs submissions from the Court until Ms. Naiman followed up in January, 2023 and I had the parties resubmit their costs submissions.

[3] I will continue to use the defined terms from my Endorsement, unless specifically defined in this Costs Endorsement/

Specific Relief Sought

[4] The relief specifically sought on this Motion by the Moving Defendants was summarized in their Notice of Motion (the "**Notice of Motion**"):

> "(a) An Order compelling the Plaintiff to provide to the Moving Defendants answers to all outstanding undertakings listed in Schedule "A", that were attached to the May 20, 2022 endorsement (the "**Undertakings**");
>
> (b) An Order that the Plaintiff attend and complete a neurosurgical medical examination with neurosurgeon Dr. Mahmood Fazl on June 13, 2022, from 9:00 a.m. to 11:00 a.m., at 2075 Bayview Avenue, Suite 138, in the City of Toronto, in the Province of Ontario, failing which the Moving Defendants may move, without notice to dismiss or discontinue the within proceeding as against them;
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> (c) An Order that the Plaintiff attend and complete a physiatry medical examination with physiatrist Dr. Benjamin Clark on June 14, 2022, from 9:30 a.m. to 11:30 a.m., at 5945 Airport Road, Suite 335, in the City of Mississauga, in the Province of Ontario, failing which the Moving Defendants may move, without notice, to dismiss or discontinue the within proceeding as against them;"

The Plaintiff's argument on preliminary issue

[5] As a preliminary issue, the Plaintiff objected to the Moving Defendants bringing the motion at all alleging that the timing of the motion was in breach of the Court Ordered Timetable of Justice Glustein.

[6] My Ruling on that issue was:

> "[9] As I advised counsel, I was not at the case conference that gave rise to the Glustein, J. Endorsement, but on the reading of that Endorsement, set out verbatim above, I can find nothing that supports the Plaintiff's contention that Glustein, J. left it open to me to determine whether I should hear this Motion as a result of the alleged breach of the Case Timetable established by Glustein, J.
>
> [10] The best person to determine whether the Moving Defendants were in breach of the timetable ordered by Justice Glustein was Justice Glustein.
>
> [11] Given that the time limits placed by Justice Glustein in the Glustein, J. Endorsement on the Moving Defendants to:
>
> 1) obtain this hearing, and
>
> 2) the requirement ordered by Glustein, J. that this Motion be heard by an Associate Justice prior to June 10, 2022, rather than January of 2023 as was apparently originally scheduled,
>
> I cannot see how the Plaintiff can argue that the time limit for bringing this motion was not extended, and the hearing of this motion today was not effectively Ordered, by Glustein, J., and I have no authority whatsoever to vary or set aside the Order of a Superior Court Justice.
>
> [12] I therefore heard this Motion."

My Ruling on Motion on requested Defence Medical Examinations:

[7] After full argument, on an urgent basis, I released my reasons and issued the following Orders:

> 1) I did not grant the Order requested by the Moving Defendants for a Neurosurgical DME.

2) With respect to the Physiatry DME I ordered as follows:

> "[95] Having considered all of the factors described in the *Godin* test of Necessity, Fairness, Prejudice and the additional test of Proportionality, and exercising my discretion as required under R.1.04, I DO grant the Order requested by the Moving Defendants for a Physiatry DME.
>
> [96] With respect to the terms of the Order requested by the Moving Defendants, I will Order:
>
> > "THIS COURT ORDERS that the Plaintiff attend and complete a physiatry medical examination with physiatrist Dr. Benjamin Clark on June 14, 2022, from 9:30 a.m. to 11:30 a.m., at 5945 Airport Road, Suite 335, in the City of Mississauga, in the Province of Ontario and that the report prepared by physiatrist Dr. Benjamin Clark shall be served upon counsel for the Plaintiff no later than the close of business on July 29, 2022."
>
> [97] I WILL NOT Order the following language requested in the draft Order:
>
> > "failing which the moving defendants may move, without notice, to dismiss or discontinue the within proceeding as against them"
>
> which is inappropriate in the circumstances of the Moving Defendants receiving significant accommodation(s) from this Court, and where this matter is subject to strict timetabling by the Court through case conferences, and Glustein, J. has seized himself with this scheduling."

Disposition of Undertakings Motion:

[8] With respect to the undertakings Motion, given the surprising arguments being made by the Moving Defendants in their Costs Submissions, this is EXACTLY what I ruled on this relief requested by the Moving Defendants on the Undertakings Motion:

> "[25] The nature of the relief sought by the Moving Defendants with respect to the Undertakings allegedly outstanding is not the usual relief sought on an undertakings motion. At the hearing I was asked to deal with 8 specific Undertakings, which are summarized in the chart produced by the Moving Defendants for this Motion, which I have attached as Appendix A to this Endorsement, with my disposition for each.
>
> [26] With respect to Undertakings 4 and 7, the issue was not that no documents were sent by counsel for the Plaintiff in answer to the undertakings given. The Plaintiff's position was that they sent the documents they had undertaken to provide relating to the clinical Notes and Records of Dr. Khan and Dr. Adam. <u>The Moving Defendants</u>

stated that they did not receive them. Counsel for the Plaintiff agreed to resend the documents, forthwith. That was a sensible solution.

[27] The remainder of the alleged unfulfilled undertakings dealt with the issue of the ongoing nature of the undertakings to provide documents to the date of trial, currently scheduled for May of 2023. As noted in the chart, the Plaintiff has produced documents in response to each of these undertakings, and in some cases provided updated documents in March and April 2022 to documents previously provided in 2019, 2020 and 2021.

[28] However what the Moving Defendants are seeking is an order compelling the Plaintiff to continue updating this documentation to Trial. That was not an order that I was willing to grant, without evidence that the Plaintiff was in breach of its obligations for continued discovery, and R.31.07 and R.31.09 relating to Undertakings and correcting incomplete answers, of which there was none.

[29] With respect to Undertaking 1, counsel for the Plaintiff has agreed to provide a copy of the new passport of the Plaintiff, if a new passport has been obtained prior to trial, and has confirmed they will fulfill that undertaking. No order compelling is necessary.

[30] With respect to Undertaking 2, counsel for the Plaintiff has agreed to provide a copy of the 2021 tax return, when that copy is filed and assessed and that they will continue to fulfill the undertaking to provide tax returns, as they have already provided for the 2012-2020 tax years. No order compelling is necessary.

[31] With respect to Undertaking 3, counsel for the Plaintiff has provided correspondence on April 12, 2022 confirming that there are no further records from St. Michaels Hospital for the period September 23, 2020 to March 10, 2022, with records prior to that date having been produced by the Plaintiff in 2019 and 2021, but agreed to request further records if their client reattends. No order compelling is necessary.

[32] With respect to Undertaking 5, counsel for the Plaintiff has agreed to write again to Toronto Rehab forthwith to request any further records for the period after July 2, 2021. No order compelling is necessary.

[33] With respect to Undertaking 6, counsel for the Plaintiff has agreed to write again to Dr. Barbera forthwith to request any further records for the period after June 30, 2021. No order compelling is necessary.

[34] With respect to Undertaking 8, counsel for the Plaintiff has agreed to write again to OHIP forthwith to request an updated OHIP Summary for the period after October 26, 2021. No order compelling is necessary.

> [35] I note that I have not compelled the Plaintiff to take any of these steps, because Judicial compulsion was not necessary, but the Plaintiff agreed to do so, confirming the Plaintiff's duties for continued discovery and the duty to continue to complete the Plaintiff's undertakings by updating information, but I have not found the Plaintiff to be in breach of those duties.
>
> [36] That disposes of the Undertakings Motion."

III) Law and Analysis

[9] All underlined text in these reasons is emphasis added by me for these reasons.

[10] The Court has considered all materials and arguments raised by the parties in their Costs Submissions. Any failure by the Court to refer in these reasons to specific arguments and materials raised does not reflect that the Court has not considered those arguments.

[11] Subject to the provisions of an Act or the *Rules*, the costs incurred during a proceeding or a step in a proceeding are in the discretion of the Court. The Court must determine by whom and to what extent costs shall be paid (s. 131(1), *Courts of Justice Act* (Ontario)).

[12] In exercising its discretion, in addition to considering the result and any offer to settle made in writing, the court may consider the other factors set out in Rule 57.01(1), which reads:

> **General Principles**
>
> ***Factors in Discretion***
> **57.01** (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,
>
> (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
>
> (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
>
> (a) the amount claimed and the amount recovered in the proceeding;
>
> (b) the apportionment of liability;
>
> (c) the complexity of the proceeding;
>
> (d) the importance of the issues;
>
> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer;

(h.1) whether a party unreasonably objected to proceeding by telephone conference or video conference under rule 1.08; and

(i) any other matter relevant to the question of costs. R.R.O. 1990, Reg. 194, r. 57.01 (1); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1; O. Reg. 689/20, s. 37.

Costs Against Successful Party

(2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case. R.R.O. 1990, Reg. 194, r. 57.01 (2).

Fixing Costs: Tariffs

(3) When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs. O. Reg. 284/01, s. 15 (1).

Assessment in Exceptional Cases

(3.1) Despite subrule (3), in an exceptional case the court may refer costs for assessment under Rule 58. O. Reg. 284/01, s. 15 (1).

Authority of Court

(4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the *Courts of Justice Act*,

(a) to award or refuse costs in respect of a particular issue or part of a proceeding;

(b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding;

(c) to award all or part of the costs on a substantial indemnity basis;

(d) to award costs in an amount that represents full indemnity; or

(e) to award costs to a party acting in person. R.R.O. 1990, Reg. 194, r. 57.01 (4); O. Reg. 284/01, s. 15 (2); O. Reg. 42/05, s. 4 (2); O. Reg. 8/07, s. 3.

Bill of Costs

(5) After a trial, the hearing of a motion that disposes of a proceeding or the hearing of an application, a party who is awarded costs shall serve a bill of costs (Form 57A) on the other parties and shall file it, with proof of service. O. Reg. 284/01, s. 15 (3).

Costs Outline

(6) Unless the parties have agreed on the costs that it would be appropriate to award for a step in a proceeding, every party who intends to seek costs for that step shall give to every other party involved in the same step, and bring to the hearing, a costs outline (Form 57B) not exceeding three pages in length. O. Reg. 42/05, s. 4 (3).

Process for Fixing Costs

(7) The court shall devise and adopt the simplest, least expensive and most expeditious process for fixing costs and, without limiting the generality of the foregoing, costs may be fixed after receiving written submissions, without the attendance of the parties. O. Reg. 42/05, s. 4 (3).

[13] Fairness and reasonableness are the overriding principles in a Court determining costs (*Boucher* v. *Public Accountants Council for the Province of Ontario*, *(2004) 71 O.R. (3d) 291* (C.A.) and *Deonath* v. *Iqbal*, *2017 ONSC 3672* at paras. 20-21)("***Deonath***").

[14] Generally, costs on a partial indemnity scale should follow the event, and this principle should only be departed from for very good reasons such as findings of misconduct by a party, where there has been a miscarriage in procedure or where there is oppressive or vexatious conduct (*1318706 Ontario Ltd. v. Niagara (Regional Municipality) (2005), 75 O.R. (3d) 405* (C.A.); *394 Lakeshore Oakville Holdings Inc*. v. *Misek*, *2010 ONSC 7238* at paras. 10, 12-14).

[15] In order to make its determination as to costs, Rule 1.04(1) must also be considered, to ensure that the Court makes a just, expeditious and least expensive determination of every civil proceeding on its merits and under Rule 1.04(1.1) so that costs orders are made which are proportionate to the importance and complexity of the issues and to the amount in dispute in the proceeding between the parties (*Deonath* at para. 21).

[16] In *Davies v. Clarington (Municipality)*, 2009 ONCA 722 the Court of Appeal stated as follows (at paragraph 52):

> "Rather than engage in a purely mathematical exercise, the judge awarding costs should reflect on what the court views as a reasonable amount that should be paid by the

unsuccessful party rather than any exact measure of the actual costs of the successful litigant."

[17] The only additional case cited by the Parties in their costs submissions is the following quotation from *1465778 Ontario Inc. v. 1122077 Ontario Ltd., 2006 CanLII 35819* (ON CA) in the factual context of *pro bono* counsel seeking costs:

> "[26] Traditionally the purpose of an award of costs within our "loser pay" system was to partially or, in some limited circumstances, wholly indemnify the winning party for the legal costs it incurred. However, costs have more recently come to be recognized as an important tool in the hands of the court to influence the way the parties conduct themselves and to prevent abuse of the court's process. Specifically, the three other recognized purposes of costs awards are to encourage settlement, to deter frivolous actions and defences and to discourage unnecessary steps [page765] that unduly prolong the litigation. See *Fellowes, McNeil v. Kansa General International Insurance Co.* (1997), 1997 CanLII 12208 (ON SC), 37 O.R. (3d) 464, [1997] O.J. No. 5130 (Gen. Div.), at pp. 467 and 472 O.R."

Interpretation of Rules and Proportionality

[18] Rule 1.04 of the Rules of Civil Procedure reads:

> **Interpretation**
> ***General Principle***
> **1.04** (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. R.R.O. 1990, Reg. 194, r. 1.04 (1).
>
> ***Proportionality***
>
> (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding. O. Reg. 438/08, s. 2.
>
> ***Matters Not Provided For***
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> (2) Where matters are not provided for in these rules, the practice shall be determined by analogy to them. R.R.O. 1990, Reg. 194, r. 1.04 (2).

Proportionality

[19] Perrell, J. in *Ontario v. Rothmans Inc.*, 2011 ONSC 3685 (S.C.J.) (***"Rothmans"***) states regarding the interpretation of the proportionality principle in R.1.04 that:

> "The general principle in interpreting the rules set out in subrule 1.04(1) requires that the rules be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. Subrule 1.04(1.1), subtitled "Proportionality", was added which states: In applying these rules, the court shall make

orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding"

Position of the Moving Defendants on Costs

[20] The Moving Defendants seeks an award of $4,649.95 in costs for fees and disbursements on the basis that they were the "successful parties" on the Motion. Their submissions in full are:

> 1. "Upon hearing the motion brought by the defendants Aaron Lipton and Erin Johnston (hereinafter collectively referred to as the "moving defendants"), the learned Associate Justice Ilchenko, in his Endorsement of May 20, 2022, ordered the plaintiff to attend and complete a physiatry defence medical examination, but decided that he need not attend at a neurosurgical examination. Associate Justice Ilchenko made no order with respect to the undertaking portion of the motion. Associate Justice Ilchenko further ordered the parties to make written submissions in the event that they could not agree on the disposition of the costs of the motion.[1]
>
> 2. The moving defendants submit that they are the successful party on the motion and should be awarded $4,649.95 in costs for fees and disbursements.[2] In the alternative, given the mixed results, the moving defendants submit that the most fair, just and reasonable result is no costs awarded to either side.
>
> 3. In *1465778 Ontario Inc. v. 1122077 Ontario Ltd.,* 2006 CanLII 35819 (ON CA)[3], the Court of Appeal recognized four purposes of an award for costs: (1) wholly indemnify the winning part for the legal costs it incurred; (2) to encourage settlement; (3) to deter frivolous actions and defences; and (4) to discourage unnecessary steps that unduly prolong the litigation.
>
> 4. Rule 57.01(1) of the *Rules of Civil Procedure* outlines the factors that are considered in exercising discretion to award costs. Amongst these factors is the importance of the issues. The moving defendants required the relief sought in the motion, namely the plaintiff's attendance at two defence medical examinations and the satisfaction of all outstanding undertakings, for the purposes of properly evaluating and responding to the claims that the plaintiff is presently pursuing as against them in advance of an upcoming Trial. Without the relief sought, the moving defendants would be at a significant disadvantage heading into Trial as they would not have all of the updated medical and other records, as well as expert evidence, with which to contest the medical conditions and corresponding damages that the plaintiff has put into issue.
>
> 5.Rule 57.07(1) also considers the conduct of any party that tended to unnecessarily lengthen the duration of the proceeding. The plaintiff originally agreed to attend a physiatry medical assessment and then refused months later causing an unnecessarily delay in this proceeding. On October 29, 2020, the moving defendants advised the plaintiff that a physiatry examination had been scheduled for December 8, 2020.[4] On

November 6, 2020, plaintiff's counsel advised that the plaintiff was unable to attend as he was out of the country between November 25, 2020 and June 15, 2021. Plaintiff's counsel stated that the plaintiff would be able to attend if the assessment could take place before November 25, 2020.[5] Indeed, as recently as June 24, 2021, plaintiff's counsel "anticipate[d]" that the plaintiff would attend at the requested physiatry examination.[6] However, once the plaintiff was back in Canada in October 2021, plaintiff's counsel refused to permit the plaintiff to submit to the proposed physiatry examination.

6. While no order was made compelling the plaintiff to produce undertakings, the motion was still necessary and successful. Had the moving defendants not brought the motion, the voluntary fulfillment of the plaintiff's duty for continued discovery and the duty to continue to complete undertakings by updating information would have occurred at a slow pace, if at all. This is evidenced by the continuous attempts the moving defendants made to ensure the plaintiff provided undertakings on August 26, November 6 and 26, 2020, and on June 18 and October 29, 2021. It was only after the moving defendants pursued the motion that plaintiff's counsel provided certain updated records and proof of best efforts. This motion could have been simplified had the plaintiff completed their obligations in a timely manner.

7.The actions of the plaintiff caused the moving defendants to take unnecessary steps that unduly prolonged the litigation. As such, the moving defendants should be indemnified for the legal costs they incurred to bring the motion to compel the plaintiff's attendance at the physiatry examination and satisfy outstanding undertakings.

8.In the alternative, the moving defendants submit that, given the mixed results, the most fair, just and reasonable result is to award no costs to either side.

9.The moving defendants anticipate that the plaintiff's will argue that the plaintiff was more successful because the neurosurgeon examination was not ordered and no orders were made in regard to the undertakings. The issue of undertakings was not a contentious issue at the motion as the plaintiff agreed to produce the productions on the day of the motion. The lack of order compelling the plaintiff to produce productions cannot be considered a "win" for the plaintiff when they agreed to provide what the defendants requested.

10. Even if a party can be found to have "won" the motion, Morden and Perell state in *The Law of Civil Procedure in Ontario* that "no order as to costs' may be the fairest resolution where the success on a motion was divided."[7]

11.Rule 1.04(1.1) is applicable when determining costs as it requires the court in applying the Rules to make orders that are proportionate to the importance and complexity of the issues and to the amount involved in the proceeding. The moving defendants submit that the $4,649.95 cost sought are proportionate to the importance and complexity of the issues argued in this motion and properly indemnify the defendants for the legal costs

incurred. In the alternative, the court should consider the outcome a divided success and order that no costs be awarded."

[21] It is not at all clear to me, as are many things in their costs submissions (the "**Moving Defendants' Costs Submissions**"), on what scale the Moving Defendants are seeking costs in the amount of $4,649.95 set out in the Moving Defendant's Cost Outline dated June 8, 2022 (the "**Moving Defendants' Costs Outline**"). It appears from the numbers and the rates that it is on the Substantial Indemnity Scale or Full Indemnity Scale, but there is no explanation in the above submissions what warrants a costs award on those elevated scales, but also the numbers do not add up.

[22] The Moving Defendants claim a $275 appearance fee, on both a partial and substantial indemnity scale, un-itemized disbursements of $320, and fees of $4,018.50 on a Substantial Indemnity Scale or $2,946.90 on a Partial Indemnity Scale.

[23] Those fees seem to be based on 16 hours of work by Mr. Biniaz (2013 Call) at $220 per hour and 7 hours of work by a Law Clerk at $135 per hour. Those fees also seem to be inclusive of HST, but that is not indicated explicitly. I do not find this to be an inappropriate spread of responsibilities and rates.

Position of the Plaintiff on Costs

[24] The Plaintiff disagrees in his Cost Submissions, stating:

> "1 The Plaintiff Mohamed Lakdawala ("Mr. Lakdawala"), is seeking his costs of defending the motion brought by the Defendants Aaron Lipton and Erin Johnston (the "Moving Defendants") to compel i) answers to undertakings, ii) attendance a physiatry defence medical examination ("DME") and iii) attendance a neurosurgical DME.
>
> 2 These written submissions on costs are filed in conjunction with the Costs Outline attached hereto as **Appendix A**, in which Mr. Lakdawala respectfully seeks 2/3 of his costs of the motion payable on a partial indemnity basis, in the amount of
> **$7,933.23** (inclusive of H.S.T.).
>
> 3. There were three aspects of the motion brought by the Moving Defendants:
>
> i) Undertakings;
> ii) the physiatry DME; and
> iii) the neurosurgery DME.

Mr. Lakdawala respectfully submits that he was successful in defending two out of the three aspects of the motion (the undertakings and the neurosurgery DME) and as such, should be entitled to two thirds of his costs.

Motion to Compel Answers to Undertakings

4. The Moving Defendants submit in their costs outline that they were successful on the undertakings portion of the motion because Mr. Lakdawala agreed to resend documents already served and to make further updated requests for previously requested medical records. This is incorrect.

5. While Mr. Lakdawala did agree to resend medical records previously served as the Moving Defendants were not able to locate them, this was as a result of professional courtesy and not because he was ordered to.

6 Additionally, while Mr. Lakdawala also agreed to send additional requests for updated medical documents, he did so as it is his obligation to do so under the *Rules of Civil Procedure* and not because he was ordered to.

7. As noted in paragraph 28 of the Endorsement of the Honourable Associate Justice Ilchenko, his Honour **was not prepared to grant an order with respect to undertakings** "without evidence that the Plaintiff was in breach of its obligations for continued discovery, and R.31.07 and R.31.09 relating to Undertakings and correcting incomplete answers, **of which there was none**".

8. There is also no evidence to support the Moving Defendants' submission that further requests for updated records would not have been made by Mr. Lakdawala had they not brought the motion. Their submission is an attempt to relitigate the motion.

7. At the April 8, 2022 Chambers Appointment to schedule the within motion, the Honourable Justice Glustein advised the Moving Defendants that a motion for updated medical records as opposed to records that had never been produced in response to an initial undertaking would be inappropriate. In spite of this comment, the Moving Defendants submitted their notice of motion for Undertakings which required Mr. Lakdawala to respond to it.

8. If the Undertakings portion of the motion was "not contentious" as suggested in the costs submissions of the Moving Party, it would have either been consented to (which is was not) or it should not have been included in their notice of motion to begin with.

11. As stated in the costs submissions of the Moving Defendants, the Court of Appeal has stated that one of the purposes of a costs award is to **discourage unnecessary steps** that unduly prolong the litigation.

12. Categorizing Mr. Lakdawala's ongoing compliance with his obligations under the *Rules* as a win for the Moving Defendants sets a dangerous precedent as it will encourage parties to bring motions every time records are not produced every few months. This is an unreasonable onus to place on parties and adds considerable expense and delay to the litigation. Moreover, it would enable parties to waste already scarce Court time on matters that are not properly before the Court.

Motion to Compel Physiatry DME

13. While Mr. Lakdawala originally agreed to attend the physiatry DME, the circumstances of the physiatry DME changed once the Moving Defendants scheduled an orthopaedic DME with Dr. Ford – an orthopaedic surgeon also qualified to comment on pain – thereby prompting Mr. Lakdawala's change in position.

14. Additionally, while Mr. Lakdawala concedes that he was unsuccessful on the Physiatry DME portion of the motion, he respectfully submits that Defendants who wait until months after an action is set down to schedule DMEs should not be rewarded.

15. The delay in bringing this motion almost caused the parties to lose their scheduled trial date because the Moving Defendants were not able to obtain a motion date until 5 months prior to trial. While the motion was able to be heard at an earlier date due to the indulgence of this Honourable Court, this type of behaviour should not be encouraged."

[25] In the Plaintiff's Cost Outline dated June 16, 2022 (the "**Plaintiff's Costs Outline**"), the Plaintiff claims costs, clearly on a Partial Indemnity Scale, of $11,991.76 in total, but for a claimed win on 2/3 of the issues, the total amount of $7,933.23. This is broken down as $10,232.63 in Fees, $308.75 counsel fee on a Partial Indemnity basis and $1,370.38 in HST.

[26] Those fees are based on 21.1 hours of work by Ms. Naiman (2014 Call) the Associate who argued the Motion at an actual hourly rate of $475 per hour and a Partial Indemnity rate of $308.75, as well as 8.8 hours work by Ms. Gilbert (2008 Call), the partner with carriage of the file whose actual hourly rate is $650.00 per hour and Partial Indemnity rate of $422.50 per hour. No disbursements appear to be claimed. I do not find this to be an inappropriate spread of responsibilities and rates.

[27] The Moving Defendants make no submissions in the Moving Defendants' Costs Submissions on the appropriateness or quantum of the rates and fees claimed by counsel for the Plaintiff, and neither do I.

[28] I find that the rates and fees claimed by the Plaintiff would be in the contemplation of the Moving Defendants on this Motion given the size of firm that they were dealing with in Thomson Rogers and the experience and profile of Ms. Gilbert and Ms. Naiman in the personal injury litigation community.

DISPOSITION

Defence Medical Examination Motions

[29] With respect to the disposition of the requests for the Physiatry and Neurosurgery Defence Medical Examinations, the parties fought to a draw, with each winning one issue and losing another issue.

[30] In each case, I do not understand the *ex post facto* submissions being made by either party as who did what and why this Motion with respect to these two examinations was necessitated. As I stated in my endorsement:

> "[21] As I advised counsel, I was not at the case conference that gave rise to the Glustein, J. Endorsement, but on the reading of that Endorsement, set out verbatim above, I can find nothing that supports the Plaintiff's contention that Glustein, J. left it open to me to determine whether I should hear this Motion as a result of the alleged breach of the Case Timetable established by Glustein, J.
>
> [22] The best person to determine whether the Moving Defendants were in breach of the timetable ordered by Justice Glustein was Justice Glustein.
>
> [23] Given that the time limits placed by Justice Glustein in the Glustein, J. Endorsement on the Moving Defendants to:
>
> > 1) obtain this hearing, and
> >
> > 2) the requirement ordered by Glustein, J. that this Motion be heard by an Associate Justice prior to June 10, 2022, rather than January of 2023 as was apparently originally scheduled,
>
> I cannot see how the Plaintiff can argue that the time limit for bringing this motion was not extended, and the hearing of this motion today was not effectively Ordered, by Glustein, J., and I have no authority whatsoever to vary or set aside the Order of a Superior Court Justice."

[31] However it was that this motion got before me, costs submissions are not an appropriate place to refight that war, particularly on no evidence.

Undertakings Motion

[32] With respect to the Undertakings Motion, I do not know how counsel for the Moving Defendants purports to *Jiu-Jitsu* a victory on this issue in the Moving Defendants' Costs Submissions. The issue was not undertakings *per se*, those were dealt with cooperatively by Counsel, and as I have excerpted in full above, as seemingly I have to, again:

> I MADE NO RULINGS COMPELLING THE PLAINTIFF TO ANSWER UNDERTAKINGS. NONE.

[33] The more contentious issue at the Motion on this issue was counsel for the Moving Defendants tacking on to his relief from the Notice of Motion a further expansive request for relief in his draft Order, namely:

> 4. **THIS COURT FURTHER ORDERS** that the plaintiff provide to the moving defendants updated answers to undertakings as listed in Schedule "A" attached hereto, or otherwise provide evidence of best efforts to do so, until the date of Trial for this proceeding.

[34] I told counsel for the Moving Defendants at the hearing that there was no way I was going to grant that late-breaking relief, because *inter alia*, there was no evidence to support the request that the Plaintiff was a scofflaw and that the relief was required.

[35] Further, conceptually, the Rules already provide for continuing discovery, and this further draconian relief was not required.

[36] There is and was no proper evidence before me regarding this claim by the Moving Defendants that they should be entitled to costs because this Motion "hurried up" the Plaintiff to answer undertakings.

[37] Not to be monotonous, again, I MADE NO RULINGS COMPELLING THE PLAINTIFF TO ANSWER UNDERTAKINGS. NONE.

[38] I wrote in my Endorsement the following disposing of these issues, which I thought was sufficiently clear:

> "…[28] However what the Moving Defendants are seeking is an order compelling the Plaintiff to continue updating this documentation to Trial. That was not an order that I was willing to grant, without evidence that the Plaintiff was in breach of its obligations for continued discovery, and R.31.07 and R.31.09 relating to Undertakings and correcting incomplete answers, of which there was none.
>
> …
>
> [35] I note that I have not compelled the Plaintiff to take any of these steps, because Judicial compulsion was not necessary, but the Plaintiff agreed to do so, confirming

the Plaintiff's duties for continued discovery and the duty to continue to complete the Plaintiff's undertakings by updating information, but I have not found the Plaintiff to be in breach of those duties.

[39] Apparently not. So I will try, again, to convey this in simpler terms to counsel for the Moving Defendants:

YOU DID NOT GET THE RELIEF YOU ASKED FOR ON THIS ISSUE.

YOU LOST.

Analysis of Tests under R.57.01 and R.1.04

[40] In my view, the Plaintiff was largely successful on the Motion with respect to the Neurological Defence Medical Examination and Undertakings Issues and the Moving Defendants were largely successful on the issue of the Physiatry Defence Medical Examination, and are entitled to costs for that issue.

[41] There is "divided success" on this Motion, but I do not find that the "success" was equally divided, nor are the costs claimed for that "success" equally divided.

Scale of Costs

[42] There is no evidence before me that justifies an award of costs on other that a partial indemnity scale, and the Plaintiff does not request costs calculated on other than a partial indemnity scale for the Plaintiff. I cannot tell how the amount of $4,649.95 claimed by the Moving Defendants was arrived at, and no scale of costs is specified in the Moving Defendants Costs Outline or Costs Submissions. I have no evidence or argument before me that justifies costs being granted on other that a Partial Indemnity Scale. Accordingly, I will be determining costs on a Partial Indemnity Scale.

Importance of issues

[43] For the purposes of the various aspects of the tests under R.57.01, given that this Motion was ordered to be heard by Glustein, J. on an urgent basis to avoid delaying a Trial, and involves issues of medical evidence that I found, with respect to the Physiatry Defence Medical Examination to be important for that Trial, I find that the issues determined on this Motion, at least with respect to the Defence Medical Examinations, were important.

Complexity of Motion

[44] The complexity of the issues is obvious, as set out and described in my 40 page Endorsement. There were almost 1500 pages of documents on this Motion, including Medical Expert Evidence. This Motion was heard on an expedited basis as an Urgent Motion. Counsel

argued this motion before me for several hours. This was a complex motion for the purposes of the R.57.01 tests.

The conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding

[45] As this Motion came before me on an Urgent basis as a result of the Order of Glustein, J. as the Case Management Judge, I have no ability to determine the conduct of the parties prior to arriving before me as necessitated by the Urgent motion. I will leave that to Glustein, J. and or the Trial Judge ruling over the totality of the Action.

[46] However, as stated by me in my Endorsement, and again here, I find that the conduct of the Moving Defendants on the Undertakings Issue did unnecessarily lengthen this Motion, which was long enough already regarding the Defence Medical Examination issues, which were properly dealt with by the parties.

Novelty of Issue

[47] Based on the reasoning of Perrell, J. in *Mancinelli v. Royal Bank of Canada* 2018 CarswellOnt 1330, 2018 ONSC 797, 289 A.C.W.S. (3d) 489, with the operative quote at para. 9 ("*Mancinelli*") I do not find this to be a case where the determination of the legal issues on the Motion could be determined as "novel" on the *Mancinelli* test.

Quantum of costs

[48] As noted above, I have no issue with the quantum of costs and rates claimed by the Plaintiff on a Partial Indemnity basis, and neither do the Moving Defendants, apparently. I find that the amount of costs claimed by the Plaintiff are an amount that the Moving Defendants could reasonably expect to pay in relation to this Motion. Therefore for the purposes of calculating the quantum of the claim for the divided success, I will use the total amount of $10,232.63 in fees claimed, which with counsel fee and HST would total $11,911.76 on the Partial Indemnity Scale.

[49] With respect to the quantum of costs claimed by the Moving Defendants, from the Moving Defendants Costs Outline, it appears that they have calculated that their total costs on this Motion, on a Partial Indemnity Scale, at $3,541.90 and I will use that total amount for the purposes of calculating the quantum of the claim for the divided success. I find that the amount of costs claimed by the Moving Defendants that the Plaintiff could reasonably expect to pay in relation to this Motion.

[50] The Plaintiff, arguing that he was successful on two of three issues, as I have found, is entitled to 2/3 of its costs, or $7,933.23.

[51] The Moving Defendants were successful on one issue, as I have found, and argue that they are, at least, entitled to costs on for that issue.

[52] Following *Davies v. Clarington (Municipality)(Supra)*, rather than engaging in a purely mathematical exercise, I find that the following costs awards to the Moving Defendants and the Plaintiff as fair and reasonable amounts that should be paid by the unsuccessful parties rather than any exact measure of the actual costs of the successful litigant:

To the Plaintiff $7,933.23

To the Moving Defendants $1180.63

[53] I find that this allocation of the costs between the Plaintiff and the Moving Defendants to be fair and reasonable.

[54] I find that the costs claimed by the Plaintiff and the Moving Defendants are fair and reasonable in the circumstances, and in terms of the provisions Rule 1.04(1.1) I find that the costs requested are proportionate to the importance and complexity of the issues and to the amount in dispute in the proceeding between the parties, as per the test in *Deonath*, above, and find the Costs awards that I have granted to the Plaintiff and Moving Defendants are also proportionate.

IV) Summary of Costs Order Granted

[55] Considering the factors in rule 57.01, and R.1.04(1.1), and the application of the binding jurisprudence I have cited, I have concluded that given:

1) the significance of the relief sought on this motion,

2) the time spent,

3) the amount at stake in the Action,

4) the complexity of the issues as asserted in the almost 1500 pages of Materials filed by the parties, and

5) the conduct of both the Plaintiff and the Moving Defendants on this Motion, and in their costs submissions,

and employing my discretion, that the partial indemnity costs as claimed by the Plaintiff and by the Moving Defendants, as calculated by me above, are fair, reasonable, proportionate and an amount that the respective parties should reasonably have expected to pay in the event they were unsuccessful on this motion, given that the costs listed in their respective Costs Outlines and Costs Submissions.

[56] I am satisfied that the parties are entitled to the costs claimed, as analyzed above, given the Plaintiff's substantial success on two issues, and the Moving Defendants substantial success on one issue. In my view the all-inclusive sum of $7,933.23 payable to the Plaintiff and the all-

inclusive sum of $1,180.63 payable to the Moving Defendants, each calculated on a partial indemnity basis are fair and reasonable amounts that the parties could expect to pay for costs in all of the circumstances of the Motion, and within the reasonable expectations of the parties, payable by the parties within 30 days of the release of this endorsement.

Associate Justice Ilchenko
Superior Court of Justice

February 13, 2023