CITATION: Rososhansky v. Williams, 2018 ONSC 1964
COURT FILE NO.: CV-13-488209
DATE: 20180326

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: BORIS ROSOSHANSKY, Plaintiff

AND:

KEVIN O. WILLIAMS and BEVERLEY M. WILLIAMS

BEFORE: **Koehnen J**.

COUNSEL: *Ziv Tsimerman*, for the Plaintiff

Sam Sandhu, for the Defendants

HEARD: In writing

ENDORSEMENT

[1] This endorsement addresses the issue of costs arising on a pre-trial conference over which I presided on February 26, 2018, at the conclusion of which I invited written submissions on costs.

[2] Pursuant to rule 50.12 of the *Rules of Civil Procedure*, the judge presiding at a pre-trial conference may make an order for cost of the conference.

[3] The plaintiff seeks costs and disbursements of $7,830.90 on a full indemnity scale and $5,090.09 on a partial indemnity scale.

[4] For the reasons set out below I order the defendants to pay the plaintiff's costs of $5,090.09 within 30 days of the date of this endorsement.

[5] The defendants were represented at the pretrial conference by an adjuster from their insurer, Aviva Insurance, and Aviva's counsel. In my view, the pre-trial conference was substantially a waste of time because of the view the adjuster took throughout the pre-trial conference.

[6] The plaintiff was the driver in a car that was hit from behind while standing at a red light on September 6, 2011. The impact caused the plaintiff to strike his head against the rear view mirror, breaking it. He was taken to hospital by ambulance and released the same day. He was prescribed anti-inflammatory medication and physiotherapy.

[7] The plaintiff produced several medical reports which stated that he had sustained head and neck injuries as a result of the accident.

[8] The first medical report was prepared on November 29, 2011, and is described as an "Independent Insurer's Orthopedic Examination Report". It describes the plaintiff's injuries as being commensurate with minor injuries as described in the Minor Injury Guideline. It notes that witnesses on the scene of the accident observed the plaintiff to be in a state of shock and that he was moaning in pain. The report notes that, since the accident, the plaintiff developed "splitting headaches" which would occur four – five times weekly as well as neck and shoulder pain which the plaintiff described at an intensity of 8.5 – 9 out of 10. The examiner concluded that the prognosis for recovery was favourable, the timeline for recovery was uncertain and that the examiner's opinion was subject to change if evidence of a more serious injury or extenuating circumstances becomes available.

[9] An Independent Insurer's Psychological Examination was conducted on February 11, 2013, and the ensuing report produced to the defendants. It observes that Mr.Rososhansky reported ongoing problems with headaches as well as neck shoulder and lower back pain. While the report indicated that Mr. Rososhansky believed he would be able to resume the sort of work he was carrying out before the accident, he had only partially returned to his pre-accident household activities. The examiner noted that

> "…[Mr. Rososhansky] did not display any obvious indication of manipulation, resistance, evasiveness or embellishment….
>
> …he is experiencing headaches and various other pain – related problems…
>
> I would not rule out the possibility of a chronic pain disorder in this case. It is concerning that Mr. Rososhansky is describing a number of ongoing, significant pain related concerns and only "35 – 40%" improvement to date, even though it has been approximately 1 ½ years since the accident. "

[10] At the recommendation of his physician, Mr. Rososhansky has been receiving therapeutic nerve block injections to his head, neck, shoulder and lower back once a month since March 2015. That physician opined that Mr. Rososhansky "likely has chronic headaches attributed to whiplash injury."

[11] A neurological evaluation conducted by a staff neurologist at the William Osler Centre in Brampton concluded that his neck pain, lower back pain and headaches were the direct result of a motor vehicle accident on September 6, 2011 and, among other things, meets the American Academy of Neurology criteria for post-concussive syndrome. The report concludes that Mr. Rososhansky has likely reached the maximum extent of his medical improvement.

[12] At the pre-trial conference plaintiff's counsel indicated he would be calling several witnesses to testify to the fact that Mr. Rososhansky could no longer perform all of his pre-

accident job activities. For purposes of settlement at the pre-trial, the plaintiff proposed a modest amount for loss of income and loss of competitive advantage which was well below the cost of a trial to any one side. Given the privileged nature of settlement discussions, I will not reveal any of the plaintiff's proposed settlement amounts in these reasons.

[13] Mr. Rososhansky demonstrated a substantial willingness to compromise on his claim during the pre-trial conference.

[14] The defendants took the position throughout the pre-trial conference that there was "zero chance" of financial liability at trial because the plaintiff does meet the threshold test for personal injury. Even assuming that were the case, it would not affect his loss of income and loss of competitive advantage claim.

[15] Although the defendants had not conducted any medical examination of Mr. Rososhansky, or produced any medical report about him, they expressed an absolute degree of confidence that the medical report they would produce would demonstrate no injuries attributable to the accident. Their confidence in the contents of their uncommissioned medical report was used to further support their "zero chance" of financial liability position.

[16] It is disturbing that the defendants have such certainty about the outcome of what is supposed to be an *independent* medical examination before they have even commissioned it.

[17] To proceed with the pre-trial conference in reliance upon a medical report that has not yet been commissioned but insist there is not even a possibility of financial liability, renders the pre-trial conference a waste of time.

[18] To support their argument for zero chance of financial liability, the defendants focused on isolated aspects of the evidence, often taken out of context.

[19] By way of example: they insisted on the first medical report's reference to a minor injury but ignored its reference to the prognosis being subject to change if evidence of a more serious injury becomes available. They focussed on the reference to degenerative changes in one medical report but ignored references to the injuries of which the plaintiff complains in the litigation as being caused by the accident. They focused on surveillance evidence which showed Mr. Rososhansky bending down and carrying a folding closet door but ignored Mr. Rososhansky's explanation from the outset that his injury is not constantly disabling. It is only when he suffers from the headaches and at the times following his injections that he is prevented from working. It is axiomatic that he is not suffering from disabling pain on those days when he was observed working. He is not claiming for the days he is working but for the days he cannot work or works at reduced capacity.

[20] The defendants submit that the latest medical report from the plaintiff was produced only shortly before the pre-trial and did not permit them to complete their own medical report before the pre-trial conference. While there was no restriction on the defendants obtaining a medical report at an earlier stage, if the is the defendants' position, then it would have been more

appropriate to adjourn the pre-trial conference until the defendants had produced their medical report.

[21] There is nothing wrong with a defendant taking the position at a pre-trial or elsewhere that there is no risk of liability. That position should have some rational foundation either in law or on the evidence. If a defendant takes a position contrary to an objective view of the evidentiary record, relies on evidence that has not yet been obtained and refuses any compromise other than to dismiss without costs, they are wasting the plaintiff's time and needlessly running up costs for him.

[22] That is a defence strategy courts should not encourage. In my view it warrants a cost order against the defendants in the amount of $5,090.09 payable to the plaintiff within 30 days.

Koehnen J.

Date: March 26, 2018