Court of Queen's Bench of Alberta

Citation: O'Meara v. Yule, 2004 ABQB 151

Date: 20040303
Docket: 9701 10811
Registry: Calgary

Between:

Edith O'Meara, Joshua O'Meara, a Minor by his Next Friend and Mother, Edith O'Meara and Edith O'Meara as Administrator *Ad Litem* of the Estate of Dream Cutie O'Meara

Plaintiffs

- and -

Steven Allan Yule, Curtis Tower, Michael Reid and Roger Hall

Defendants

And Between:

9701 10704

Roger Hall

Plaintiff

- and -

Steven Allan Yule

Defendant

Reasons for Judgment of the Honourable Madam Justice C.L. Kenny

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INTRODUCTION

[1] I have been the case management judge in this matter and, as such, have been dealing with interim matters primarily for the purpose of ensuring that the matters were ready for trial. There have been many meetings and applications throughout that time. All matters were eventually settled. There are outstanding cost issues among the parties. I heard the motions on these issues on September 17, 2003. On that date we finalized an Order as amongst the O'Meara Plaintiffs (including Manitoba Health) and the Defendants Yule and Hall. The outstanding cost issues are as follows:

ISSUES

1. **What are the appropriate costs to be awarded to the O'Meara group of Plaintiffs as a result of the settlement?**

2. **What are the appropriate costs in favour of the Defendants, Yule and Hall, to be set off against the award of costs to the O'Meara group of Plaintiffs?**

3. **What costs, if any, are to be awarded to the Defendant Reid and who is to pay it?**

4. **Distribution of the settlement funds awarded to Edith O'Meara as Administrator of the Estate of Dream Cutie O'Meara.**

5. **What are the thrown away disbursements pursuant to the Order of Cairns, J. granted May 16, 2002.**

DECISION

1. What are the appropriate costs to be awarded to the O'Meara group of Plaintiffs as a result of the settlement?

[2] The O'Meara Plaintiffs provided a Bill of Costs with respect to the Defendants Yule and Hall. The Defendants took issue with some of the items claimed by the Plaintiffs. I will detail and comment on each.

a) Notice to Admit Facts - the claim for this item has been abandoned by the Plaintiffs;

b) Examination of Defendant Yule by other counsel - Schedule C, Item 5. The Plaintiffs argue that their attendance at the examination of the Defendant Yule by counsel for other parties was necessary for gathering information.

I would allow that claim by the Plaintiffs at 50% of the amount claimed. On the same basis, the Plaintiffs are entitled to 50% of tariff for the half day examination of Mr. Hall by Ms. Coates. There appears as well to be some double counting with respect to examinations on June 22, 1999 and I accept the comments of counsel for Yule that total costs for the June 22, 1999 discovery be set at $1,500. The tariff would be 50% for the examination of Mr. Hall by Ms. Coates on June 23, 1999. There also appears to be a typing error resulting in a duplicate claim of $2,000 rather than $1,000 for the half day examination for discovery of Mr. Hall by Ms. Coates on June 23, 1999.

Examination of Defendants Tower and Reid - counsel for Yule suggests deleting these Examinations for Discovery as they are not related to the Defendant Yule and Hall. I agree. Therefore, the total claim for Item 5 matters (examinations for discovery) will be reduced from $17,000 to $11,000.

c) The Plaintiffs have claimed a number of items under Item 7 of Schedule C. None of these matters are allowed. As indicated by counsel for Yule and Hall, these items are either not warranted as against these Defendants, or double counted, or were awarded to other parties.

d) Special Application before Justice Bensler - this is to be deleted as costs were awarded to the Defendant Yule and not to the Plaintiffs.

e) There shall be no claim by the Plaintiffs for the meeting with Justice Cairns on June 6, 2002 to settle the Minutes of his earlier Order. Those costs were dealt with (other than disbursements) by him.

f) Case Management Meetings before myself - The Plaintiffs have claimed their costs pursuant to Schedule C for each case management meeting being a total of 24 meetings. The Defendants' position is that other than $600 for the first case management meeting, the fact that there was case management at all was caused by the failure of the Plaintiffs to comply with directions or orders to move the matters forward. I awarded costs to the Defendants Yule and Hall for 8 of the 24 case management conferences. The Plaintiffs argue that even where the Defendants were awarded costs of the meetings they should also be able to claim those same costs as they are entitled to their costs under the terms of the settlement. They propose then to simply offset one against the other, as I understand it, for those eight conferences. Absent any discussion of costs, the Plaintiffs in the ordinary course would have received costs for those meetings pursuant to a bill of costs. That is not the case here however. I gave costs of those meetings specifically to the Defendants. Therefore, the Plaintiffs are not entitled to any of those costs.

The Plaintiffs further argue that the primary Plaintiff, Edith O'Meara, suffered from a major depressive and panic disorder. The doctor's report which sets forth this information was received very late in the day as these matters progressed. As a result, Plaintiffs's counsel found it extremely difficult to receive proper instructions from their client and argue that as a result of her disorder she should not be penalized further. Were the Court to deny the Plaintiffs costs for case management meetings given this background, they say, would be extremely unfair. The Defendants argue that they are properly entitled to those costs where not yet awarded. They are prepared however to forego their claim for additional costs over and above those awarded to them if the Plaintiffs will agree to forego their claim for case management costs.

While I understand the difficulty which counsel had in obtaining proper instructions from his clients, it was clear throughout the period of case management that virtually all of the work done in organizing the meetings, contacting all counsel, preparing minutes and orders was borne by the Defendants. In particular, counsel for Mr. Yule, Ms. Coates, went far beyond any obligations she had with respect to these matters and did so willingly. It was necessary for her on behalf of the Defendants as a whole to do in effect what was the work to be done by counsel for the Plaintiffs. While empathizing with his difficulty in obtaining instructions, clearly it is the Plaintiffs, not the Defendants, who have the obligation to move the matter forward. Given that background the Defendants' suggestion that there be no further award of costs to either the Plaintiffs or the Defendants for the other 16 case management meetings has merit and is fair in the circumstances.

g) Preparation for trial. The Plaintiffs claim full costs for preparation for trial even though two of the claims settled about a week before the first scheduled trial and two other claims settled approximately a month prior to trial. The Plaintiffs correctly point out that the Defendants were granted full costs as thrown away costs when the trial needed to be adjourned and, therefore, in their view, it is ironic now that the Defendants take issue with the costs claimed by the Plaintiffs for preparation for trial. I am of the view that the Plaintiffs are entitled to their full claim for preparation for trial.

2. What are the appropriate costs in favour of the Defendants, Yule and Hall, to be set off against the award of costs to the O'Meara group of Plaintiffs?

[3] In addition to the costs already granted in favour of Yule and Hall, there are the following further claims.

[4] June 6th, 2003 application before Justice Clark. This was an application brought by the Plaintiffs to deal with the issue of settlement costs. That application was brought after a motion was already set down by Yule and Hall before me at a later date. The timing of that later application took into account the fact that I was not available prior to then and as I understand it, counsel for Yule was also unavailable. Counsel asked Mr. Boyle to adjourn his motion or have it heard at the same time as the motion already scheduled before me. That suggestion was refused. Therefore, all counsel had to attend before Justice Clark who refused to deal with the matter given the circumstances. Both Yule and Hall are each entitled to costs of $500 as a result of that application.

[5] Costs of the June 25th, 2003 application before me. This application was brought by the Defendants seeking an order to pay out settlement funds. Many attempts were made before this application to resolve the incidental issues such as interest and costs. Those attempts were unsuccessful, hence the application before me. We were unable to conclude this application in the time allotted even with the assistance of counsel for Yule in organizing the material which would be necessary. I will grant costs of that application in favour of Yule in the sum of $1,500 and Hall in the sum of $1,000.

[6] Costs of September 17, 2003 application. This application was set down by me in order to conclude the application started earlier in June. This application took the entire day and required a great deal of work by counsel in advance to prepare for the various issues before the Court. During the proceedings, I signed an order which had been prepared by counsel for Yule with only minor adjustments dealing with costs. I also dealt with the issue of releases. I direct costs in favour of Yule and Hall for this application. For Yule the sum of $3,000. and for Hall, the sum of $1,000.

3. What costs, if any, are to be awarded to the Defendant Reid and who is to pay it?

[7] Mr. Reid was one of the three persons in the vehicle which was responsible for the accident. He was named as a Defendant when the within action was commenced. Examinations for Discovery of Reid took place on December 6, 1999. Prior to that date the Defendants Yule and Tower had already been examined. Within three days following the Examination for Discovery, counsel for Mr. Reid offered to consent to a discontinuance of action as against Mr. Reid without costs. Despite that offer it was approximately a year and a half later in March of 2001 that a Discontinuance of Action without costs was filed by counsel for the Plaintiffs.

[8] Mr. Reid did not consent to that and seeks costs for the discontinuance.

[9] Mr. Reid claims costs for steps taken even before the Examination. He argues that even before the Statement of Claim was filed the Plaintiffs had evidence from a criminal preliminary inquiry held in January of 1996 that made it clear that Mr. Reid was not the driver of the vehicle. Counsel for the Plaintiffs says that it would not have been prudent to release Mr. Reid from the litigation until he had been examined under oath at the discovery. I agree with his position.

[10] The real time period then is from December 6th, 1999 when Mr. Reid was examined to March of 2001 when the discontinuance was filed.

[11] In the event that costs are assessed against the Plaintiffs for the discontinuance, it is the view of counsel for the Plaintiffs that the other Defendants, Yule and Hall, should pay those costs. They seek what is commonly known as a Bullock or Sanderson Order. Exactly what those orders are and the test to be applied is set out by Justice Perras in ***Allen v. University Hospital***, 2000 ABQB 965, paras 4, 5 and 6:

> The issue then is whether or not the Plaintiffs will obtain relief with respect to the costs or some portion thereof awarded against them, relating to the successful Defendants, from the unsuccessful Defendants. A ***Bullock*** Order envisions the unsuccessful Defendants contributing to the Plaintiffs payment of costs to the successful party; while a ***Sanderson*** Order contemplates that the unsuccessful Defendants will pay directly the successful Defendants costs.
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> In this jurisdiction the Courts, *vide* ***Simpson v. Bender***, [1996] 37 Alta. L.R. (3d) 191, have adopted a three point test for consideration where an application for a contribution toward costs in either a ***Bullock*** or ***Sanderson*** form is made.
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> The test is this:
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> 1. was it reasonable for them to join the successful Defendants given the circumstances;
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> 2. is there any good reason to deprive the successful Defendants of costs; and
>
> 3. were the unsuccessful Defendants *vis a vis* the successful Defendants wholly responsible for the action.

[12] I find that it was reasonable in the first instance for the Plaintiffs to add Mr. Reid as a Defendant. Under the second part of the test there is no good reason to deprive Mr. Reid of his costs. It is the third part of the test where the difficulty arises. I accept that the Plaintiffs felt that they could not discontinue against Mr. Reid until after he had been examined for discovery. It was almost a year and a half later however when, unknown to counsel for Mr. Reid, the Plaintiffs filed the Discontinuance of Action without costs. It would be completely inappropriate to saddle the remaining Defendants with the costs to Mr. Reid. It was the Plaintiffs' sole decision not to accept Mr. Reid's offer of a discontinuance without costs immediately after the Examination for Discovery of Mr. Reid. By that time all parties had been examined and the full case known to the Plaintiffs. Mr. Reid therefore is entitled to costs payable by the Plaintiffs for those costs incurred from December, 1999 to March of 2001. Those costs are set at $5,000 inclusive of disbursements. These will be paid from funds currently held in trust pending this decision.

4. Distribution of the settlement funds awarded to Edith O'Meara as Administrator of the estate of Dream Cutie O'Meara

[13] The claim of Edith O'Meara as the Administrator *Ad Litem* of the Estate of Dream Cutie O'Meara was settled in the sum of $125,000. A further claim, pursuant to the **Fatal Accidents Act** RSA 2000, c. F-8 was settled for $43,000.

[14] The Defendant Hall is the biological father of Dream Cutie O'Meara. Mr. Hall brought a motion before the Court seeking a share of the settlement proceeds pursuant to the estate claim and the **Fatal Accidents Act**. I earlier ordered that the sum of $84,000 be held in trust with all other settlement funds being released until such time as Mr. Hall's application for one-half of the share of the estate claim and one-half of the Fatal Accidents Act claim was heard. As the father, Mr. Hall, is entitled to his equal share along with Ms. Edith O'Meara of the settlement funds paid to settle the estate claim and the **Fatal Accidents Act** claim. Therefore, from the proceeds being held in trust by Mr. Boyle, one-half of the estate settlement, along with one-half of the settlement under the **Fatal Accidents Act** shall be paid to Mr. Hall. Along with these payments will also be provided an accounting of the estate and **Fatal Accidents Act** claims from the firm of Spier Harben, counsel for the estate. The Defendant Hall is entitled to costs as against the estate of $1,000 for this application. The settlement funds to be divided shall be net of all legal fees incurred in the litigation relating to these claims.

5. Determination of thrown away disbursements pursuant to the Order of Cairns, J. granted May 16, 2002.

[15] There was an application by the Plaintiffs for an adjournment of this trial before Justice Cairns on May 16th, 2002. An adjournment was granted on certain conditions which included thrown away costs as set by Justice Cairns and thrown away disbursements. In that order Justice Cairns indicated that if the parties were not able to agree on thrown away disbursements they were at liberty to approach him further on that issue.

[16] Counsel appeared before Justice Cairns on June 6, 2002 to settle the terms of his order. No issue was raised at that time about what would be included in thrown away disbursements.

[17] The parties attended before a Taxing Officer on October 27th, 2003. During the taxation the Plaintiffs took the position that Taxing Officer Morin had no jurisdiction to tax the disbursement portion of the Bills of Cost because the order of Justice Cairns had not yet been filed and, further, that the disbursements claimed were not properly "thrown away". After the June 6, 2002 meeting with Justice Cairns, the Defendants sent the form of order duly endorsed by them to counsel for the O'Mearas on June 12th, 2002. As they had already endorsed their approval on the order they asked counsel for the Plaintiffs to arrange to have the order signed by Justice Cairns and filed. That was never done. When the issue of Taxing Officer Morin's jurisdiction arose at the taxation, the Defendants were surprised as the matter had never been raised by counsel for the Plaintiffs before.

[18] Finally counsel for the Defendant Hall, out of frustration, applied to enter the order of Justice Cairns which order was filed January 29th, 2004. Pursuant to Rule 322 an order is in effect upon pronouncement whether or not it has actually been filed. It is inappropriate for counsel for the Plaintiffs in this case to stand mute on the order and then raise the jurisdictional argument before the Taxing Officer. While Rule 640 indicates that costs cannot be taxed until after the order is entered, or otherwise perfected, it has been solely the fault of the Plaintiffs that such has not taken place. Plaintiffs ' counsel has been in possession of the order of Justice Cairns endorsed by counsel for the Defendants for almost a year and a half. During that time counsel for the Plaintiffs did not respond to five written requests for comments.

[19] The Defendant Yule seeks thrown away disbursement costs as follows:

a) Fax charges - $136
b) Photocopying - $101.15
c) Courier - $30.50
d) Dr. Bezant's updated reports (Yule's share) - $600
e) PETA Consultants' updated calculations (Yule's share) - $255

Total: $1,122.65

[20] I am satisfied that these claimed thrown away disbursements have been properly calculated and, in fact, do represent thrown away disbursements.

[21] The Defendant Hall takes the same position as Mr. Yule. Mr. Hall has recalculated his thrown away disbursements as a result of discussions at the Taxation. Those disburdenments are as follows:

a) Travel costs for Ms. O'Meara to attend discoveries - $386.83
b) PETA Consultants fees (40%) - $274
c) Gabe's Reporting Services Ltd. - $125.40
d) Amicus Reporting Group - $358.02

Total: $1,039.34

[22] Both Yule and Hall seek solicitor client costs for having to raise this issue with me and prepare the necessary material when the same could have been concluded at the Taxation.

[23] I award solicitor client costs in favour of Yule and Hall in the sum of $500 each to be paid by the Plaintiffs.

Heard on the 17th day of October, 2003.
Dated at the City of Calgary, Alberta this 3rd day of March, 2004.

C.L. Kenny
J.C.Q.B.A.

Appearances:

Timothy Boyle
for the Plaintiffs

Tamela J. Coates
Erin McAlister
for the Defendant Steven Allan Yule

Walter W. Kubitz
for the Defendant Roger Hall