Case Name:

Stekel v. Toyota Canada Inc.

RE: Karen Stekel and Maurice Stekel, Appellants (Plaintiffs), and Toyota Canada Inc. et al, Respondents (Defendants)

[2010] O.J. No. 5023

2010 ONSC 6213

Court File No. 594/09

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

A.M. Molloy, H.E. Sachs and T.P. Herman JJ.

Heard: November 9, 2010.
Judgment: November 12, 2010.

(33 paras.)

Civil litigation -- Civil procedure -- Costs -- Assessment or fixing of costs -- Whether amount fair and reasonable -- Particular items -- Counsel fees -- Disbursements -- Particular circumstances -- Interlocutory proceedings -- Appeal costs -- Determination of costs -- Plaintiff forced to bring motion to compel discovery after defendant took position that expert had not prepared report and his notes were protected by litigation privilege -- Plaintiff's motion denied, but plaintiff successfully sought leave to appeal -- Defendants later disclosed report and notes -- Plaintiff entitled to costs of $15,000 -- Defendants' significant delay in obtaining and producing expert report substantially delayed action and unnecessarily increased plaintiff's expense -- Delay and expense unreasonable, needless, and avoidable -- Appeal costs reasonable, but costs of leave motion excessive given nature of motion, issues involved and degree of difficulty.

Determination of costs. In 2005, while in Florida, the plaintiff loss control of her leased vehicle and crashed into a tree. She had previously reported problems with the car to the manufacturer, claiming that it had a tendency to hesitate and then suddenly accelerate, and she claimed that this defect was the cause of the crash. An independent expert retained by the manufacturer inspected the vehicle within months of the accident. Thereafter, the vehicle was returned to the leasing agent and was destroyed. Approximately one year after the accident, the plaintiff commenced an action against the

manufacturer. One of the defences raised by the manufacturer was that it had requested that the plaintiff ensure that the vehicle was preserved for future investigation, and alleged that it had been prejudiced by the plaintiff's failure to preserve the evidence and therefore was entitled to the benefit of the presumption that the evidence from the car would have been unfavourable to the plaintiffs. In 2008, representatives of the defendants were examined for discovery and were asked questions about the investigation conducted by its independent expert in 2005. The plaintiffs sought production of any notes, photographs or other documents created as part of the inspection of the vehicle and the results of diagnostic tests performed. Defence counsel refused to produce such documents, alleging that no written report had been prepared by the expert and claiming litigation privilege for his work product. Thereafter the plaintiff brought a motion on various refusals, including that one. The defendants were ordered to produce the requested documents in relation to the inspection of the vehicle, but some of the other issues were denied, and in light of the divided success, no order as to costs was made. The defendants successfully appealed the order with respect to the production of the expert's records, but were unsuccessful on a related issue. Consequently, because of the divided success, no costs were ordered on the appeal. The plaintiff sought leave to appeal the portion of the decision which dealt with the expert documents. Leave was granted and the parties agreed that the issues of costs in the leave motion would be left to the panel hearing the appeal. In the meantime, the defendants had the expert conduct further investigations and prepare a report. It was served on the plaintiff a couple of months later, and several months after that the records underlying the report were also delivered. As the plaintiff had received the disclosure she sought, the parties agreed that the appeal was moot. The defendants further argued that the appeal was without merit and the plaintiff should not be entitled to costs, while the plaintiff took the position that she should have her costs because of the history of the matter and because the appeal would have been allowed had it been argued in full.

HELD: The plaintiff was entitled to costs of before the appeal judge and on the leave to appeal motion in the amount of $15,000. The defendants' significant delay in obtaining and producing the expert report had substantially delayed the action and unnecessarily increased the plaintiff's expense. A bulk of plaintiff's counsel time on the appeal was after the defence had obtained the expert report and before it produced and the underlying documents it to the plaintiff. As this time and expense was unreasonable, needless and avoidable given that the defendant eventually produced the report and could have disclosed the report earlier, the plaintiff was entitled to costs. Although the defendant was not required to produce the report and documents earlier than it did, it unnecessarily lengthened the proceeding and caused the plaintiff to incur substantial costs. The appeal costs were reasonable. However, the costs of the motion for leave to appeal were excessive given the nature of the motion, the issues involved and the degree of difficulty.

Statutes, Regulations and Rules Cited:

Rules of Civil Procedure, Rule 1.04, Rule 57.01

Counsel:

Ted Charney, for the Appellants.

Tim Pinos and Jason Beitchman, for the Respondents.

ENDORSEMENT

The judgment of the Court was delivered by

A.M. MOLLOY J.:--

Introduction

1 Originally, this matter was an appeal from an order of Bellamy J. reversing a decision of Master Hawkins. Essentially, Master Hawkins had ordered the defendants to produce certain documents, which Bellamy J. on appeal held were not produceable because they were protected by litigation privilege. For reasons I will explain shortly, the documents have since been produced and the appeal is therefore moot. The only remaining issue is whether the appellants are entitled to costs.

Background

2 In April, 2005, while in Florida, Karen Stekel lost control of her leased Toyota Lexus and crashed into a tree. The car was a total write-off. Ms Stekel had previously reported problems with the car to Toyota, claiming it had a tendency to hesitate and then suddenly accelerate or lurch forward. She alleged that this defect in the car was the cause of the April 2005 accident. By at least June 2005, her position on that point had been communicated to Toyota.

3 Toyota retained an independent expert engineer, Mr. Corriea. Mr. Corriea inspected the vehicle in Florida on August 4, 2005.

4 The plaintiffs commenced this action on April 12, 2006. One of the defences raised by Toyota was that it had requested the plaintiff to ensure that the vehicle was preserved for future investigation. However, the vehicle, which had been leased, was subsequently returned to Toyota Credit Canada, and was destroyed. In its statement of defence, Toyota pleaded spoliation, asserting that it has been prejudiced by the plaintiffs' failure to preserve the evidence, and claiming the benefit of a presumption that the evidence from the car would have been unfavourable to the plaintiffs.

5 In September 2008, plaintiffs' counsel examined representatives of the defendants for discovery. Counsel asked questions about the investigation done by Mr. Corriea. In particular, the plaintiffs sought production of any "notes, photographs or other documents" created as part of the inspection of the vehicle and the results of diagnostic tests performed by Mr. Correia. Defence counsel refused to produce such documents, stating that no written report had been obtained from Mr. Correia and claiming litigation privilege for his work product. The defence also refused to provide an undertaking that they would not call Mr. Corriea as an expert, maintaining that this decision had not yet been made.

6 The plaintiffs brought a motion before the Master on various refusals, including this one. By endorsement dated July 10, 2009, Master Hawkins ordered the defendants to produce the results of the diagnostic tests and any "notes, photographs or other documents" created by Mr. Correia as a result of his inspection of the vehicle. The Master ruled against the plaintiffs on some of the other issues argued and in light of the divided success, made no order as to costs.

7 The defendants appealed two aspects of the Master's Order, one of which was the order for production of Mr. Correia's records. On September 2, 2009, Bellamy J. granted the appeal on that issue, ruling that the documents were protected by litigation privilege and it was premature to require the defendants to decide whether they were calling this witness at trial. The defendants were

unsuccessful on the other unrelated issue. The appeal judge ordered no costs because of the divided success.

8 On September 10, 2009, the plaintiffs' counsel delivered a notice of motion seeking leave to appeal from that portion of the decision of Bellamy J. dealing with the Correia documents.

9 Meanwhile, in July and August 2009, just after the Master's decision of July 10, 2009, Toyota caused Mr. Corriea to do further testing and investigation with a view to producing a report. This testing was performed on cars of the same make and model as the plaintiffs' and involved comparing data from those tests to data obtained from the investigation of the plaintiffs' vehicle in the summer of 2005. Mr. Corriea also did further testing in November 2009.

10 On February 26, 2010 the motion for leave to appeal was argued before Greer J., who reserved her decision. On March 1, 2010, Greer J. released her endorsement granting leave to appeal and stating that costs could be addressed in writing by April 15, 2010.

11 On or about March 29, 2010, defence counsel obtained the written report of Mr. Correia. He did not disclose it to plaintiffs' counsel.

12 Not knowing of the existence of the report, plaintiffs' counsel agreed with counsel for the defendant that the issue of costs of the leave motion could be left to the panel hearing the appeal. Their consent on that issue was communicated to Greer J. who made an order accordingly. Greer J. dealt with the costs of a motion to exclude fresh evidence which the defendants had attempted to file, awarding those costs to the plaintiffs payable forthwith.

13 Plaintiffs' counsel perfected his appeal to the Divisional Court on April 30, 2010.

14 On May 17, 2010, defence counsel served Mr. Correia's report on counsel for the plaintiffs.

15 The appeal was scheduled to be heard on November 9, 2010. On October 22, 2010, defence counsel delivered all of the records of Mr. Correia underlying his report, in effect producing everything that had been ordered in the first place by the Master. Defence counsel then took the position that the appeal is moot and should be abandoned without costs.

Position of the Parties

16 The parties agree that the appeal is moot. The only issue to be determined is costs.

17 Defence counsel argues that he produced the report and documentation before they were required under the Rules. He says this was done in the normal course of the litigation and not because there was any merit to the appeal brought by the plaintiffs. Further, he submits that the appeal is without merit and the plaintiffs should not be entitled to any costs.

18 Counsel for the plaintiffs takes the position that the plaintiffs should have their costs because of the history of this matter, and also because the appeal would have been allowed if it had been argued in full.

Analysis

19 Leave to appeal was granted in this case on three issues:

(1) whether the appeal judge erred in finding that the documents were protected by litigation privilege in the absence of sufficient evidence from the defence to meet its onus;

(2) whether the appeal judge erred by not taking into account the failure of the defence to provide an undertaking that it would call the expert witness at trial; and,

(3) whether the appeal judge erred by not determining that the defendants had waived privilege for the documents by pleading spoliation.

20 There may well be cases where it is necessary to hear the full argument of an appeal with respect to issues that are moot in order to determine entitlement to costs. I do not see this as such a case.

21 The critical issues here are delay and expense. One of the guiding principles for the interpretation and application of the Rules of Civil Procedure is that the rules shall be "liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits:" Rule 1.04. The emphasis on discouraging litigation tactics that unnecessarily prolong proceedings or needlessly run up costs is also reflected in some of the general principles to be taken into account in awarding costs. Rule 57.01 sets out a number of factors to be considered by judges in the exercise of discretion to award costs, including:

(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;

22 The defendants have presented no evidence to explain why they could not have produced Mr. Correia's report in a more timely way. In my view, the significant delay in obtaining and producing the report has substantially delayed this action and unnecessarily increased the expense to be borne by the plaintiffs. It is relevant to take this into account in determining what, if any, costs the plaintiffs may be entitled to, regardless of whether their appeal would ultimately have been successful.

23 Of particular concern with respect to costs of the appeal itself is the fact that Mr. Correia's report was completed at the end of March 2010, but not disclosed to the plaintiffs. The bulk of plaintiffs' counsel's time on the appeal was after the defence had the report and before the defence provided it to the plaintiffs. Another significant portion of the time was incurred prior to the production of the underlying documents in late October 2010. In my view, all of this time and expense was needless, given the eventual defence reliance upon and production of Mr. Coreia's report. Had the report been disclosed earlier, the entire appeal could have been avoided. In these circumstances, I consider the plaintiffs to be entitled to their costs of the appeal.

24 The plaintiffs also seek costs of the leave motion before Greer J. and the costs of the appeal before Bellamy J. The defence argues that they were under no obligation to produce the documents sought because they were protected by litigation privilege. We did not hear full argument on this aspect of the appeal, and I therefore make no finding with respect to whether the claim for litigation privilege had been adequately set out in the evidence before the court. We did, however, invite

counsel for the defendants to present his argument with respect to the impact of the spoliation defence on the defence obligations to produce relevant documents.

25 After the accident and prior to the destruction of the car, the plaintiffs did not retain their own expert to investigate or examine the car. The only examination of the car was by the defence engineer, Mr. Corriea, in July 2005. The defence pleaded that the plaintiffs' failure to preserve the evidence prejudiced their defence in that valuable evidence had been lost. The defence took the position, therefore, that the court should draw an inference that an examination of the car would reveal evidence adverse to the plaintiffs' case. At the time of discoveries in 2008, the plaintiffs tried to determine whether the defendants were in fact prejudiced by the destruction of the car. Evidence with respect to what Mr. Corriea had been able to glean on his examination of the car would be highly relevant to whether or not the defence was prejudiced by the destruction of the car. This would be important information to enable the plaintiffs to assess the strength of their case prior to trial. It is in the interests of all parties and in the interest of the administration of justice generally that such information be provided in a timely manner to ensure the early resolution of litigation wherever possible.

26 Rather than taking an approach that would have minimized costs for all concerned and expedited the resolution of this case, the defence chose a "you can't make me" attitude. The defence refrained from getting a written report from Mr. Correia over a period of years, and then maintained that it could not produce what it did not have. At the same time, the defence refused to indicate whether it would or would not be calling Mr. Coreia as a witness at trial, again taking the position that it could not make that decision until it got a report. It was entirely within the power of the defendant to obtain a report in a timely way and to then advise the plaintiffs either that the records sought would therefore be produced, or alternatively that the documents would not be produced and that Mr. Coreia would not be testifying at trial.

27 I appreciate that such decisions cannot be made immediately after litigation is commenced. However, the length of time between when the investigations of the car were initially done and when the defence finally made a decision as to whether Mr. Correia would be a witness was unduly long and caused needless expense to the plaintiffs.

28 In my view, in light of the spoliation defence and the direct relevance of the documents sought to that defence, it was particularly unreasonable for the defence to make a tactical decision to delay obtaining a report from Mr. Correia and likewise delay making a decision as to whether to rely on his report, thereby avoiding their discovery obligations on the spoliation issue. The plaintiffs were entitled to know how to assess this important issue in their litigation. I refrain from making any ruling as to whether such conduct when coupled with the pleading of a spoliation defence resulted in a waiver of litigation privilege. However, such conduct is relevant to the overall delay and expense that was caused by the defence dragging its heels on this issue.

29 It may be the case that the defence was not, strictly speaking, required to produce the report and documents earlier than it did. Since we did not hear full argument on the merits of the appeal, I make no determination on that point. However, regardless of whether conduct actually breaches a Rule, it may still be taken into account in determining costs if it unnecessarily lengthens the proceedings or results in unnecessary steps in the proceedings. As a result of the position taken by the defence on this issue, the plaintiffs' action has been substantially delayed and the plaintiffs have incurred substantial litigation costs, all of which could have been avoided if the defendants had been reasonably diligent in deciding what it was going to do about Mr. Coreira and his report. A more

reasonable approach would have been to undertake the steps to obtain Mr. Coreia's report at the time of the discoveries, or shortly thereafter, and to advise the plaintiffs this was being done and that a position would be taken shortly. Even if the defence was not obligated by law to take such an approach, the failure to do so is a factor that is relevant to costs.

30 In these circumstances, I would award the plaintiffs their costs both before the appeal judge and on the leave to appeal motion.

Quantum of Costs and Order

31 Counsel for the defendants takes no serious issue with respect to the costs claimed for the appeal before Bellamy J. (being approximately $4000.00 for fees and $419.32 for disbursements) or the costs claimed for this appeal in Divisional Court (being approximately $4500 for preparation, plus a counsel fee for the argument and disbursements of $1373.47.)

32 However, the defence does take issue with the costs claimed for the leave motion, which total approximately $10,000. I agree that this is excessive for a leave motion. In my view, given the nature of the motion, the issues involved and the relative degree of difficulty, an appropriate range for costs for the leave motion would be between $3000-$5000.

33 Accordingly, I consider $15,000 to be an appropriate costs award for all three levels. I would dismiss the appeal as abandoned, with costs to the plaintiffs fixed at $15,000, all inclusive, payable forthwith.

A.M. MOLLOY J.
H.E. SACHS J.:-- I agree.
T.P. HERMAN J.:-- I agree.

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