

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

DELIA BOZOLASCO

Plaintiff

- and -

RAFAEL ESTACIO and JUAN BOZOLASCO

Defendants

ENDORSEMENT ON COSTS RELEASED AUGUST 26, 2014

For defendant Rafael Estacio: Mester, N.

For defendant Juan Bozolasco: Sproule, W.

For plaintiff: E. Shlomovitz

It appears from the written submissions that the costs claimed are by the defendant, Juan Bozolasco, as against the defendant, Rafael Estacio both for the successful summary judgment motion, and costs of the action.

The defendant Bozolasco seeks costs of the action against the defendant Estacio pursuant to a “Sanderson Order.”

Prior to the hearing of the motion, the defendant agreed not to pursue any costs against the plaintiff if successful on the motion. The defendant Estacio concedes he is solely liable for the defendant Bozolasco’s costs of the motion, if any.

Costs of the motion and action are claimed against Estacio on a full indemnity [basis]; no misconduct or unreasonableness is claimed. He seeks full indemnity on the basis that this is less than suggested partial indemnity rates. He also submits he is entitled to full indemnity based on an offer to settle. However, that offer does not comply with the terms of Rule 49.

I agree that the amount claimed on the motion is excessive. Costs are not awarded for motion materials not relied upon. The issues were not complex. The plaintiff did not oppose the summary judgment motion. Despite the ultimate results on the motion however, it was not unreasonable for the plaintiff, passenger, to sue both drivers involved in the collision on the basis of joint and several liability under the Negligence Act.

In these circumstances costs of the motion are awarded in favour of the moving party, the defendant J. Bozolasco fixed at \$25,000.00 partial indemnity. In determining the quantum of these costs I have also taken into account the factors in Rule 57.01 including the amount of costs an unsuccessful party could reasonably expect to pay for the motion, the complexity of the proceeding, which was simplified due to the plaintiff's consent, and the importance of the issue, the result of which brought finality to the moving party.

Significant time was reasonably expended by counsel in order to achieve the result on the summary judgment motion. While I have considered the amount the losing party could reasonably expect to pay, as stated above, the amount submitted by the defendant Estacio in this regard is artificially low in all the circumstances.

The issues on the costs of the action are quantum and whether a Sanderson Order should be made. The defendant Bozolasco having had the case dismissed against him is entitled to costs. The plaintiff does not seek costs, but the defendant Estacio claims costs of the action should be apportioned 50/50 between him and the plaintiff, thereby leaving a liability of 50% on the total costs awarded in favour of the defendant Bozolasco.

As I have previously noted, the evidence of independent witnesses strongly pointed to clear liability of Estacio. Although it was still reasonable to include the defendant Bozolasco as an involved driver upon issuance of the Claim, the plaintiff did not agree to discontinue against him until March 2013. I am not persuaded that all of the costs that would have been attributed to the plaintiff's decision to sue J. Bozolasco should be paid by Estacio. Some of the costs in all the circumstances would have fallen to the plaintiff, had she not waived them.

Accordingly I am fixing costs of the action payable by the defendant Estacio to the defendant Bozolasco at \$60,000, all inclusive, partial indemnity.

"Seppi, J."