

## IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Briscoe v. Smyth and NW Floral Express  
Ltd.,  
2011 BCSC 1492

Date: 20111103  
Docket: M7915  
Registry: Campbell River

Between:

Clayton Woodrow Briscoe

Plaintiff

And

Michael Dennis Smyth and  
NW Floral Express Ltd.

Defendants

Before: Master Donaldson

(As Registrar)

### Reasons for Decision

Counsel for the Plaintiff:

S. Sinnott

Counsel for the Defendant:

R. Hornquist

Place and Date of Hearing:

Campbell River, B.C.  
July 18, 2011

Place and Date of Judgment:

Campbell River, B.C.  
November 3, 2011

[1] The plaintiff was involved in a motor vehicle collision on the 1<sup>st</sup> of February, 2006. The action was commenced the 16<sup>th</sup> of January, 2008 and it was settled on the 10<sup>th</sup> of April, 2010. The matter had been set for trial to commence the 1<sup>st</sup> of June, 2010.

[2] The parties attended a pre-hearing conference on or about the 10<sup>th</sup> of September, 2010 and pursuant to that pre-hearing conference defence counsel was requested that he set out the issues with regard to the taxation of costs as to what disbursements would be agreed to and what were in issue. Counsel for the defendant responded in a letter dated the 14<sup>th</sup> of September, 2010.

[3] It is important to note that both counsel were able to agree on a number of matters. The matter was brought on for a Registrar's hearing to determine the quantum of the party-and-party costs which had been agreed upon when settlement was reached on the 10<sup>th</sup> of April, 2010. This took place on the 18<sup>th</sup> of July, 2011.

[4] Following the hearing, issues remained as to disbursements and counsel were required to provide written submissions relating to the disbursement issues.

[5] Inexplicably those submissions by the plaintiff were not provided until the 25<sup>th</sup> of October and they were responded to by counsel for the defendant on the 28<sup>th</sup> of October, 2011.

[6] At the end of the hearing before me on the 18<sup>th</sup> of July, 2011, I suggested to counsel for the defendant that they forward to counsel for the plaintiff the undisputed and/or adjudicated items in relation to the plaintiff's bill of costs. Thus, the sum of \$22,500 was forwarded to counsel for the plaintiff on the 17<sup>th</sup> of August, 2011.

[7] I will deal with the disbursements that are disputed in the order as they were dealt with by respective counsel in their written submissions.

#### **Photocopies**

[8] A claim is made for payment of \$1,121.50 for 4,486 copies in the action and a further 813 copies which apparently were in the view of counsel for the plaintiff

required to prepare for the taxation. Apparently counsel for the plaintiff saw fit to prepare copies for the Court, defence counsel and the experts who apparently were to be retained. The material filed in support, that is to say the affidavit of Susan Sinnott, simply sets out the number of copies which she then states "were required". No detail was provided as to how many multiple copies there were, the number of copies sent to each of the "experts" and in particular, no reference is made as to the "various financial records" of the plaintiff. Certainly so far as this latter item is concerned it is clear from the material that the plaintiff's financial records were in a state of almost total disarray.

[9] On the material it is all but impossible for me to determine the appropriate number of photocopies. While dealing with the unit items, it would appear that documents were obtained through freedom of information, documents obtained directly from I.C.B.C. as set out in their list of documents and documents from W.C.B. and the client. It would appear that a very wide net was cast and it would also appear that significant numbers of documents were sent to various persons referred to as experts, notwithstanding the fact that few if any of the persons to whom or entities to with which documents were sent could properly be categorized as experts in that experts' reports were formally filed, etcetera, in accordance with the provisions of the Rules. There was no evidence led under the specific heading of documents prepared for the Court and defence counsel. It is noted by counsel for the defence that the matter settled approximately two months before the trial and there is no indication that evidence booklets or other documentary evidence had been copied in preparation for trial.

[10] It is clear that the party paying costs should only be liable for the necessary (or proper) costs of preparation of the plaintiff's case and as set out by then Registrar Bouck in *Prehara v. Royer*, 2007 (BCSC) 912, it was necessary to create binders for a mediation and it was also not necessary to copy all of the plaintiff's documents to all of the experts retained. It should be noted that counsel had the benefit in that decision setting out that detailed information as to the copies prepared

and the purpose of them was necessary. Such was not available in the hearing before me.

[11] I am satisfied in the circumstances that it is appropriate that the defendant be responsible for the amount of \$700 for photocopying. The photocopies provided at the Registrar's hearing, I am satisfied, were excessive and would appear to be duplications in many respects of duplications.

#### **Fax Charges**

[12] The plaintiff claims 360 fax charges at 34 cents a copy for a total of \$132.30 including GST.

[13] It would appear on the material that at least one-half of the documents faxed were then mailed with the plaintiff contending that both the fax charges and the postage charges be the responsibility of the defendant. Certainly in situations where time is of the essence or where documents have been requested to be provided within certain time limits, then the use of the fax is certainly appropriate. Here, however, there is little if any evidence indicating either of those requirements. Again, without this evidence, it is difficult to properly determine what, if any, fees should be paid by the defendant for the choices made by counsel for the plaintiff in relation to faxing items. On the basis that it is likely that certain documents on certain occasions might well have been required to be provided by fax, I am satisfied that the appropriate allowance for the fax charges is \$40 plus GST.

#### **Ben Chatterson - \$290 plus \$14.50 GST Total \$304.50**

[14] Apparently Mr. Chatterson who is a physiotherapist made a telephone statement to an I.C.B.C. adjuster Jivana Tao on the 11<sup>th</sup> of July, 2006. Counsel for the plaintiff apparently sent Mr. Chatterson copies of Dr. Salvian's report and Mr. Chatterson responded in a letter the 6<sup>th</sup> of March, 2008 that he would "like to revise my statement given by telephone to Jivana Tao on the 11<sup>th</sup> of July, 2006." In the written submissions the following comment is made:

Apparently there was a suggestion that the plaintiff may have been malingering in an early report Mr. Chatterson to an I.C.B.C. adjuster. Ms. Sinnott therefore felt it necessary to bring Mr. Chatterson up to date particularly after the plaintiff had been seen and diagnosed by Dr. Salvian.

[15] It would seem to me that Dr. Salvian's report being (a) more current and (b) one assumes more comprehensive than a "report" or "statement" given by telephone to an I.C.B.C. adjuster. There is no suggestion that the report of Mr. Chatterson is anything in the nature of an expert's report and certainly was not submitted to defendant's counsel as such. I am satisfied therefore that while it may have been the view of counsel for the plaintiff that such a clarification would be helpful, I am not satisfied that it is an expense that should be borne by the defence.

#### Reports of Dr. Anthony Salvian

[16] The account of the 13<sup>th</sup> of November 2009 indicates that Dr. Salvian spent 2 1/4 hours and rendered his account for \$892.50 without GST. The April 14<sup>th</sup> account does not include any reference to the time spent. The November 13<sup>th</sup> account deals with a one-half hour file review on the 2<sup>nd</sup> of June, 2009 and a conversation with counsel for some 15 minutes and then apparently an hour review the 10<sup>th</sup> of June, 2009 and a second 15-minute telephone conference with counsel. Apparently in November of 2009 Dr. Salvian spoke to counsel for 15 minutes but there is no time review required.

[17] So far as the November 13<sup>th</sup>, 2009 account is concerned I am satisfied that it is an appropriate charge and therefore will be allowed at \$892.50.

[18] There is no time set out in the April 14<sup>th</sup> account and apparently it is in relation to time spent on the 14<sup>th</sup> of April, 2010. This of course would be some four days after the matter had settled and one wonders how it could be appropriate that the defendant be responsible for the April 14<sup>th</sup>, 2010 account.

[19] This account has been in dispute since the September 2010 letter from counsel for the defendant to counsel for the plaintiff. It is somewhat surprising that

no particulars have been provided by Dr. Salvian as to the time spent for the basis of his April 14<sup>th</sup>, 2010 charges. It is not allowed.

#### **Harbourview Rehabilitation**

[20] The plaintiff claims charges made by Harbourview Rehabilitation in the amount of \$8,198.25 plus \$409.91 for GST total \$8,608.16. It is common ground that Harbourview conducted functional capacity report (F.C.E.) and vocational assessment.

[21] In his September letter counsel for the defendant expresses concern as to the account being excessive and additionally the basis for \$50 per hour charge to prepare a report, the report taking some 22 hours to complete. In relation to this account there is an affidavit of Dr. Dean Powers sworn the 9<sup>th</sup> of March, 2011 in which he sets out what he considers the basis for the Harbourview account.

[22] The time spent by Dominic Shew for the functional capacity evaluation (F.C.E.) is not contested by counsel for the defendant.

[23] His time apparently being charged out at \$135 per hour. Of concern to the defendant is the 31<sup>st</sup> of December, 2009 entry where 22.7 hours are charged at \$185 per hour. Mr. Powers does not in his affidavit set out the exact number of hours he worked on the file. In his submissions counsel for the defendant points out that 29.62 hours were charged at a rate of \$135 per hour and some 22.7 hours were charged at \$185 per hour. I am not satisfied there is an adequate or any explanation for the difference in the hourly rates. I am satisfied that it was necessary for the plaintiff to obtain the reports obtained, but am satisfied that they should all be charged out at \$135 per hour, thus making the appropriate charge for the Harbourview report \$7,063.20 plus appropriate tax.

#### **Campbell River Physiotherapy Account \$300 plus \$15 GST Total \$315**

[24] This account is dated the 28<sup>th</sup> of April, 2010. It should be remembered that the trial was not set to commence until the 1<sup>st</sup> of June, 2010. No explanation is

provided as to why this "trial preparation" was necessary so much in advance of the trial date.

[25] I am not satisfied that the account has been justified and therefore it is disallowed.

#### **Medication Research**

[26] The plaintiff claims \$200 plus \$10 GST a total of \$210 for "medication research". This invoice was from Surge Narrows Sea Farms Ltd. and is dated the 31<sup>st</sup> of August, 2009. It is apparently common ground that C. Sinnott, while the holding of a nursing degree, is now retired. She is the mother of plaintiff's counsel and she apparently spent four hours at \$50 an hour reviewing three pages of PharmaNet records. There is no indication that any special expertise is required to review PharmaNet records and apparently the purpose of the examination was to assist counsel in determining what medication was relevant and which was not relevant.

[27] I have not been able to think of a basis for a justification of this account and therefore it is disallowed.

#### **Turnbull & Company Accounting Report**

[28] Plaintiff claims \$3,320 plus GST of \$166 for a total of \$3,486 for services provided by Turnbull & Company.

[29] In addition to Mr. Turnbull being an accountant he apparently has given evidence in the Supreme Court as an economist.

[30] Counsel for the defendant takes the position that it is appropriate to allow a fee of \$350 as the economic evidence in which Mr. Turnbull provides the multiplier as such would cost in the range of \$300 to \$400 from generally retained economics consultant.

[31] It is clear that Mr. Turnbull's report is to attempt to make sense of the disorganized business and financial affairs of the plaintiff. There does not appear in the report to be any specific expert opinion analysis but rather it would appear that Mr. Turnbull sorted through the disorganized financial affairs of the plaintiff. Susan Sinnott in her affidavit of the 1<sup>st</sup> of March, 2011 at paragraph 29 sets out that matters were both complicated and messy and as a result she believed the assistance of an accountant was necessary to organize the plaintiff's records. Had Mr. Turnbull's report taken the form of an expert's report and had it been submitted as such, more serious consideration would have to be given to this account. It appears, however, to have been an attempt to clarify the financial affairs of the plaintiff rather than taking the form of an expert's report. Thus the amount allowed will be \$350 plus GST of \$17.50 for a total of \$367.50.

#### Lexfund Loan

[32] Apparently some \$2,940 was paid in relation to a Lexfund loan taken out by the plaintiff to fund his litigation. Counsel for the plaintiff makes reference to the decision of *Milne v. Clarke*, 2010 (BCSC) 317 and the following quotation of Mr. Justice Burnyeat:

The law in British Columbia is that interest charged by a provider of services where the disbursement has been paid by counsel for a party is recoverable as is the disbursement. The interest charge flows from the necessity of litigation. If the disbursement itself can be assessed as an appropriate disbursement so can the interest owing as a result of the failure or inability of a party to pay for the service provided.

[33] The charge of \$2,940 is in relation to a loan taken out by Mr. Briscoe on the 4<sup>th</sup> of March, 2010, that is to say approximately one month before the matter was settled and approximately three months before the trial was scheduled. A \$1,750 "underwriting fee" was paid by Mr. Briscoe and \$25,000 was apparently advanced to Ms. Sinnott's trust account on the 9<sup>th</sup> of March, 2010. The loan was repaid on the 29<sup>th</sup> of April, 2010 and \$916.69 interest was charged.

[34] Ms. Sinnott in her affidavit deposes that she advised the plaintiff to take out the loan on or about the 8<sup>th</sup> of March, 2010 as she estimated that \$35,000 to



\$50,000 would be required to pay six experts approximately \$4,000 each and "other assorted trial expenses".

[35] There is nothing in the material provided that would indicate that interest was being charged on various accounts which had been incurred for experts and the like by the law firm, nor is there any evidence indicating the names of the experts who it was anticipated would be needed or that they would require to have their fees paid "up front" before giving evidence at the trial.

[36] This is clearly a different situation from that in Milne v. Clarke where to use an example in this matter, Harbourview, for example, was charging interest at a given rate on its unpaid account.

[37] Of particular concern is the \$1,750 "underwriting fee". That seems to me to be very remote from the decision in Milne v. Clarke. I am satisfied that the plaintiff has not succeeded in bringing this charge within the Milne v. Clarke authority and therefore it is disallowed.

#### Travel Claim - \$459.18

[38] The plaintiff claims \$459.18 travel expenses for "litigation purposes". One of Mr. Briscoe's sources of income was a movie set construction business which he pursued in the lower mainland. He submitted this travel claim as an expense for "litigation purposes".

[39] They appear to me to be expenses travelling from Campbell River to Vancouver and return to Campbell River in an attempt to work. How this can be transmorphed into a litigation expense has been not proven to my satisfaction. Thus the amount claimed is denied.

[40] Thus the amounts allowed are as follows:

Photocopies	\$700.00
Faxes	42.00
Dr. Salvian	937.13
Harbourview Report	7,416.36
Turnbull & Company Accounting Report	367.50
T O T A L	\$9,462.99

[41] At the hearing on the 18<sup>th</sup> of July, 2011, 133 unit items were submitted, that is to say a sum totalling \$14,630, 85 units were allowed, totalling \$9,350.00.

[42] The claim of the plaintiff for disbursements totalled \$31,239.05 including taxes, the undisputed disbursements totalled \$11,701.66. The disputed disbursements amounted to \$19,537.39.

[43] It is my understanding that as I had recommended, the defendant forwarded the sum of \$22,500 to counsel for the plaintiff following the hearing of the 18<sup>th</sup> of July, 2011 as an advance on the costs claimed. Counsel can calculate the balance due with appropriate taxes.

"Master Donaldson"