THE SUPREME COURT
OF BRITISH COLUMBIA

THE LAW COURTS
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To:	C. Peter Collins	**Fax:**	604-683-4541
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Re:	***Stamatopulos v. Sanchez***	**Pages:**	9
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Please see attached Oral Reasons for Decision of Registrar Sainty.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20130417
Docket: M104635
Registry: Vancouver

Between:

Stella Stamatopulos

Plaintiff

And

Maximilian Anthony Sanchez

Defendant

Before: Registrar Sainty

Oral Reasons for Decision

In Chambers

Counsel for Plaintiff:	G.E. Calder
Counsel for Defendant:	C.P. Collins
Place and Date of Trial/Hearing:	Vancouver, B.C. April 17, 2013
Place and Date of Decision:	Vancouver, B.C. April 17, 2013

[1] **THE REGISTRAR:** I have before me an appointment to assess the plaintiff's bill of costs in this action. The matter was settled for some $411,000 plus costs and disbursements. The parties have been able to agree on everything, with two exceptions, and that is the costs for the experts Dr. Hunt and Dr. Mailis-Gagnon. Other than that, as I say, the parties have been able to agree on all of the matters, and I commend them for being able to do so.

[2] I am just going to make a couple of comments here. I am giving these reasons orally at the end of hearing of the parties' submissions. If anyone were to order a copy of them for any particular reason, I reserve the right to edit them for grammar, content, syntax, add case names and the like, or even flesh out my reasons if I feel that necessary. However, of course, the result will not change.

[3] I will start by giving a very brief history of the matter. The plaintiff was involved in - I think Mr. Calder called it a bizarre accident - wherein the plaintiff was in her car and a truck backed up into her vehicle and, in fact, rolled up on her hood and only stopped just as it reached her windshield. Initially, she did not have any symptoms or issues, but the next day, she presented with pain in her neck, shoulder and right hand, and with a particularly intense burning and tingling in her right index finger.

[4] The plaintiff saw a number of different practitioners to assist her with her injuries as she continued to suffer a great deal of pain. Eventually she was referred to the St. Paul's Hospital Pain Clinic where she came under the care of Dr. Hunt, who diagnosed her as having chronic regional pain syndrome ("CRPS") Type 1, which I understand is a controversial and unusual diagnosis, in the sense that, with CRPS Type 1, there is apparently no direct evidence of any nerve damage, but the individual who is suffering from it experiences severe pain, whose origin is difficult to determine. In his submissions, Mr. Calder also told me that, in assessing or diagnosing someone claiming these symptoms, one has to decide whether the person claiming to be suffering from it is malingering, or whether she might be suffering from some kind of conversion disorder, and the truth could be anywhere

between those two extremes. So it is in that context he was dealing with this plaintiff and her claims.

[5] The accident occurred on October 7, 2008. The plaintiff hired counsel on September 2010, who pretty much immediately thereafter, filed a notice of civil claim. The defendant's response was to deny liability, although, clearly, that was not an issue in this proceeding.... there was not likely any doubt that the defendant was liable for the accident and I am simply noting that as having been the case here. I expect it is standard procedure that the defence deny liability in most motor vehicle accident cases. In any event, there was a notice to mediate and a mediation was held on July 29, 2011. There was also an examination for discovery. That occurred on June 28, 2011.

[6] Shortly after being retained, counsel for the plaintiff set about getting a variety of expert opinions. As a CRPS Type 1 diagnosis is unusual, counsel felt it was important to involve a number of different medical experts in the matter, including Dr. Hunt, whom I have already mentioned. A functional capacity and future cost of care report was obtained from an occupational therapist. That occupational therapist, I understand, recommended that the plaintiff be seen, from a medical perspective, by a physiatrist or physical medicine and a rehabilitation specialist. The plaintiff was then referred to a Dr. Kiai. A psychiatrist's report was also obtained. And there was a treating psychologist, a Dr. Buch, who I believe also did a report. A past and future income loss and cost of future care report was also done.

[7] At the time of the mediation (July 2011), the plaintiff was suffering quite substantially from her injuries. The mediation was not successful. There was a difference of some $385,000 between what was offered at the mediation and what the plaintiff was seeking. A formal offer to settle was made August 5, 2011, for $340,000. The trial was then set for January 21, 2013, for 10 days.

[8] Mr. Calder told me that, as it seemed to him the defence did not believe the CRPS diagnosis, after the mediation he contacted Dr. Mailis-Gagnon of Toronto, whom I understand is an expert in the field of CRPS, and asked Dr. Mailis-Gagnon if

it might be possible to retain her as an expert in this matter. Mr. Calder exchanged some emails with Dr. Mailis-Gagnon and eventually Dr. Mailis-Gagnon was hired as an expert. Dr. Mailis-Gagnon apparently requested that the plaintiff have some additional medical testing and psychological tests before seeing her. Those tests were done and provided to Dr. Mailis-Gagnon. The plaintiff then travelled to Toronto and met with Dr. Mailis-Gagnon who then provided a medical-legal report. The action continued.

[9] The defence obtained some of their own expert opinions, including some rebuttal reports to those I mentioned earlier. The defence also obtained an opinion from a Dr. Ochoa, whom I understand practises in Portland, Oregon, to rebut the plaintiff's CRPS diagnosis. I was told that Dr. Ochoa is of the opinion that there is no such thing as CRPS, Type 1. Dr. Ochoa's report was served on the plaintiff. That then apparently raise the spectre of what might possibly happen at trial. Where there are two diametrically opposed opinions on CRPS, it must be decided if it is a legitimate diagnosis or not. And an "all or nothing" decision must be made by the trier of fact; i.e., does the plaintiff suffer from CRPS, or not? Or, even, is there even such a thing as CRPS, Type 1?

[10] Sometime in October of 2012, the defence conducted some surveillance of the plaintiff. Copies of the surveillance videos were sent to plaintiff's counsel. I was told that, on the surveillance videos, the plaintiff appears somewhat less symptomatic than she had been at the time of the mediation (at least). Faced with mounting disbursements, the surveillance video and the defence medical reports against a diagnosis of CRPS (basically saying it did not exist), counsel for the plaintiff decided that it would be most prudent to settle the matter, especially considering the plaintiff's potential exposure to costs at trial if she did not beat the formal offer to settle. The matter then settled and we are here today to complete this matter - essentially to deal with the costs of these two experts.

[11] Dr. Hunt's and Dr. Mailis-Gagnon's invoices were attached to the appointment. Dr. Hunt billed a total $8,100, which included the costs for preparing

the initial medical report (which was received in the plaintiff's counsel's office on May 20, 2011), as well as for reviewing some other expert reports - that cost was $800. Also, once the defence started to hire their experts, their reports were given to Dr. Hunt, who then provided two additional invoices for reviewing the reports of Dr. Ochoa, Dr. Levine and some other reports, as well as reviewing, I think, the surveillance video and providing his opinion on that. There was a bill of $3,750 for his time - which I note, does not include the secretarial time or that of others - dated June 25, 2011. And then a final bill of $1,850 was issued on January 14, 2013.

[12] As for Dr. Mailis-Gagnon's invoices, the first invoice, which really represented the medical-legal report – her preparation of it, her meeting with the plaintiff, her review of all of the other documentation, and her answering questions that had been posed to her by Mr. Calder – apparently took 43 hours in total, which was billed at $500 per hour, so the total cost on that invoice was $21,500. She also issued a subsequent invoice for reviewing the surveillance videotape, Dr. Ochoa's opinion and the rebuttal reports of Drs. Madryga and Jaworski for 12 hours of her time - or $6,000.

[13] Plaintiff's counsel argues that it was necessary and proper to obtain reports, both from Dr. Hunt and subsequently from Dr. Mailis-Gagnon. He told me that, in his opinion, it was useful to have both of those reports. Firstly, he says, Dr. Hunt is a treating physician. Secondly, as Dr. Hunt had been criticised in this court for an opinion he had given in a previous case [*Warkentin v. Riggs*, 2010 BCSC 1706], he wanted an opinion from someone who had greater experience dealing with CRPS (than Dr. Hunt), particularly because it is such a controversial diagnosis. In counsel's view, it was necessary to seek a second expert.

[14] On the other hand, Mr. Collins, counsel for the defendant, says that, in his view, the report of Dr. Mailis-Gagnon was neither necessary nor proper. Obtaining it was - I think he compared that report to buying a Lamborghini - far more than even a Cadillac. He submitted that there was no need for the plaintiff to hire and instruct Dr. Mailis-Gagnon, especially as Dr. Hunt and Dr. Kiai had each provided

comprehensive opinions and their opinions were all that were necessary and proper for the plaintiff to advance her case at trial. Alternatively, Mr. Collins argues that, if I do find that it was necessary and proper for the plaintiff to have hired both Dr. Hunt and Dr. Mailis-Gagnon, then the amounts charged by Dr. Hunt and Dr. Mailis-Gagnon collectively are simply not reasonable and I ought to reduce them.

[15] There are a number of general principles that I must apply in making my decision on these issues. I must first determine whether a disbursement was necessary and proper at the time it was incurred [Rule 14-1(5) of the *Supreme Court Civil Rules*; and *Van Daele v. Van Daele* (1983), 56 B.C.L.R. 178 (C.A.)] and, if I find it was necessary and proper, I must then allow a reasonable amount for that disbursement [Rule 14-1(5) and *Cloutier v. Wong* (1992), 12 C.P.C. (3d) 169 (B.C.S.C. Registrar)]. So there is really a two-part test. The first part of that test is: was it necessary and proper? And then secondly, if it was necessary and proper: is the amount claimed reasonable? It is also important for me to remember that a "necessary" disbursement is one for which the outlay could not be avoided in the conduct of the proceeding [*McKenzie v. Darke*, 2003 BCSC 138 (Registrar)], but that a disbursement might also be "proper" if it was reasonably incurred although, strictly speaking, avoidable [McKenzie v. Darke, *supra*; and *McKenna v. Anderson*, 2005 BCSC 84 (Registrar)].

[16] There are a number of cases that stand for the proposition that a party is not entitled to a Cadillac version of a service when a cheaper model will suffice. [See, for example, *Bell v. Fantini (No. 2)* (1981), 32 B.C.L.R. 322 (S.C.)]. Thus the costs of the experts must be "reasonable" (i.e., not necessarily a Cadillac expense) in the circumstances of the particular case.

[17] In the circumstances of this case, I think that retaining Dr. Mailis-Gagnon was - and I hate to use the vernacular - but I must say retaining her was "overkill" and I find that her opinion was obtained out of extravagance or an abundance of caution on the part of the plaintiff. Even in the face of the *Warkentin* decision, Dr. Hunt is still an expert on the topic of CRPS. Dr. Hunt was available to the plaintiff. He could

(and did) provide the expert opinion that was necessary. I took a look at his report. It is very comprehensive. In it, Dr. Hunt refers to a great deal of literature explaining, for example: what is CRPS? And what is the difference between type 1 and type 2 CRPS? That information is set out in the appendices to his report. He specifies his own expertise. Despite the *Warkentin* decision, he has since been qualified as an expert in these courts. He is one of the leading doctors at the St. Paul's Pain Clinic, which is well known for its work. In my view, he was capable of providing the opinion that was necessary in this case, especially when that opinion is combined with that of Dr. Kiai. So between the two of them...

[18] Therefore, for the reasons noted, I will disallow the costs of retaining Dr. Mailis-Gagnon, including the airfare for the plaintiff to go to Toronto to see her as, in my view, if I disallow the cost of the report, I must, as well, disallow the costs of the flight to go and meet with her.

[19] I am going to make one final comment that I think is important. Mr. Calder suggested that, as the defendants had to go to Oregon to find an expert on the subject of CRPS, it was then reasonable (and necessary and proper) for him to seek out (and retain) an expert in Toronto in one sense. That fact by itself does not, however, provide an answer to the necessity or propriety of the disbursements. There were other experts available in BC. I would also imagine that, just as the defendants here submitted that it was not necessary, proper or reasonable for the plaintiff to seek out an expert in Toronto, had the shoe been on the other foot, Mr. Calder would have been arguing that it was not necessary, proper or reasonable for the defendants to go to Oregon to retain an expert of their own.

[20] Further, the defendants are certainly entitled to hire whomever they wish. But the question that must still be answered, on an assessment of this nature, is: was it necessary and proper to retain that particular expert or an expert in that field? Then, the second question must be answered: was it reasonable for the defendants to have made that choice and paid the expert's fees for his/her opinion? A party can make a choice, but they do so at the risk of not recovering the costs of having made

that choice, unless they can satisfy the assessing officer of the necessity and propriety of that choice. The mere fact that the defendants went to Oregon for an expert is not sufficient to support the plaintiff's claim for reimbursement of the costs associated with the plaintiff's out of town expert. Nor is it sufficient reason for a registrar on an assessment of costs to allow the plaintiff to claim the cost of their expert whom they found in Toronto.

[21] I do not think that there is anything else that I need to do other than confirm that, although I have disallowed the costs for Dr. Mailis-Gagnon, I will allow those associated with Dr. Hunt. There is no question that one or the other expert was necessary and proper to prosecuting the plaintiff's case. Quite frankly, I am satisfied that it was necessary and proper to retain Dr. Hunt and that his accounts are reasonable.

[22] MR. CALDER: Thank you, Your Honour.