CITATION: Ferreira v. Cardenas, 2014 ONSC 7119
COURT FILE NO.: CV-10-395039
DATE: 20141209

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
RICARDO FERREIRA	)	
Plaintiff	)	
	)	
	)	
	)	
- and -	)	
	)	
	)	
	)	
CRISTHIAN GIOVANNI CARDENAS, NASEER AHMAD GHANI and ONTARIO INC. #1546021	)	*Courtney Leyland*, for the Defendant Naseer Ahmad Ghani and 1546021 Ontario Limited
	)	
Defendants	)	*Jin Ying (Olivia) Cheng*, for the Defendant Cristhian Giovanni Cardenas
	)	
	)	
	)	
	)	
	)	
	)	**HEARD**: December 4, 2014

F.L. Myers J.

REASONS FOR DECISION

Background

[1] The defendants, Naseer Ahmad Ghani and 1546021 Ontario Limited, move for summary judgment dismissing the crossclaim of the defendant, Cristhian Giovanni Cardenas. The plaintiff, Ricardo Ferreira, previously agreed to dismiss the claim against Mr. Ghani and the numbered company without costs on consent.

[2] The action arises from a three-car pileup on Finch Avenue West in Toronto on December 7, 2008. The plaintiff's car was at the front of the line of stopped cars.[1] Mr. Ghani's car was next in line. Mr. Cardenas drove his car into the rear of Mr. Ghani's car. As a result, Mr. Ghani's car was run into the back of the plaintiff's car.

[3] The uncontested evidence is that before the accident both the plaintiff's car and Mr. Ghani's car were stopped at a red light. Mr. Cardenas plowed into the back of the line of cars. On these uncontested facts, there is no triable issue as to there being any basis for liability of Mr. Ghani to the plaintiff or to Mr. Cardenas. Therefore, judgment is granted dismissing the plaintiff's claim against Mr. Ghani and the numbered company without costs on consent and dismissing Mr. Cardenas' crossclaim with costs as set out below.

The Facts

[4] In his affidavit sworn October 16, 2014, Mr. Ghani gave evidence that on the day of the accident he was driving a taxi that was owned by the numbered company defendant. Before starting his shift, Mr. Ghani inspected the car and determined that it was in proper working condition. He specifically inspected the brake lights and determined that they were operating properly. He testified that he was traveling westbound on Finch Avenue West when he came to complete stop at a red light. Paragraphs 10 through 16 of his affidavit provide:

> 10. I had remained in a stopped position, approximately 1.5 car lengths behind the plaintiff's vehicle, for approximately 10 to 15 seconds before my vehicle was struck from behind.
>
> 11. My right foot remained on the brake pedal of my vehicle as I was stopped at that intersection.
>
> 12. The traffic light did not turn green before my vehicle was struck from behind.
>
> 13. The Plaintiff's vehicle also remained in a stopped position and had not moved prior to my vehicle being struck from behind.
>
> 14. I did not see the vehicle that impacted with the rear of my vehicle prior to the accident occurrence. I did not have any warning that an impact was about to occur.
>
> 15. I understand and do verily believe that I lost consciousness after my vehicle was struck from behind.

[1] It was actually second in line behind another car, but that car was not involved in the accident and plays no role in the issues in this action.

> 16. My last clear recollection prior to the impact from behind is of sitting in my vehicle, which was 1.5 car lengths behind the Plaintiff's vehicle, with my right foot on the brake pedal and waiting for the red traffic signal to turn green.

[5] Mr. Ghani was not cross-examined on his affidavit.

[6] Upon being examined for discovery, the plaintiff testified that he was stopped at the red light. The plaintiff had no basis to dispute Mr. Ghani's evidence that Mr. Ghani had been stopped for 10 to 15 seconds behind him. He agreed that Mr. Ghani was 1 to 1.5 car lengths behind. He admitted expressly that he had no basis for a claim against Mr. Ghani.

[7] During his examination for discovery, Mr. Cardenas testified that he had no recollection of the impact. He recalled seeing the red light ahead and veering his car to the right because he was concerned he might hit pedestrians who were at the intersection. He does not recall seeing the cars already stopped in front of him. At question 120 of his examination for discovery, Mr. Cardenas testified as follows:

> 120. Q. Okay, but you don't know— bottom line, there's nothing that you can think of in your mind to point to the Ghani vehicle somehow causing or contributing to this accident occurring?
>
> A. No.

[8] It is no surprise therefore that the plaintiff has agreed to discontinue his action against Mr. Ghani without costs. One wonders why Mr. Cardenas has not seen fit to do so.

[9] The only evidence submitted on behalf of Mr. Cardenas was an affidavit of the lawyer with primary carriage of Mr. Cardenas' case. Counsel who appeared at the motion was not the same as the affiant lawyer.

[10] The lawyer's affidavit contains the following paragraphs:

> 10. Based on a review of the evidence cited below, I verily believe that there are genuine issues requiring a trial, which include but are not limited to:
>
> a. Whether the Co-Defendants' vehicle was fully stopped prior to the motor vehicle accident;
>
> b. Whether the Co-Defendants' vehicle was inside the car lane and straight at the time of the motor vehicle accident;
>
> c. Whether Naseer Ahmad Ghani, a taxi driver, was "cruising for a fare" prior to the motor vehicle accident and, as a consequence, was distracted; and

> d. Whether the [*sic*] Naseer Ahmad Ghani verily remembers the motor vehicle accident as he lost consciousness following the motor vehicle accident.
>
> ***
>
> 13. Further, in my review of the Motor Vehicle Accident Report, dated December 7, 2012 [*sic*], the investigating officer's diagram depicting the accident shows Naseer Ahmad Ghani's vehicle in an angle, positioned from left to right, suggesting that Naseer Ahmad Ghani may have made a lane change prior to the motor vehicle accident. A copy of the motor vehicle accident report is attached to the Motion Record of the Moving Parties as Exhibit "A".
>
> ***
>
> 17. Based on a review of the evidence, cited above, I verily believe that there are genuine issues requiring a trial.
>
> 18. I verily believe that it would be unfair and unjust to dismiss the Plaintiff's claim and the crossclaim against the Co-Defendants, Naseer Ahmad Ghani and Ontario Inc. #1546021 while there are genuine issues requiring a trial.
>
> 19. Alternatively, I verily believe that it would be unfair and unjust to award costs as against the Defendant, Cristhian Giovanni Mr. Cardenas, as the evidence does not clearly establish that the Defendant is fully liable for the motor vehicle accident.

[11] The affiant lawyer's references to evidence refer to quotations from the examinations for discovery of Mr. Ghani.

Lawyers' Affidavits

[12] Rule 20.02(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, provides that in response to a motion for summary judgment, the responding party must set out in affidavit material or other evidence, "specific facts showing that there is a genuine issue requiring a trial". Under Rule 20.02(1) the court may draw an adverse inference from the failure of a party to provide evidence from a person having personal knowledge of contested facts. The applicable rules are well understood. The court is entitled to assume that a party has led all of its available evidence in response to a motion for summary judgment. Moreover, a party is not entitled to hold evidence back hoping for a trial. It must "lead trump or risk losing": *Sweda Farms v. Egg Farmers of Ontario*, 2014 ONSC 1200 (CanLII).

[13] Generally, lawyers' affidavits are not appropriate for motions for summary judgment. Clients' and/or eyewitness firsthand evidence and expert opinion based on firsthand evidence are the trump suit.

[14] Lawyers' affidavits can be quite helpful in cases where the lawyers, or their staff, have particular knowledge relevant to the facts in issue before the court. In *Mapletoft v. Christopher J. Service*, 2008 CanLII 6935 (ON SC) at para. 15, Master MacLeod provided the following guidelines for the use of lawyers' affidavits:

> 15. For the guidance of counsel in future, I propose the following guidelines:
>
> a) A partner or associate lawyer or a member of the clerical staff may swear an affidavit identifying productions, answers to undertakings or answers given on discovery. These are simple matters of record, part of the discovery and admissible on a motion pursuant to Rule 39.04. Strictly speaking an affidavit may not be necessary but it may be convenient for the purpose of organizing and identifying the key portions of the evidence. Used in this way, the affidavit would be non-contentious.
>
> b) If it is necessary to rely on the information or belief of counsel with carriage of the file, it is preferable for counsel to swear the affidavit and have other counsel argue the motion. This approach will not be appropriate for highly contentious issues that may form part of the evidence at trial. If the evidence of counsel becomes necessary for trial on a contentious issue, it may be necessary for the client to retain another law firm.
>
> c) Unless the evidence of a lawyer is being tendered as expert testimony on the motion, it is not appropriate for an affidavit to contain legal opinions or argument. Those should be reserved for the factum.

[15] Some procedural motions turn on evidence that counsel is uniquely situated to provide. For example, a motion for dismissal for delay under rule 24.01 or a motion to amend a timetable under rule 3.04 will turn on facts concerning how the litigation has progressed or the reasons why it may not have progressed for a period of time. Counsel, rather than clients, are often best suited to have personal knowledge of these types of facts. Similarly, if the conduct of counsel is the subject matter of a proceeding, such as a motion for costs under rule 57.07 or more a motion brought to compel undertakings under rule 34.15, then, once again, counsel will likely be best suited to provide firsthand evidence of relevant facts.

[16] It is rarer for law firm clerical staff to be helpful witnesses. In some cases, a clerk or assistant may conveniently adduce evidence simply exhibiting correspondence between lawyers that is non-contentious. By contrast, evidence from a lawyer adduced by way of information and belief through a staff member simply limits the weight of the evidence and should be discouraged: *Essa (Township) v. Guergis; Membery v. Hill*, [1993] O.J. No. 2581 (Ont. Div.

Ct.). Moreover, this is not an appropriate vehicle if the lawyer who provides the information wishes to be counsel at the hearing: *Manraj v. Bour*, 1995 CarswellOnt 1335 (SCJ). One may also question the advisability and propriety of exposing administrative staff to cross-examination.

[17] Unlike these procedural motions, motions for summary judgment go to the heart of the merits of the dispute between the clients. The lawyers for the parties generally have no firsthand knowledge of the facts. They have no "specific facts showing that there is a genuine issue requiring a trial". For this reason, information and belief evidence tendered through a lawyer's affidavit will rarely satisfy rule 20.02. Moreover, as the Court of Appeal explained in *Armstrong v. McCall*, 2006 CanLII 1748 at para. 33, there is a concern that information and belief evidence will be used to shield persons from cross-examination.[2]

[18] Lawyer's affidavits that recite background gleaned from "the file" are especially problematic. Although affidavits based on information and belief that fail to state the source of the information are not struck out automatically (see *Carevest Capital Inc. v. North Tech Electronics Ltd.* 2010 ONSC 1290 at para. 16), one doubts whether these vague "advised by the file" affidavits are proper information and belief evidence at all or whether they really just serve to put the affiant lawyer's personal opinion of the case before the court. In either case, such evidence is not particularly credible. Generally, the contents of lawyers' affidavits of this sort can be ignored on motions for summary judgment: *Victoria Mendes et al. v. Blaisdale Montessori School*, 2014 ONSC 3178 (CanLII) at para. 3, aff'd 2014 ONCA 821 (CanLII).

[19] It also should be borne in mind that lawyer's affidavits risk contravening the "lawyer as witness" rules of ethics. Rule 5.2 of the Law Society of Upper Canada's *Rules of Professional Conduct* provides:

> SECTION 5.2 THE LAWYER AS WITNESS
>
> Submission of Evidence
>
> 5.2-1
>
> A lawyer who appears as advocate shall not testify or submit their own affidavit evidence before the tribunal unless
>
> (a) permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal, or
>
> (b) the matter is purely formal or uncontroverted.
>
> Commentary

[2] Rule 39.03 allows a party involved in a motion to serve a summons to cross-examine anyone with information relevant the motion. The use of lawyers' affidavits no longer provides an effective shield from cross-examination.

> [1] A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination, or challenge. The lawyer should not in effect appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect to receive special treatment because of professional status.

[20] In addition, among the commentaries to Rule 5.1-1 is the following:

> [5] A lawyer should refrain from expressing the lawyer's personal opinions on the merits of a client's case to a court or tribunal.

[21] The Supreme Court of Canada in *R. v. Boucher*, [1995] S.C.R. 16 at para. 41, described the prohibition on lawyers expressing their personal opinions in court as an "inflexible rule of forensic pleading". Quoting from an address given by Justice Rose, at para. 42 of *Boucher*, the Supreme Court explained the rationale for this rule in the following terms:

> Your duty to your client does not call for any expression of your belief in the justice of his cause … The counsel's opinion may be right or wrong, but it is not evidence. If one counsel may assert his belief, the opposing counsel is put at a disadvantage if he does not state that in his belief his client's cause or defence is just. If one counsel is well known and of high standing, his client would have a decided advantage over his opponent if represented by a younger, weaker, or less well known man.

[22] There are also implications for the administration of justice when lawyers act as witnesses. When a lawyer gives evidence on the merits of a matter, not only does she risk putting her credibility on the line, but, in the client's eyes, the lawyer who swears in her belief as to the appropriate outcome of a proceeding is implicitly criticizing the court should it come to a different view. When a lawyer swears to her belief in the appropriate outcome or that any other outcome would be unfair and unjust, she undermines the role of the court and the status of counsel as a participant with the judge in the justice system. As the Court in *McKellar Estate v. Powell*, 1996 CarswellOnt 642 at para. 17 stated, "…the integrity of the judicial system itself is threatened when counsel abandons the traditional role as advocate and enters the fray as witness…"

[23] As the Newfoundland Court of Appeal explained in *Langor v. Suprell*, (1997), 17 CPC 4th 1 (Nfld. C.A.) at para 53,

> The argument that, because it is only the solicitor who is able to express a legal opinion that there is a good defence on the merits, a solicitor's affidavit is appropriate, misses the point. The court is not looking for an opinion on the merits; rather, it is looking to satisfy itself that there is a factual substratum to

> the positions being advanced so that there will be a real issue to be decided at trial. It is the court, not the solicitor, who has to be satisfied that there is an arguable defence.

[24] In all, given the increase in summary judgment motions in the wake of *Hryniak v. Mauldin*, 2014 SCC 7, counsel should bear in mind rule 20.02 and avoid reliance upon lawyers' affidavits on summary judgment motions. The use of a lawyer's affidavit will likely attract an adverse inference.

Analysis

[25] In this case, the lawyer's affidavit is both inadmissible and inappropriate. At the hearing of the motion, counsel for Mr. Cardenas made the same arguments but, insightfully, did so without reference to her principal's affidavit.

[26] There is no basis in the evidence for there to be a triable issue as to whether Mr. Ghani was stopped when the accident occurred.

[27] There is no evidence that Mr. Ghani was distracted while stopped. Counsel was unable to explain the relevancy of being distracted while stopped in any event. She presented no law suggesting that a driver stopped at a red light owes a duty to watch for people driving into his vehicle's rear end. The law is to the contrary. A driver who rear ends another is *prima facie* 100% liable and bears the burden of proof to the contrary. *Beaumont v. Ruddy,* 1932 CanLII 147 (ON CA).

[28] Mr. Ghani's evidence is that his car was straight in the lane before it was hit. That is the only evidence on the position of his car before the accident. There are two diagrams in unsworn police officers' notes that appear to depict that Mr. Ghani's car came to rest at an angle in its lane after being hit from behind and being propelled into the car in front of him. Mr. Cardenas says he veered to his right before hitting Mr. Ghani's car. Counsel for Mr. Cardenas filed no expert evidence on what, if any, meaning might be inferred from the final resting place of Mr. Ghani's car. There is no affidavit from the police officers. There is no evidence from an accident reconstruction expert or an engineer indicating whether a car that is stopped while straight in a lane that is hit from behind by a car that is veering can end up at an angle once all of the cars have come to rest. There is no inference concerning how the accident was caused apparent from the fact that the middle car might have come to rest at an angle after undergoing two collisions. Mr. Cardenas did not adduce any expert evidence suggesting that learned analysis might provide a probative inference where common experience and common sense do not.

[29] While I doubt that the police officers' notes are properly admissible before me without evidence to support them, I do note that there are several references in the police officers' notes to Mr. Ghani's car having been stopped when hit just as he swears. This includes confirmation

by independent witnesses. Were the notes admissible, nothing in them raises a triable issue that could result in Mr. Ghani being held liable.

[30] Finally, counsel argued that there is a triable issue as to Mr. Ghani's credibility since he lost consciousness after being hit. There is no medical evidence before the court suggesting that someone who loses consciousness in a car accident cannot remember events prior to losing consciousness. Moreover, Mr. Ghani's recollection is consistent with the plaintiff's recollection and is not contradicted by anyone.

[31] In *Hryniak*, *supra*, the Supreme Court of Canada set out a roadmap for judges to follow in deciding whether to grant summary judgment. The first step is to consider whether there is a triable issue raised by the evidence submitted to the court and whether that evidence gives the court confidence that it can find the necessary facts and apply the necessary law to resolve the merits in the interests of justice. There is no need to resort to any of the other tests set out by the Supreme Court of Canada. The only evidence before the court is that Mr. Ghani's car was stopped when hit from behind. There is no evidence of anything done or not done by Mr. Ghani that raises a triable issue as to whether he may be liable to the plaintiff or Mr. Cardenas. The lawyer's affidavit provides no admissible evidence of facts to the contrary. Neither has Mr. Cardenas led any expert evidence to support the arguments that counsel sought to make. They did not "lead trump" as they had no cards to play. I have confidence that on the admissible evidence before the court, I can find the necessary facts and apply the relevant law to decide this motion on the merits and that doing so is in the interest of justice in this case.

Result

[32] In this case, Mr. Cardenas has no recollection of the accident. Mr. Cardenas' evidence from discovery is clear. He admits he knows of no evidence that anything done by Mr. Ghani caused or contributed to the accident. There is no conflicting evidence. In all, there is no genuine issue requiring a trial on the question of liability of Mr. Ghani or the numbered company to either the plaintiff or Mr. Cardenas. Accordingly, the action against Mr. Ghani and the numbered company is dismissed without costs and the crossclaim of Mr. Cardenas is dismissed with costs.

Costs

[33] Counsel for Mr. Ghani seeks costs on a substantial indemnity basis for the entire action. However, the action was commenced by the plaintiff. The plaintiff has been willing to let Mr. Ghani out of the action since discoveries in mid-2012. At first, the plaintiff required that Mr. Cardenas admit liability before letting Mr. Ghani out of the action without costs. More recently, the plaintiff simply agreed to consent to dismissal without costs against of Mr. Ghani and the numbered company. While Mr. Cardenas' insurance coverage may not be sufficient if both the plaintiff and Mr. Ghani receive substantial judgments, absent admissible evidence raising an issue of liability of Mr. Ghani, there was no air of reality to the goal of accessing his insurance coverage. The lawyer's evidence of her belief that there was a triable issue and her view that a result to the contrary would be unfair and unjust, were not admissible evidence. Moreover, her

affidavit was not an appropriate response to the motion whatever its goal. The lawyer's affidavit exemplified the ethical and systemic concerns discussed above.

[34] The fixing of costs is a discretionary decision under section 131 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43. That discretion is generally to be exercised in accordance with the factors listed in Rule 57.01 of the *Rules of Civil Procedure*. These include the principle of indemnity for the successful party (57.01(1)(0.a)), the expectations of the unsuccessful party (57.01(1)(0.b)), the amount claimed and recovered (57.01(1)(a)), and the complexity of the issues (57.01(1)(c)). Overall, the court is required to consider what is "fair and reasonable" in fixing costs, and is to do so with a view to balancing compensation of the successful party with the goal of fostering access to justice: *Boucher v. Public Accountants Council (Ontario)*, 2004 CanLII 14579 (ON CA), (2004), 71 O.R. (3d) 291, at paras 26, 37.

[35] In my view, this motion should not have been necessary. The position of Mr. Cardenas was ill-conceived throughout and simply served to increase the costs of all parties. Considering the *Boucher* factors and especially sub-rules 57.01 (1) (0.b), (e), (f) and (g), in my view, having reviewed the Costs Outline of counsel for Mr. Ghani and noting the very modest rates billed and the efforts by counsel to limit fees in this matter, costs of the crossclaim and this motion ought to be paid by Mr. Cardenas to Mr. Ghani on a generous partial indemnity basis fixed in the amount of $12,500.

F.L. Myers, J.

DATE: December 9, 2014

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SUPERIOR COURT OF JUSTICE

B E T W E E N:

RICARDO FERREIRA

Plaintiff

- and -

CRISTHIAN GIOVANNI CARDENAS and NASEER AHMAD GHANI and ONTARIO INC. #1546021

Defendants

REASONS FOR DECISION

F.L. Myers J.

Released: December 9, 2014