CITATION: Longarini v. Lloyd et al., 2025 ONSC 974
COURT FILE NO.: CV-23-00070
DATE: 2025-02-12

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
TIFFANY LONGARINI Plaintiff/Moving Party	)	Self-Represented
– and –	)	
CLIFFORD LLOYD, KONSTANTINE DIMAKIS, AND SILKPORT CAPITAL Defendants/Responding Parties	)	Self-Represented
	)	**HEARD:** January 31, 2025

REASONS FOR JUDGEMENT

Overview

[1] The plaintiff is a 50 percent shareholder in 2669200 Ontario Inc. operating as Grand Cannabis (the "Corporation"). The other 50 percent shareholder is Mr. Huitema. The Corporation operates legal cannabis dispensaries. The plaintiff and Mr. Huitema are the two directors of the Corporation. A dispute arose between them in 2023 which led to litigation.

[2] The plaintiff sues the defendants Clifford Lloyd ("Lloyd"), Konstantine Dimakis ("Dimakis") and Silkport Capital ("Silkport") for their conduct arising out of services provided to her with respect to her dispute and litigation with Mr. Huitema. There are three proceedings between the plaintiff and Mr. Huitema:

a. CV-23-28 – the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16 ("OBCA") application. The OBCA application arises out of the business of the Corporation. Mr. Huitema is the applicant, and the plaintiff is the respondent.

b. CV-23-32 – the defamation action. Mr. Huitema sues the plaintiff for defamation.

c. HRTO 2023-53128-I – the Human Rights Tribunal of Ontario ("HRTO") application commenced by the plaintiff against Mr. Huitema.

[3] The plaintiff's claim in this action is framed in breach of fiduciary duty and negligence. As I see the facts and based on the materials of the plaintiff and her submissions, the plaintiff's claim sounds in negligence. The hallmarks of breach of fiduciary duty, for example the lawyer failing to disclose material information to a client, misuse of client funds, and the lawyer failing to disclose secret profits, are not present in this case.

[4] The plaintiff moves for summary judgment against the defendants to recover costs awarded against her in various motions in the OBCA application, $17,500 she paid to the defendants, $100,000 for future legal fees for the OBCA application, costs of a motion in the defamation action, and damages for psychological harm allegedly suffered because of the defendants' conduct.

[5] In their factum, the defendants concede that this action can proceed by way of summary judgment and that the action can be decided on the documents before the court. The defendants oppose the relief sought and seek summary judgment dismissing the plaintiff's action, sometimes referred to as a boomerang order. The defendants assert that granting judgment in their favour is not only in the interest of justice but also necessary and warranted to secure the just, most expeditious, and least expensive determination of this action.

[6] Although they filed separate statements of defence, the defendants collectively responded to the motion for summary judgment. The submissions on behalf of all the defendants were made by Dimakis who is not a licenced paralegal or lawyer. Lloyd, who was a licenced lawyer at the relevant time, was present throughout.

[7] The plaintiff's motion for summary judgment was initiated in April 2024. The parties have had many months to put their evidence together for the motion. There have been several case management conferences dealing with the motion. The plaintiff served an extensive affidavit of documents. She filed an affidavit on the motion. Lloyd and Dimakis each swore affidavits. Dimakis appended and relied on three earlier affidavits he swore. There have been cross-examinations on the affidavits. Both parties have had ample time to put their best foot forward. Neither the plaintiff nor the defendants pointed to the existence of other relevant evidence that could be put before the court at trial that was not before me on this motion.

Summary Judgment is Appropriate

[8] Pursuant to r. 20.04(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*"), the court shall grant summary judgment if it is satisfied that there is "no genuine issue requiring a trial". Under subsection (2.1), in determining whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and has the power to weigh evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence, unless it is in the interest of justice for such powers to be exercised only at trial. A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation: r. 20.04(2.2).

[9] The moving party bears the burden of establishing that there is no genuine issue requiring a trial. Only after the moving party has discharged its evidentiary burden of proving there is no genuine issue requiring a trial does the burden shift to the responding party to establish there are issues requiring a trial: *Sanzone v. Schechter*, 2016 ONCA 566, 402 D.L.R. (4th) 135, at para. 30; *Rescon Financial Corporation v. New Era Development (2011) Inc.*, 2018 ONCA 530, at para. 21.

[10] As the claim sounds in negligence the plaintiff must prove:

a. That the defendants owed her a duty of care:

b. That the defendants breached the standard of care;

c. That the breach of the standard of care caused the plaintiff to suffer damages.

[11] The Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, set out the guiding principles on a summary judgment motion, at para. 49:

> [49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[12] There will be no genuine issue requiring a trial if the summary judgment process provides the court with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under r. 20.04(2)(a): *Hryniak*, at para. 66.

[13] The evidence need not be equivalent to that at trial but must be such that the judge is confident that he or she can fairly resolve the dispute: *Hyrniak*, at para. 57.

[14] The court should first determine if there is a genuine issue requiring a trial based only on the evidence before the court, without using the fact-finding powers.

[15] If there appears to be a genuine issue requiring a trial, the court should then determine if the need for a trial can be avoided by using the powers under rr. 20.04(2.1) and (2.2). The court may at its discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability, and proportionality in light of the litigation as a whole: *Hryniak*, at para. 66. What is fair and just turns on the nature of the issues, the nature and strength of the evidence and what is the proportional procedure: *Hryniak*, at para. 59.

[16] Each side on a summary judgment motion must "put their best foot forward" with respect to the existence or non-existence of material issues to be tried: *Hryniak*, at paras. 57, 66;

Cuthbert v. TD Canada Trust, 2010 ONSC 830, at para. 12; *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 11, citing *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Ont. Gen. Div.), at p. 434; *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200, at para. 27, aff'd 2014 ONCA 878, leave to appeal dismissed, [2015] S.C.C.A. No. 97.

[17] Having reviewed the authorities and the evidence, I find that this case is appropriate for summary judgment. The materials before the court allow me to reach a fair and just determination on the merits. I can make the necessary findings of fact and apply the law to those facts based on the record before me.

[18] For the most part, this can be done without resort to the powers in r. 20.04(2.1). Where it is necessary to use those powers to evaluate the credibility of a deponent and draw any reasonable inference from the evidence, doing so is not against the interest of justice as it leads to a fair and just result and serves the goals of timeliness, affordability, and proportionality. The issues are not overly complex. The parties have put their evidence before the court. They have been waiting for some time for the motion to be heard. The parties agree that the summary judgment process is appropriate. Further, while there are issues with the credibility of all the parties, as I will explain, that is ultimately of no moment.

[19] All the affidavits contain hyperbole and overreach. Each of the parties impugns the reputation of the other. The credibility of each of the plaintiff, Lloyd, and Dimakis is undermined by the documentary record.

[20] The plaintiff makes assertions in her affidavit which are not true. For example, she asserts that the HRTO application was made without her approval or consent when emails clearly indicate that she approved the application. At times she overstates or misstates the facts disclosed by the written record between the parties.

[21] In his affidavit, Lloyd disguises argument as fact. He vouches for his own credibility. He sets out paragraphs of the plaintiff's notice of motion and statement of claim that he admits, denies, and of which he has insufficient knowledge, apparently confusing pleadings with affidavits. He complains of the plaintiff's incivility. His affidavit contains few facts and is filled with bald assertions and conclusory statements.

[22] The first 15 paragraphs of Dimakis' March 12, 2024, affidavit are about his accomplishments. He asserts his credibility and integrity is "beyond reproach". It should go without saying that an accomplished person of good character who has never had complaints made against him can still be negligent and engage in improper conduct.

[23] Much of Dimakis' March 12, 2024, affidavit is essentially a copy of Lloyd's affidavit, including paragraphs admitting, denying and asserting insufficient knowledge of the plaintiff's notice of motion and statement of claim. Dimakis' March 12, 2024, and April 2, 2024, affidavits add little of substance.

[24] Much of Dimakis' September 30, 2024, affidavit is focused on the negotiation, terms, and alleged breach by the plaintiff of the written retainer agreement between the parties. He repeatedly states that the plaintiff breached the agreement, but scant details are provided. Some of it is a repetition of his March 12, 2024, affidavit. The affidavit contains bald denials, assertions, conclusory statements, and argument, but few facts.

[25] In the end, there are few disputed facts that go to anything other than general credibility. Most of the facts necessary to determine the issues do not require assessments of credibility. Where there is a conflict in the evidence of the parties on facts necessary for a determination of the issues, the conflict can readily be resolved by reference to the documentary record, in particular the communications exchanged between the parties and communications sent by the defendants on behalf of the plaintiff: see *Massaar v. Moneck*, 2024 ONSC 6889, at paras. 115-116.

[26] For example, both Lloyd and Dimakis assert that Lloyd was under the direction of Silkport, and the guidance of Dimakis – who is neither a paralegal nor a lawyer. Lloyd asserts he was not retained. Both Dimakis and Lloyd assert that the plaintiff had contracted with Silkport and not with Lloyd. Lloyd and Dimakis depose that Lloyd only acted as an officer, director, attorney, and/or agent of Silkport. This sworn evidence is contradicted by the written record, which will be discussed below, that demonstrates that Lloyd represented himself to opposing counsel and the court as the lawyer for the plaintiff. Further, there is no evidence that Silkport complied with the requirements of the LSO or was the holder of a Certificate of Authorization from the LSO, a prerequisite for practicing law or providing legal services through a professional corporation.

[27] Similarly, at paragraphs 30 and 31 of his September 30, 2024, affidavit Dimakis deposes that the defendants disclosed to the plaintiff "from the onset" that they "were not providing legal services and that they were not practicing law or governed by the LSO". Dimakis states that he disclosed to the plaintiff that he was not providing any legal services. He denies that the defendants acted as lawyers for the plaintiff. As I will explore further below, these sworn statements are readily contradicted by the correspondence between the parties and with opposing counsel, court appearances and court documents, which demonstrate that Dimakis provided legal services and that the defendants were acting as lawyers for the plaintiff.

[28] Where there are disputed facts that cannot be determined on the record, they are not facts which go to the core of the dispute or which impact the determination of the issues between the parties. For example, whether the plaintiff sought Lloyd's assistance, or Lloyd offered it; whether, when Lloyd learned of it, Lloyd advised the plaintiff that he was temporarily under administrative suspension by the Law Society of Ontario ("LSO") for failure to pay his annual dues. Nothing turns on this latter point because of the administrative nature of the very brief suspension which was immediately rectified.

[29] As a result, I can make the necessary findings of fact from the record and can draw the necessary inferences from the evidentiary record, including from the evidence which has not been tendered by the defendants.

Duty of Care: The Retainer of Lloyd, Silkport and Dimakis

[30] There is no dispute that a lawyer owes a duty of care to their client. Determining whether the defendants owed a duty of care to the plaintiff requires a determination of the nature of the relationship between the parties. The parties take a somewhat different view of the nature of their relationship. As noted above, the defendants assert they were not acting as the plaintiff's lawyers. Their position rests entirely on their interpretation of the written agreement between the parties dated May 4, 2023.

[31] The principles of contractual interpretation of commercial contracts are set out in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 47-48 and 56-61, and *Weyerhaeuser Company Limited v. Ontario (Attorney General)*, 2017 ONCA 1007, at para 65. *Sattva* held that courts can only consider surrounding circumstances made up of background facts within the parties' common knowledge, meaning those facts that both parties knew or should have known, at the time of entering into the contract: at paras. 58-60.

[32] Evidence of subsequent conduct should only be admitted if the contract remains ambiguous after considering its text and factual matrix: *VanderMolen Homes Inc. v. Mani*, 2025 ONCA 45, at para. 28, citing *Shewchuk v. Blackmont Capital Inc*., 2016 ONCA 912, 404 D.L.R. (4th) 512, at para. 46.

[33] The parties knew that in February and March, 2023, the plaintiff was represented by another lawyer with respect to issues with the Company. It is not clear exactly when that retainer ended because the plaintiff redacted the date from the email in the record.

[34] The plaintiff met Lloyd on or about April 27, 2023. As a result of their discussions, he introduced her to Dimakis. On April 29, 2023, the plaintiff began to send information to Lloyd and Dimakis with respect to the Corporation. This continued through May 3, 2023. Lloyd began to do work for the plaintiff, assisting her with regaining access to the accounting records of the Corporation.

[35] On May 4, 2023, the plaintiff signed an agreement with Silkport. The agreement had first been provided to the plaintiff on May 3, 2023.

[36] The plaintiff asserts that the agreement was a retainer agreement for legal services with the defendants. The defendants deny that it was an agreement for legal services. They say it was an agreement relating to assisting the plaintiff with her dispute with Mr. Huitema and the sale of her shares. The defendants assert the agreement is a typical mergers and acquisitions agreement and was for the purpose of assisting the plaintiff with the sale of her shares in the Corporation.

[37] The agreement refers to the "Shareholder Dispute" with Mr. Huitema in its re: line. In the first line it refers to "our Legal and Strategy Consulting Services". It requires a "an initial retainer deposit" of $9,500. It refers to the plaintiff as the client. It sets out hourly rates for Dimakis ($1,000 per hour), Lloyd ($250 per hour) as well as hourly rates for an assistant and clerk. It sets out fees for disbursements. The agreement contains "an incentive fee"

which is based on the amount due to the plaintiff from 0% to 40%. The words, "merger" and "acquisition" do not appear in the agreement. The agreement contains an entire agreement clause to preclude either party from relying on prior representations as well as an indemnity clause.

[38] Lloyd was a licenced Ontario Lawyer during his dealings with the plaintiff except for a very brief period of administrative suspension for non-payment of fees. The plaintiff understood him to be a lawyer at the time of the agreement.

[39] On May 16, 2023, the LSO wrote to Lloyd to advise him it had lifted the May 3, 2023, administrative suspension after he submitted his annual fees. The plaintiff was not aware of the administrative suspension at the time she signed the agreement. The evidence suggests that the defendants were not aware of the administrative suspension at the time of the signing of the agreement. I am satisfied the suspension was inadvertent, short lived, immediately addressed, and had no impact on the decision of the plaintiff to retain the defendants.

[40] The plaintiff was not aware at the time of signing the agreement that any litigation had been commenced by Mr. Huitema. The parties knew there was a dispute between the plaintiff and Mr. Huitema. The defendants, especially Lloyd, a lawyer of longstanding, would have expected that it could result in litigation. Given his experience as set out in his affidavit, I find that Dimakis would have been aware of this possibility as well.

[41] The language of the parties and the agreement as whole, interpreted giving the words used their ordinary and grammatical meaning and considering the surrounding circumstances in a way that that accords with sound commercial principles, good business sense and avoids a commercially absurd result, suggests the agreement is a retainer agreement for legal services. It certainly has terms consistent with such a retainer agreement.

[42] However, the agreement contains provisions that would not be in an ordinary retainer agreement between and lawyer and a client (e.g., the indemnification and hold harmless clause), thereby obscuring the mutual and objective intentions of the parties in entering into the agreement and creating ambiguity. I turn therefore to the subsequent conduct of the parties.

[43] The plaintiff paid the retainer of $9,500. Between May 3, 2023 and July 19, 2023, the plaintiff paid the defendants a total of $17,500.

[44] On May 9, 2023, Mr. Huitema's *ex parte* motion for an injunction in the OBCA application was heard by Henderson J., who granted an interim injunction and related orders ("*ex parte* order").

[45] Between May 12 and May 14, 2023, the plaintiff became aware of the *ex parte* order.

[46] On May 15, 2023, Lloyd wrote to Huitema's lawyers and advised them that he was now counsel for the plaintiff and was taking over from her prior counsel. Lloyd copied the plaintiff's prior lawyer and the plaintiff.

[47] On May 19, 2023, Lloyd advised Mr. Huitema's lawyers that he was "retained for any action relating to libel and slander you and or your client seek to serve my client with." He invited Mr. Huitema's lawyers to serve any documents "to us."

[48] The defendants, and in particular, Dimakis, worked with the plaintiff on a response to Mr. Huitema's motion materials. The plaintiff provided notes, comments and documents to the defendants. The defendants prepared affidavits in Dimakis' name, rather than the plaintiff, and served them on Mr. Huitema on or about May 22, 2023.

[49] The *ex parte* order came before MacNeil J. on May 23, 2023. Lloyd was listed as the plaintiff's lawyer in MacNeil J.'s endorsement. The defendants filed the plaintiff's responding materials that morning. MacNeil J. continued the *ex parte* order with some amendments and the motion was adjourned to June 9, 2023, for a two-hour hearing. MacNeil J. made some additional orders, including that the plaintiff could cull her personal, confidential and/or privileged emails from the emails required to be disclosed.

[50] The defamation action was issued by the Superior Court of Justice in Cayuga on June 1, 2023. The plaintiff was served with the statement of claim on June 2, 2023.

[51] On June 7, 2023, Dimakis submitted an HRTO application on the plaintiff's behalf.

[52] On June 9, 2023, the return of the *ex parte* order came before me. Lloyd appeared for the plaintiff. As noted in my endorsement of that date, the motion could not proceed as the materials uploaded to Case Center (formerly CaseLines) were not in compliance with the Central South Notice to Profession and were so disorganized as to be unusable by the court. The *ex parte* order, as amended, was continued, and the motion was adjourned to June 26, 2023 for a 2.5 hour hearing. As noted in my endorsement at the time:

> The [plaintiff's] factum purports to incorporate "Paragraphs 7 to 99 of the [Plaintiff's] Response and Cross Application" into the facts portion of her factum. First, there is no such pleading in the Rules of Civil Procedure. Secondly, the document with this name in CaseLines is not sworn and therefore does not contain facts as intended by this section of a factum. Finally, facta have page limits. Adopting by reference 92 paragraphs from another document is improper.

[53] On June 21, 2023, Lloyd served Mr. Huitema's lawyers with a Notice of Intent to Defend in the defamation action but did not file the documents with the court. Lloyd is named on the Notice of Intent to Defend.

[54] On June 26, 2023, the motion for the return of the *ex parte* order in the OBCA application was heard by Sheard J. as a hearing *de novo*. The applicant was represented by Lloyd at the hearing. Sheard J. ordered that the *ex parte* order, as amended by MacNeil J., should continue until the application was heard.

[55] On July 1, 2023, Silkport issued to the plaintiff a "bill for services rendered pursuant to our Retainer Agreement for Legal and Strategic Consulting Services" in the amount of $182,461.19. The bill describes the following work done to justify the account:

> To all urgent calls and correspondence with client and review of client's former lawyer's file in assessment of action and responding;
>
> To review Application and Order and preparation and service of Respondent's urgent Response;
>
> To review Motion and ex parte order, Application and Order and preparation and service of Respondent's response;
>
> To all calls, correspondence, correspondence review, and correspondence reply with client and with Applicant's lawyers;
>
> To review supplementary materials on the motion and ex parte order Application of the Applicant;
>
> To review over 42,000 emails from client's email account as ordered;
>
> Research, preparation of Respondent's supplementary factum, and preparation of supplementary affidavits and materials;
>
> Further research, and redrafting of Respondent's supplementary factum and affidavit materials;
>
> Research on new issues, preparation of Respondent's redrafted factum per Judges order, serve and file:
>
> To preparation of Respondent's Compendium and preparation of Respondent's brief and for service and file of documents;
>
> Preparation of cost outlines and billing outlines;
>
> Preparation for and attendance to and on the original return date of May 23, 2023, the June 9, 2023 continued date, and the June 26, 2023 hearing date.

[56] A second invoice refers to the following work:

> To all urgent calls and correspondence with client and review assessment of action and responding;
>
> To review Statement of Claim and preparation and service of Intent to Defend;
>
> Research of libel and Anti-SLAPP legislation and case law;
>
> To review Statement of Claim and prepare draft Statement of Defence.

[57] Most of the work billed was related to the OBCA application. Some was related to the defamation action. Although the HRTO application was prepared and issued, the accounts do not refer to it.

[58] In early July, the defendants told the plaintiff they were considering withdrawing their services. On or about July 10, 2023, the defendants suggested they could take a charge/lien on the plaintiff's shares. On July 10, 2023, the defendants, by way of email from Dimakis, wrote to the plaintiff setting out the timelines and requirements for an appeal of Sheard J.'s order and how they could be removed from the record. That day, the plaintiff wrote to the HRTO with copy to Mr. Huitema's lawyers advising that Lloyd and Dimakis should be removed as her representatives.

[59] On July 12, 2023, the defendants advised the plaintiff they were placing a lien on her file and would not release it.

[60] On July 12, 2023, the defendants drafted a Notice of Motion for Leave to Appeal the order of Sheard J. It listed the plaintiff as a self represented litigant. On July 13, 2023, Dimakis sent an email to the plaintiff explaining changes made to the draft Motion for Leave to Appeal the order of Sheard J.

[61] On July 13, 2023, Dimakis wrote to the plaintiff that they would "be removing ourselves off your actions as provided for and pursuant to the terms and conditions of our Agreement. Moreover, as our position is also effective to the actions, we will be noticing the other side pursuant to our Agreement along with a copy of our Agreement."

[62] On July 14, 2023, Dimakis advised the plaintiff that they were serving the Notice of Motion for Leave to Appeal the order of Sheard J on Mr. Huitema's lawyers.

[63] On July 14, 2023, Lloyd forwarded the plaintiff an Amended Statement of Claim in the defamation action. Lloyd did not prepare a Statement of Defence, nor inform the plaintiff that one was required. However, the plaintiff was not noted in default. On or about July 14, 2023, Dimakis advised the plaintiff Lloyd was no longer representing her.

[64] On or about July 14, 2023, the plaintiff advised Mr. Huitema's lawyers that Lloyd and Dimakis would no longer be representing her.

[65] On July 15, 2023, the defendants wrote to the plaintiff that if the plaintiff did not provide a Notice of Intention to Act in Person by July 17, 2023, they "would be forced to apply to the court to get removed".

[66] Also on July 15, 2023, the defendants sent the plaintiff a "bill for services rendered pursuant to our Retainer Agreement for Legal and Strategic Consulting Services" in the amount of $207,161.92. The increase of almost $25,000 over the 14 days since the prior bill appears to be on account of interest.

[67] On July 19, 2023, the defendants wrote to Mr. Huitema's lawyers that they were "no longer representing" the plaintiff in the litigation with Mr. Huitema.

[68] Throughout, Lloyd communicated with Mr. Huitema's lawyers as the plaintiff's lawyer.

[69] I find that the conduct of the parties after the execution of the agreement makes clear that they understood that the agreement between them included the defendants acting for the plaintiff in all the litigation with Mr. Huitema in which she was involved. The defendants in fact acted as the plaintiff's lawyers in that litigation, with Lloyd as the only LSO licenced lawyer representing the plaintiff in court, in court documents, and in communications with opposing counsel. Virtually all the evidence before the court, other than bald assertions by the defendants that they were engaged in mergers and acquisitions services, demonstrates that the defendants were providing legal services in the context of, and in litigation involving the plaintiff.

[70] Neither Silkport nor Dimakis are licenced by the LSO to provide legal services and Dimakis is neither a lawyer nor a paralegal. While it is not clear whether this was known to the plaintiff, as noted, it is clear the parties understood that Lloyd was the lawyer and would be representing the plaintiff.

[71] I do not need to exercise enhanced fact-finding powers to reach the above conclusion. It is readily apparent from the documents exchanged between the parties, Lloyd's communications with Mr. Huitema, and court documents notwithstanding the sworn evidence of Lloyd and Dimakis to the contrary.

The Standard of Care

[72] The defendants submit and rely upon *Ristimaki v. Cooper*, 2004 CanLII 16074, in which the court considered a solicitor's negligence claim. The decision was overturned by the Court of Appeal in *Ristimaki v. Cooper*, 79 O.R. (3d) 648. The defendants did not provide the court with the decision of the Court of Appeal.

[73] At para. 59, the Court of Appeal succinctly set out the following principles in respect of the standard of care of a lawyer:

> (a) A solicitor must bring reasonable care, skill and knowledge to the professional service which he or she has undertaken.
>
> (b) For a solicitor who holds himself or herself out as having particular expertise in a given area of the law, a higher standard of care applies.
>
> (c) A lawyer who does not adequately or diligently protect the client's interests will be found negligent. [Citations omitted.]

[74] The trial judge in *Ristimaki* relied on the following additional principle as it relates to standard of care of lawyers, with which I agree:

> [97] A lawyer has a duty to warn the client of the risks involved in a course of action. [Citations omitted.]

Breach of the Standard of Care

[75] As noted, the *ex parte* order as amended came before Sheard J. on June 26, 2023, and proceeded as a hearing *de novo*. Prior to the hearing, the plaintiff, through Lloyd, refused to submit to examination on the motion and to have Dimakis submit to cross-examination. Mr. Huitema challenged the affidavits of Dimakis filed on the motion on the basis that Dimakis had no firsthand knowledge of what was set out in his affidavits and failed to identify the source of his information. Sheard J. held that these submissions were well founded.

[76] Sheard J. was critical of the contents of the Dimakis affidavits including that:

a. It was obvious from the content of Dimakis' affidavits that he had no firsthand knowledge of what is set out in his affidavits;

b. What is contained in Dimakis' affidavits is most contentious – he made allegations concerning the conduct of Mr. Huitema and the actions of the plaintiff about which he had no firsthand knowledge and did not reference a source for the hearsay evidence; and

c. Dimakis expressed views on the applicable law concerning allegations in his affidavit.

[77] Sheard J. held that that no weight could be given to any evidence in Dimakis' affidavits as they spoke to material events about which he had no firsthand knowledge and for which he failed to identify the source of his information and belief. As a result, Sheard J. held that to the extent that assertions made by Dimakis conflicted with the sworn evidence submitted by Mr. Huitema from persons with direct knowledge, she preferred the sworn evidence tendered by Mr. Huitema.

[78] Sheard J. noted that the decision not to submit affidavits from the plaintiff in response to the motion and, instead, to rely on affidavits sworn by Dimakis, all but left the Plaintiff without any admissible evidence on which to rely in response to the motion.

[79] At paragraph 29 of her reasons Sheard J. found putting forward the plaintiff's evidence through Dimakis "to be at best negligent, and at worst, improper".

[80] Sheard J. found that a letter from Lloyd to a witness was "'threatening' to a witness". His conduct was described as "highly improper and impugns the integrity of opposing counsel and the integrity of the administration of justice". Sheard J. further found that many of the letters included in the record which were sent by or on behalf of the plaintiff's lawyer were filled with accusations against counsel and, for the most part, were entirely irrelevant to the determination of Mr. Huitema's motion.

[81] Sheard J.'s decision is a *prima facie* determination that the defendants fell below the standard of care in their representation of the plaintiff on the motion before her. I note that

Sheard J.'s observations of the materials before her from the defendants are consistent in many respects with the materials before me.

[82] The court can determine whether the conduct in these circumstances, which involves evidentiary issues and matters that routinely come before the court, falls below the standard of care without expert evidence.

[83] The *Rules* clearly state that an affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts that are not contentious if the source of the information and the fact of the belief are specified in the affidavit: r. 39.01(5).

[84] The plaintiff and Mr. Huitema were the two principal witnesses. Opposing the *ex parte* order and having it set aside was the plaintiff's goal. The defendants knew this. The affidavits from Dimakis offended r. 39.01(5). It was obvious that an affidavit from the plaintiff was required to respond to an affidavit from Mr. Huitema and any witnesses with direct knowledge of the events in issue. The failure to tender an affidavit from the plaintiff and the refusal to allow the plaintiff to be examined or cross-examined in response to the motion for an injunction in these circumstances fell below the standard of care. Similarly, the refusal to allow Dimakis to be cross-examined in these circumstances fell below the standard of care.

[85] Lloyd deposes that Silkport (not Lloyd) "sought to see how the Plaintiff was going to provide an affidavit and be available for examinations, however, the Plaintiff obtained letters from her doctor and psychologist that supported her insistence that she was not able to prepare an affidavit or be available for examinations during her treatments as the stress would be a danger to her health and treatments." Dimakis provides similar evidence. Lloyd and Dimakis depose that, as a result, they had no option but to submit an affidavit from a "third-party".

[86] In part this is contradicted by the evidence tendered by Dimakis that the plaintiff actively participated in the preparation of a response to Mr. Huitema's injunction motion materials. More importantly, Lloyd and Dimakis miss the point – Lloyd is the lawyer, not the plaintiff. Lloyd has a duty to protect the plaintiff's interests adequately and diligently and to warn her of the risks involved in a course of action – in this case, tendering an affidavit from someone who does not have any direct knowledge of the events on an important and pivotal hearing with respect to the *ex parte* order that the plaintiff opposed.

[87] Lloyd does not depose that he gave the plaintiff any advice about the risks of an affidavit from Dimakis, rather than from her, in response to the injunction, or of refusing to be examined, or refusing to allow Dimakis to be cross-examined. There is no evidence from the defendants of any advice provided to the plaintiff with respect to the nature of the affidavit required to respond to Mr. Huitema's injunction motion. There is no evidence that they advised the plaintiff that she should personally swear the affidavit or produce herself for examination.

[88] As set out in *2212886 Ontario Inc. v. Obsidian Group Inc.*, 2018 ONCA 670, a decision relied upon by the defendants, a motion judge is entitled to draw an adverse inference from a party's failure to adduce personal evidence: at para. 49, citing *Mazza v. Ornge Corporate Services Inc.*, 2016 ONCA 753, 62 B.L.R. (5th) 211, at para. 9. The inference I draw is that the defendants, and in particular Lloyd, did not provide the plaintiff with the required advice.

[89] Lloyd and Demakis depose that the plaintiff approved the threatening letter to the witness. This is supported by the communications between the parties and acknowledged by the plaintiff in her cross-examination. However, there is no evidence that the defendants provided any advice to the plaintiff about the risks of sending such a letter. As a result, I reach the same conclusion as above.

[90] Dimakis asserts that "the Plaintiff had granted Silkport and myself full authority to manage the litigation matter with her partner as we deem fit." This does not authorize the defendants to represent the plaintiff in a manner that falls below the standard of care. Further, it fails appreciate the role of counsel is to give legal advice and advise clients of the options available to them and any risks associated with those options.

[91] Finally, Lloyd and Dimakis assert the plaintiff failed to provide the defendants with "full and truthful disclosures". The only particulars of this lack of disclosure relates to the qualifications of the plaintiff's "doctor". Both Dimakis and Lloyd depose that they were blindsided by the revelation early in the hearing before Sheard J. that the doctor the plaintiff relied on regarding her inability to be cross-examined was in fact a chiropractor and that this undermined the success of their submissions for the plaintiff. Sheard J. does not mention the "doctor issue" in her reasons. I find that this issue either played no role in the decision or a sufficiently unimportant role in the outcome of the motion such that Sheard J. did not mention it.

[92] The defendants say they were instrumental in obtaining the modification to the *ex parte* order before MacNeil J. Whether they did or not had no impact on the hearing before Sheard J.

[93] There is no genuine issue requiring a trial as to the standard of care. The defendants fell below the standard of care in failing to bring reasonable care, skill and knowledge the legal services they undertook on behalf of the plaintiff.

Causation and Damages

[94] Sheard J. fixed costs payable by the plaintiff in the amount of $27,425.10 all-inclusive and payable forthwith. In addition the plaintiff required an appointment before Sheard J. to settle the costs order on February 20, 2024. Additional costs of $500 were ordered against the plaintiff. The plaintiff seeks to recover these costs from the defendants.

[95] It is evident from her reasons that Sheard J. fixed costs on an elevated scale in large part because of the conduct of the defendants. In particular:

a. The decision not to put forward evidence from the plaintiff and instead to rely on affidavits from Dimakis resulted in additional work and additional time at the hearing;

b. The threatening letter to the witness;

c. The refusal to produce Dimakis for cross-examination or to produce the plaintiff to be examined in advance of the motion;

d. The vitriolic and improper communications sent by the defendants to Mr. Huitema's lawyer;

e. Lloyd advancing irrelevant and unsustainable arguments on matters such as whether the *ex parte* order and the MacNeil Orders were Anton Piller orders;

f. Lloyd making submissions on issues that had been determined by Sheard J. earlier in the hearing, thereby lengthening the hearing from the scheduled 2.5 hours to a full day;

g. The late filing of the materials on May 23, 2023, leading to wasted costs; and

h. To discourage the sanctioning of inappropriate behaviour by litigants in their conduct of the proceedings.

[96] The defendants' breach of the standard of care at the hearing before Sheard J. caused the elevated award of costs payable by the plaintiff to Mr. Huitema. The plaintiff is therefore entitled to the difference between the partial indemnity costs of $19,962.80 and the substantial indemnity costs as awarded.

[97] However, that is not the extent of the loss caused by the breach. It also deprived the plaintiff of the opportunity to resist the motion because she essentially had no evidence before the court. The plaintiff suffered a loss of chance to resist the injunction order. She is entitled to be compensated for that loss. Neither party made submissions on how to calculate that loss. In my view, the loss includes, at a minimum, the chance that the plaintiff would not have had to pay any costs of the motion and the possibility that if the plaintiff had successfully resisted the motion it could have changed the course of the litigation. These costs cannot be determined with precision.

[98] Where damages are, by their inherent nature, difficult to assess, I must do my best to assess the damages suffered by the plaintiff on the available evidence even where difficulties in the quantification of damages render a precise mathematical calculation of the plaintiff's loss uncertain or impossible: *TMS Lighting Ltd. v. KJS Transport Inc.*, 2014 ONCA 1, at para. 61. As noted in *TMS Lighting* at para 61:

> The controlling principles were clearly expressed by Finlayson J.A. of this court in *Martin v. Goldfarb*, 1998 CanLII 4150 (ON CA),

[1998] O.J. No. 3403, 112 O.A.C. 138, at para. 75, leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 516:

> I have concluded that it is a well-established principle that where damages in a particular case are by their inherent nature difficult to assess, the court must do the best it can in the circumstances. That is not to say, however, that a litigant is relieved of his or her duty to prove the facts upon which the damages are estimated. The distinction drawn in the various authorities, as I see it, is that where the assessment is difficult because of the nature of the damage proved, the difficulty of assessment is no ground for refusing substantial damages even to the point of resorting to guess work. However, where the absence of evidence makes it impossible to assess damages, the litigant is entitled to nominal damages at best.

[99] Here, the plaintiff has established the facts upon which the damages may be estimated. A court at trial is in no better position than this court on this summary judgment motion to assess the damages. I find that there is no genuine issue requiring a trial to assess damages.

[100] Considering all the circumstances, I fix damages with respect to the costs arising out of the hearing before Sheard J. at $26,500.

[101] The plaintiff seeks the return of $17,500 paid to the defendants for services which, according to the accounts, appear to be related almost entirely to the OBCA application. The facts upon which the damages may be estimated have been established.

[102] From the accounts, it can be determined that much of the work done by the defendants was directed toward responding to the motion which was ultimately determined by Sheard J. Some work was done sorting through emails to comply with the *ex parte* order and some to address the defamation litigation although the defendants did not draft a statement of defence. How much time was spent on what activities is within the knowledge of the defendants. They have not led that evidence. I draw an adverse inference against the defendants that most of the work done related to the OBCA application.

[103] There appears to have been some benefit to the work done by the defendants with respect to the appearance before MacNeil J. There was no benefit to the work done for the June 9, 2023 appearance. There was no benefit to the work done with respect to the Dimakis affidavits in response to the *ex parte* order. There appears to have been minimal benefit to the work done by Lloyd before Sheard J.

[104] Considering all the circumstances, I fix damages with respect to the fees paid to the defendants at $14,500.

[105] On January 19, 2024, the plaintiff served a s. 137.1 motion in the defamation action. Ramsay J. dismissed the motion and awarded $1,000 in costs against the plaintiff. The plaintiff seeks these costs from the defendants. These costs are in no way connected to the defendants' breach of the standard of care and are not recoverable from the defendants.

[106] The plaintiff has sought other counsel to represent her and has been asked for a substantial retainer which she has not provided. She seeks the retainer for future legal services from the defendants. These costs are in no way connected to the defendants' breach of the standard of care and are not recoverable from the defendants. The defendants' breach of the standard of care did not create the conflict or the litigation between the plaintiff and Mr. Huitema. The issues between them would have been litigated even if the defendants had never represented the plaintiff.

[107] The plaintiff seeks damages for psychological harm. There is no evidence before me of psychological harm, no expert reports, no evidence from treating practitioners, no evidence of medication being taken, counselling, diagnosis of mental health issues and no evidence connecting any psychological harm to the conduct of the defendants. The evidence before me in emails from the plaintiff indicates that if the plaintiff suffered any harm it was because of the alleged improper conduct of Mr. Huitema.

[108] The plaintiff seeks, in paragraph 1(d) of her Amended Statement of Claim, a declaration that Lloyd breached his fiduciary duty and is liable to the plaintiff for the loss of her shareholder assets. There is no evidence before me that the plaintiff has lost these assets. Further, as stated above, Lloyd did not cause or create the conflict or the litigation between the plaintiff and Mr. Huitema. It existed before the plaintiff met Lloyd and is independent of him. This claim is dismissed.

[109] Considering all the evidence before me, I fix the plaintiff's total damages at $41,000 plus pre-judgment interest for the defendants' breach of the standard of care.

Defences Raised by the Defendants

[110] Apart from asserting that they did not act for the plaintiff, did not provide legal services, and met the standard of care, the defendants raised two additional defences.

[111] The defendants assert the claim against them is barred by absolute privilege. Absolute privilege does not apply. Absolute privilege does not protect a lawyer from being sued by his own client for negligent conduct while representing the client in litigation, even if the alleged negligence is based on the preparation and filing of court documents and affidavits.

[112] In any event, the negligence here is not limited to just tendering the Dimakis affidavits on the injunction motion. It includes failure to allow Dimakis to be cross-examined or to allow the plaintiff to be examined on the motion, improper conduct at the hearing, but most importantly, failing to properly advise the plaintiff of the risk of proceeding in that manner and failing to advise the plaintiff of the options available to her.

[113] The defendants also assert that their agreement with the plaintiff indemnifies them from claims by the plaintiff. It does not. Lloyd was a licenced lawyer at the time. He cannot indemnify himself from a claim in negligence. He acted for the plaintiff. Dimakis held himself out as being able to provide legal services and did provide legal services. I find that the indemnity provisions in the agreement are contrary to public policy and not enforceable.

[114] The defences raised and the arguments asserted by the defendants do not raise a genuine issue requiring a trial.

Judgment

[115] There shall be judgment for the plaintiff in the amount of $41,000 plus pre-judgment interest.

Costs

[116] The plaintiff has been successful on her summary judgment motion and, *prima facie*, is entitled to costs. If the parties cannot resolve the issue of costs, they may submit a bill of costs and make written submissions consisting of not more than two double-spaced pages in length, together with any relevant offers to settle and excerpts of any legal authorities; The plaintiff by no later than February 21, 2025; the defendants by no later than March 5, 2025.

[117] All submissions are to be filed with the court and uploaded to Case Center, with a copy to the trial coordinator by end of day March 5, 2025. If no submissions or written consent to a reasonable extension are received by the court by that date, the matter of costs will be deemed to have been settled.

Bordin, J.

Released: February 12, 2025

CITATION: Longarini v. Lloyd et al., 2025 ONSC 974
COURT FILE NO.: CV-23-00070
DATE: 2025-02-12

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

TIFFANY LONGARINI

Plaintiff/Moving Party

And

CLIFFORD LLOYD, KONSTANTINE DIMAKIS, AND SILKPORT CAPITAL

Defendants/Responding Parties

REASONS FOR JUDGMENT

Justice Bordin

Released: February 12, 2025