

CITATION: Frantz v. NB Thrilling Films 4 Inc. et. al., 2025 ONSC 1308
COURT FILE NO.: CV-16-70457
DATE: 2025 02 27

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ADRIENNE FRANTZ, Plaintiff

AND:

NB THRILLING FILMS 4 INC., PIERRE DAVID, CINTHIA BURKE,
and CURTIS CRAWFORD, Defendants

BEFORE: C. MacLeod, Regional Senior Justice

COUNSEL: Robyn L. Wishart, for the Plaintiff

Pasquale Santini, for the Defendants

HEARD: Costs Submissions made in writing

COSTS AWARD

[1] This was a hearing in writing to fix the costs of a proceeding which was dismissed on consent with costs to be agreed or fixed by the court. The reason for dismissal was because the Workplace Safety and Insurance Appeals Tribunal (WSIAT) determined that the plaintiff's right of action against these defendants had been taken away by legislation. I received submissions in writing.

Background

[2] The plaintiff was a California based actress starring in a movie, "The Perfect Girlfriend" which was filming in Ottawa, Ontario in 2014. During filming, the plaintiff was apparently bitten in the face by a canine actor and sustained what she alleged to be a career threatening injury. The Plaintiff commenced this action seeking more than \$5 million in damages in 2016 just before the expiry of the two year limitation period.¹

[3] In their Statement of Defence, the Defendants pled that the action was barred by Ontario's *Workplace Safety and Insurance Act* ("WSIA" or "the Act").² The provincial scheme for workers compensation benefits (WCB) in force in Ontario and established by the Act is complex.

¹ *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, s. 4

² *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sched. A.

Participation is mandatory in some sectors and voluntary in others but in general workers who are eligible for WCB have no right to sue.

[4] In those cases, the legislation provides that workers covered by the insurance scheme do not have the right to sue employers or other workers for workplace accidents.³ This result, however, depends upon the status of the worker, the industry, the nature of the employment relationship, and other factors. In some cases where there is a cause of action against someone other than an employer or worker covered by the Act, the Act may not apply or the injured person may have an election between benefits and litigation. In other cases, the right to sue is vested in the employer or the Board.⁴

[5] The exclusive jurisdiction to determine whether or not the Act applies, the right of action is taken away and liability is limited is conferred on the Workplace Safety and Insurance Appeals Tribunal (“WSIAT”). The legislation also provides that a WSIAT decision is final, not subject to appeal and may not be reviewed by any court. It follows that whenever there is litigation concerning a work place accident and it may be barred in whole or in part, it is in the interest of both parties and the administration of justice to obtain a WSIAT ruling as soon as possible.

[6] Despite the pleading that the action was precluded by statute, all of the normal pre-trial steps in the litigation were concluded before the Defendants brought an Application to WSIAT to determine the question and stay the proceedings. For example, a Motion for security for costs was argued in July of 2017. Thereafter discoveries took place in the fall of 2018. Mediation took place in March of 2020. The Plaintiff set the action down for trial in October of 2021. By that point the litigation had continued for 5 years.

[7] It was not until Trial Management Court (“TMC”) on May 10, 2022 that the Defendants advised the Court they would be commencing a WSIAT Application. It was not until October of 2022 that the Application was launched.

[8] The Tribunal held a two day hearing in late 2023 and gave a decision in March of 2024.⁵ At that time the Tribunal held that the right of action of the Plaintiff to sue the Defendants had been “taken away by the Act.” It ruled that the Plaintiff was a worker who could pursue benefits under the Act but could not sue these defendants.

[9] A subsequent request for reconsideration was denied. That decision was conveyed to the parties by the Chair of the Tribunal on September 13, 2024.

[10] Subsequently, on September 25, 2024 at Trial Management Court, I was advised by Mr. Santini the parties consented to an Order dismissing the action with costs to be agreed upon or fixed by the Court. I signed that Order.

³ S. 28 of the Act.

⁴ See s. 27 – 30 of the Act.

⁵ 2024 ONWSIAT 477

[11] The parties were unable to agree on costs and I have now received written submissions.

Position of the Parties & Analysis

[12] It is the position of the Defendants that “this action should never have been commenced” and they submit they should be entitled to substantial indemnity costs fixed at \$104,107.10.⁶ The Defendants submit that there had been a determination made by a WSIB adjudicator about entitlement to benefits upon receipt of the employer’s accident report in 2014. They argue that this was known or should have been known to the plaintiff with the application of simple due diligence.

[13] It seems the Plaintiff did not make a claim for benefits but had she done so, she would have qualified and it would have been apparent the action was barred by the legislation. The Defendants also state that the delay in bringing the Application was due to the Plaintiff’s failure to produce the WSIB file although she had undertaken to do so at discoveries. The Defendants took the position at the May 10, 2022 TMC they required the answer to that undertaking before launching its WSIAT Application. They state that they launched the Application as soon as they obtained the disclosure.

[14] For her part, the Plaintiff argues that only a modest costs award is appropriate because the Defendants delayed in bringing the Application. The parties had completed all of the steps in the litigation including production, discoveries and mediation and the Plaintiff had set the action down for trial before the Defendants brought the WSIAT Application. The Plaintiff argues that the production of the WSIB file was not necessary and discoveries were not necessary for the Defendants to proceed before the Tribunal. Furthermore, it was not self evident that WSIAT would rule against the Plaintiff. She did not believe herself to be an employee or a “worker” within the meaning of the legislation because her services as an actress were provided through her personal services corporation in California. In addition to negligence, the action was advanced pursuant to the *Occupier’s Liability Act*⁷ and the *Dog Owner’s Liability Act*⁸. There was a two day contested WSIAT hearing.

[15] The Plaintiff refers the Court to the decision in *Boyd v. Taj Mahal Stables Inc.*⁹ The facts are very similar. Justice Ray at paragraph 11 observed that had the defendants proceeded promptly before the WSIAT as anticipated in the statement of defence, considerable time and expense would have been avoided. He rejected the submission that they had to wait until discovery observing that it was always in the employer defendant’s power to produce proof that WSIB premiums were paid and insurance in place. He concluded there were no special circumstances to deny the defendants

⁶ Counsel for the defendants submits that the plaintiff is already benefitting from reduced hourly rates charged to Travellers Insurance as a preferred client.

⁷ *Occupiers’ Liability Act*, R.S.O. 1990, c. O.2

⁸ *Dog Owners’ Liability Act*, R.S.O. 1990, c. D.16

⁹ *Boyd v. Taj Mahal Stables Inc.*, 2009 CanLII 32256 (ON SCJ)

their costs and ordered the costs on a partial indemnity scale but he reduced those costs due to delay in bringing the WSIAT application.

[16] This decision was followed in *Olesiuk v. Hilltop Water Service*.¹⁰ I would note that in both of those cases, however, it appears the employer denied the plaintiff was an employee. In the case at bar, by contrast the Defendants always pleaded that the Plaintiff was an employee. It remains the case, however, that the Defendant NB Thrilling Films 4 Inc. had filed a report with the WSIB, had access to the particulars of its own insurance coverage and should not have had to wait for production of the file by the Plaintiff in order to advance the WSIAT Application.

[17] It seems to me that if pursuing this action knowing it might turn out to be precluded by the legislation is “reprehensible”¹¹, it is equally reprehensible to run up all of the costs necessary to ready the action for trial before bringing the WSIAT Application. The Defendants pleaded the statute in defence and could have brought the WSIAT application at any time. While I agree that as in *Boyd*, the resulting wasted costs are a factor to be considered, I would not penalize the Defendants greatly because the responsibility to clarify if the action is statute barred is shared by both parties. Section 31 (1) of the Act provides that “a party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act* may apply to the Appeals Tribunal” to determine the question. It was open to either the Plaintiff or the Defendants to bring the Application at any time. This partially, if not entirely, blunts the complaint about delay and wasted costs.

[18] I agree with the Plaintiff that costs of the WSIAT hearing itself are not recoverable as costs of the action. The Tribunal does not award costs and the Court should not do an end run around the legislative scheme by awarding those costs as costs of the action.

[19] There was a Motion for security for costs. The Defendants were presumptively entitled to a security for costs order because the Plaintiff was not resident in Ontario. The motion was not granted because the Plaintiff was able to satisfy the judge that there was adverse costs insurance in place. The policy stood in place of security but the Defendants continued with the motion. Justice Hackland indicated he would award costs to the Plaintiff if the Plaintiff requested them (which she did not). There was no suggestion in that endorsement that the Defendants were entitled to costs. In light of that Endorsement, Justice Hackland effectively dealt with the costs of the motion and did not reserve them to the trial judge. The Defendants are not entitled to recover costs of the unsuccessful Motion as costs of the action.

[20] In conclusion, the Defendants are entitled to costs of the action on a partial indemnity scale and not on a higher scale. I would remove the costs associated with the WSIAT hearing and the

¹⁰ *Olesiuk v. Hilltop Water Service*, 2016 ONSC 4548

¹¹ In fact, it is doubtful that simply advancing an action that is not frivolous on its fact could meet that test. See *Dia et. al. v. Calypso Theme Waterpark et. al. and Messina v. Dia & Zeineddine*, 2020 ONSC 5191 (CanLII) and cases referred to therein.

motion for security for costs. I would reduce the costs only slightly for the delay in bringing the WSIAT application.

[21] The costs outline discloses that the actual costs incurred by the Defendants (inclusive of \$22,067.55 in disbursements) totalled \$113,222.60. Roughly \$6,000 related to the security for costs motion and roughly \$27,000 related to the WSIAT application. If I remove those items, bearing in mind that fixing costs is designed to achieve a result that is fair and is not a precise mathematical exercise, a reasonable award for partial indemnity costs (inclusive of the disbursements which were not challenged) would be \$65,000. Adjusting slightly for the delay in bringing the application, I am awarding \$62,000.00 in costs.

Costs Award

[22] For the foregoing reasons, costs payable by the Plaintiff to the Defendants are fixed at \$62,000.00 inclusive of fees, disbursements and HST.



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Justice C. MacLeod

Date: February 27, 2025