

**SMALL CLAIMS COURT OF NOVA SCOTIA**  
**Citation: *Adam v. Marshall*, 2019 NSSM 64**

**Date:** 2019-10-16  
**Docket:** SCT 487231  
**Registry:** Truro

Between:

Sandra Adam

*Claimant*

- and -

Gregory Marshall

*Defendant*

**Adjudicator:** Eric K. Slone

**Heard:** September 9 and 19, 2019 in Truro, Nova Scotia

**Appearances:** For the Claimant, self-represented

For the Defendant, self-represented

## **BY THE COURT:**

[1] The Claimant is a court reporter/transcriber who operates her own business transcribing court proceedings. She has several decades of experience, including a past association with a well-known, large court reporting company in Halifax. In early December 2018, she moved from Halifax to Digby. In this claim she seeks recovery of \$6,202.00 plus general damages of \$100.00, for unpaid transcription services.

[2] The Defendant resides in Truro. He is a legally educated, former Community College teacher, currently living on a disability pension.

[3] For sake of the narrative I will mostly refer to the Claimant as Ms. Adam and the Defendant as Mr. Marshall.

[4] During the years 2014 to 2017, Mr. Marshall was engaged in matrimonial litigation with his former wife, which resulted in an order of the Family Court of Nova Scotia in 2017 or 2018. Mr. Marshall filed an appeal of that order to the Nova Scotia Court of Appeal. Part of that process required him to have prepared transcripts of all of the court proceedings in the Family Court, including not only the days of trial but all of the preliminary and interlocutory proceedings, including short or perfunctory attendances.

[5] The preparation of court transcripts can be an expensive proposition. Mr. Marshall had limited financial resources. As such, he decided to shop around for a transcription service that could accommodate his budget. Among the people he talked to was Ms. Adam, whose name and contact information he found listed on the

government website that lists all properly accredited court transcribers in Nova Scotia. Based upon what was available on the website, Mr. Marshall believed Ms. Adam to be carrying on her business in Halifax, and according to Mr. Marshall he only learned otherwise very late in the relationship. More will be said about this later.

[6] The precise terms of the contract between Ms. Adam and Mr. Marshall are in question. Each of them claims that the other misrepresented something about themselves, causing them to agree to terms they might otherwise not have done.

[7] The parties communicated with each other both by telephone and by email. As time went on, the bulk of communication was by email.

[8] Ms. Adam extended fairly generous terms to Mr. Marshall, namely \$2.50 per page of transcript, plus HST. She says that her generosity was motivated, in part, because Mr. Marshall told her that he was a member of the Ontario bar, and thus a lawyer, and that he was a single father of two young children. She understood that he was engaged in matrimonial litigation on his own behalf, rather than on behalf of any client. She says that she was told by Mr. Marshall that there were approximately 10 days of court appearances (not all full days) to be transcribed. The magnitude of the actual job became an issue later on.

[9] Although I allow for the possibility that either or both of the parties may have said something different in a telephone call, the most reliable measure of their agreement and representations to each other can be found in the emails exchanged between them. The earliest email appears to be one dated September 30, 2018, where Mr. Marshall states:

I am a self represented litigant and I require court transcripts for an already filed appeal. I believe I already have all of the CDs... And I believe it is a sizable job with five or six days of trial and probably as many shorter hearings. Are you able to take on this job and, if so...(1) what do you charge?... and (2) what is your estimated turnaround time?

[10] This was answered quickly with a copy of Ms. Adam's standard price list which includes a sliding scale of as little as \$3.50 per page with a 30-day turnaround time, all the way up to \$8.00 per page with a one-day turnaround time. That same document states that payments may be made by e-transfer, but otherwise contains no particular terms of payment; nothing requiring payment in full before transcripts are delivered, and nothing pertaining to interest charges on outstanding balances.

[11] On October 2, 2018, Mr. Marshall emailed Ms. Adam stating:

I have no problem with you taking two or three months to complete the job if we can negotiate a lower "per page" cost. For a job this size, we should be able to work a preferred price - at least I hope so. I have two people who have come in at \$3.00, in fact one has offered a little bit under \$3.00, for digital copies, Word and PDF, with proper hard copy certificate etc. And I can certainly come up with \$1,000-\$1,500 to get you started, but as a single dad it is not feasible for me to pay everything up front. However, I am a member of the Law Society of Upper Canada and have every intention of ensuring that you are fully paid for your work. I will require an answer from you today because my Certificate of Readiness is being filed in the next few days, and we will have to button down our terms.

[12] This generated an immediate response from Ms. Adam, who stated:

I could do it for you for \$2.50 a page with two month turnaround time for Word and PDF and a hard certified copy as well. Since you're a member of the Law Society I trust you and don't require a deposit. That will give you a little time to get it together before the transcript is finished.

[13] The next day, Mr. Marshall emailed Ms. Adam as follows:

Thanks so much for agreeing to take on this job for me. As agreed, I will pay \$2.50 a page and I will advise the Court of Appeal that the transcripts will be ready by December 19, 2018.... I will have the audio files sent to you by Friday... And any missing files will be supplied as soon as I have them in my hands.

[14] It is important to note what was not covered by this correspondence. Although Ms. Adam made mention of “time to get it [i.e. payment] together,” at no point did she specify that payment in full would have to be made before the transcripts were delivered. Ms. Adam appears to believe, and submitted to the court, that such a term would be normal in this line of work, but I cannot necessarily accept that. In order for such a term to be implied into the relationship, something more by way of evidence would be required. In my view, Ms. Adam had a perfect opportunity either on her price list or in the correspondence to make clear what the payment terms would be.

[15] The target completion date of December 19, 2018 was the first of many targets undertaken by Ms. Adam, all of which were missed.

[16] Over the next number of days, digital files were sent to Ms. Adam so that she could begin her work.

[17] As the first deadline of December 19, 2018 loomed, Ms. Adam wrote to Mr. Marshall as follows:

Good morning Mr. Marshall. I just wanted to let you know that I've had an unforeseen circumstance. We have had a sudden death in the family on Friday. I had hoped to get the transcripts to you on the weekend but this happened and threw a wrench in plans. I apologize but I guess we can't control mother nature. The funeral is today. I will have the transcripts to you no later than Friday.

[18] Mr. Marshall took this news gracefully. He sent his condolences, and continued:

I have more CDs for you... But the good news is my deadline has been pushed to January 19. I can only send so many in Dropbox but I'll get some to you today.

[19] The response from Ms. Adam was "no problem." A day later she responded by saying:

So what I'll do is just keep working on the stuff as you send it.

[20] On December 31, 2018 Mr. Marshall informed Ms. Adam that some further files had been sent via Dropbox, and as well asked:

As far as I know we are still looking at a January 18 deadline. Will that be a problem?

[21] Later that day, Ms. Adam responded:

All downloaded and all is good. That date is fine.

[22] Using January 1, 2019 as a convenient marker, the correspondence clearly establishes several things:

- a. Ms. Adam led Mr. Marshall to believe that the work on the transcripts was substantially done, having been derailed by a death in Ms. Adam's family.
- b. Ms. Adam had all of the audio files in her possession and could not reasonably have been under any false impression of how much there was

to transcribe.

- c. The parties had agreed to a revised completion deadline of January 18, 2019.
- d. Ms. Adam knew, or ought to have known, that the deadlines for the transcripts were based upon deadlines set by the Court of Appeal for the preparation of Appeal Books and factums. She also knew, or ought to have known, that there would be serious consequences if the transcripts were not ready in time.

[23] The next communication of any substance occurred on January 15, 2019. Ms. Adam wrote to Mr. Marshall as follows:

I'm writing to let you know that the transcripts are being worked on but there is no way they will all be done for the 19<sup>th</sup>. The job is longer than originally expected which normally wouldn't be an issue. But I have run into a difficulty.... I had a bad accident in September. I fell down the stairs of my cousins in Connecticut on our way to Winnipeg for my sister-in-law's 50th wedding anniversary. I broke three ribs and re-injured my broken tailbone which has been broken for 35 years and can't be repaired anyway. Along with that my whole lower back was bruised. The ribs and tailbone have healed but my back doesn't seem to be. I saw my family doc on Friday and he's thinking maybe I have fractured my spine. I'm going for x-rays tomorrow to see what is going on. Normally I can sit for 15/16 hours a day typing and have been known to pull a few overnights in the past 35 years. But I find I have to take more breaks now etc. Anyway I have my daughter working full time with me now but she is presently working on a trial that we've been doing for two years. When she is finished that she will come and help me with this one. I apologize for any inconvenience but I cannot meet the deadline of Jan 19. I can however have them done for the end of January....

[24] On January 21, 2019, Mr. Marshall replied:

I'm terribly sorry for your situation and hope the x-rays were promising and that you

are on the mend. I have contacted the registrar about seeking an extension, but I get the sense it will not be an easy process.... Is it possible to focus on the earliest transcripts chronologically from 2014... 2015... 2016 etc. That way, I can at least start the page numbering process. The good news is that most of these dates were of relatively short duration. One additional thought... If you believe that your physical condition might require additional convalescence, I can request a reset of the dates from the court... But to do so, I think I would require a brief letter from your specialist to justify this request.

[25] Ms. Adam responded the next day advising that she did not have a medical specialist, and suggesting that an extension should be sought, in which case she would herself write a letter to the court explaining the reason for the delay. She apologized profusely for the situation.

[26] As that process was going on, on January 29, 2019, Mr. Marshall emailed Ms. Adam as follows:

We should also try to choose a new filing date that is generous in terms of time. Time for you to have everything finished up without straining your injury and back. In time for me to collate and number and generate tables of contents and to have printing and binding of eight copies of all the volumes.

[27] That same day, Ms. Adam advised Mr. Marshall that she had hired two more people to help her with the typing. She stated:

I think realistically we are looking at the middle of February to get this finished. I have hired two people to type but I have to proof their transcripts and sign them as they are not certified.

[28] Those two people hired appear to have been Ms. Adam's daughter Kirsten and son in law Eddie.

[29] By January 31, with some back and forth edits, a suitable letter was drafted for



the Court, signed by Ms. Adam. Mr. Marshall brought his motion to the Court of Appeal which was due to be heard sometime in mid-February.

[30] Communications in the next couple of weeks were somewhat brief, as Ms. Adam and her family all apparently came down with the flu.

[31] On March 14, 2019, Mr. Marshall queried whether the transcripts were getting close to being finished. This was met with a response as follows:

Hi Mr. Marshall. They are just about finished being typed. I have to proof the ones that I haven't typed. I'm aiming to have them to you on Tuesday or Wednesday at the latest. The flu knocked the hell out of me for almost a week so working around the clock to get it done. A couple days past the middle of the month but working as hard as I can.

[32] That was met with a request from Mr. Marshall that Ms. Adam send along to him the ones that had been done, so he could begin to paginate his appeal book.

[33] On March 19, 2019 transcripts began to be sent via email. However, it was not all of the transcripts. It almost goes without saying that Mr. Marshall needed all of the transcripts to prepare his appeal.

[34] On March 22, 2019, Ms. Adam emailed Mr. Marshall saying:

Just wanted you to know for your own information that the amount up to now is \$1,745. I'll be sending more over the weekend.

[35] To summarize where things stood at this point, Mr. Marshall had been unfailingly gracious and flexible with Ms. Adam. He went to the trouble and expense of obtaining an extension from the Court of Appeal to allow for the fact that his

transcripts were not ready. For her part, Ms. Adam made repeated promises that the transcripts were almost ready and pushed her projected delivery date forward several times. Her mention of \$1,745.00 was the first time money had come up since the initial discussions about price.

[36] On March 22, 2019 Mr. Marshall told Ms. Adam that he would "get some money over to you at the end of the month" by email transfer. That same day, Ms. Adam replied:

Yeah that's fine. Will be sending more [transcripts] over the weekend.

[37] The weekend came and went. On March 30, 2019, Ms. Adam wrote to Mr. Marshall as follows:

I am working on getting the rest of this done and out to you in the next few days. My daughter has been sick with the flu that I had for six weeks so she hasn't been able to do much. But just wanted to update you.

[38] She followed that up with a further message:

I just wanted to also let you know that when I'm finished typing this day that I'm working on and proof the four transcripts that I have left to proof along with what's done on this day already it will be \$2,917.50.

[39] A few hours later, Ms. Adam wrote to Mr. Marshall:

So I'm finishing up September 11, 2017. Kirsten just sent me a transcript. And Eddie is finishing up one. Then there's two days left to type. Kirsten is starting one and Eddie will help her when he's done the one he's working on. I will start the other one. Tomorrow I'm going to proofread the rest that are typed. But when I'm done doing that the bill will be over \$3,000.

[40] I think it's fair to say that with all of the different numbers being mentioned, Mr. Marshall might have been confused about exactly how much he was going to be charged for the remaining transcripts.

[41] On March 31, Ms. Adam sent Mr. Marshall a list of the days that she had typed and/or proofread. That consisted of 13 different court days, of varying duration. She indicated that there were a further six days typed but not yet proofread, and one day still not typed.

[42] That same day she advised Mr. Marshall that she would continue proofreading more of the transcripts but that she needed "*some of the bill paid.*" She followed it up with an email saying "*we are working to finish this up but I need some money paid on this. I have to pay the others working on it.*"

[43] On April 2 Ms. Adam wrote again to Mr. Marshall saying:

So the situation is that I've not heard from you regarding the \$1,700 that is owing so far. So by the time I finish the rest it will be close to \$3,500-\$4,000. Since I haven't heard from you regarding paying the first amount I have to actually take some paying jobs. I have to pay the two people who have been working on this with me and now I have to do that out of my pocket.

[44] This was met with a reply from Mr. Marshall as follows:

Sorry for the delay. I believe I advised you that I would get the funds to you this week. Last week, I was in court for three days and had to prepare a massive filing for yesterday... And two more trial dates for next week. I will get the money to you tomorrow... But you have to get these done. There is NO WAY the Court of Appeal is going to accept further delays. Please keep at it so I can be sure it gets done... Hopefully this week. I realize you have been faced with some difficulties, but I hope

you agree that I have been very patient. Just fyi ... the other side was previously seeking to have my appeal dismissed because of missing the appeal book deadline. So please proceed as quickly as possible. Thanks. Stay tuned for some funds soon.

[45] On April 3, Ms. Adam emailed:

I never did say that we stopped working on it. We have been working on it and you will have it all on the weekend. I'm also not saying that you haven't been patient. But I do need to be paid for what has been done already in order to pay the people who have worked on it.

[46] On April 3, 2019, Mr. Marshall transferred \$1,700.00 to Ms. Adam.

[47] On Monday, April 8, 2019, Mr. Marshall asked:

Didn't you say you would have everything done... And over to me by the weekend?

[48] That same day, Ms. Adam replied:

I am proofing now and will send them to you this evening.

[49] Later that evening, another batch of transcripts was sent by email with a promise that she would "*send the rest tomorrow.*"

[50] On the morning of April 9, 2019, Ms. Adam emailed as follows:

I'm proofing the rest of the transcripts that are done today. I did a rough calculation and by the time that I finish proofing these today the bill for this batch will be approximately \$3,117. So I'd like to have some money deposited before I send these along this evening.

[51] At this point, Ms. Adam dug in her heels and refused to send the balance of the transcripts unless the bill was paid in full. Mr. Marshall told Ms. Adam that he did not have the money to be able to pay right away, and cautioned her that she was putting his appeal in jeopardy because he was unable to put together and file his appeal books without these remaining transcripts. He also noted that the transcripts he had reviewed contained a number of typographical and other minor errors.

[52] On April 10, 2019 a further three days of transcripts were sent, along with a bill for a further \$1,847.

[53] From this point forward, I believe it is fair to say that there was a total breakdown of the relationship.

[54] Ms. Adam wrote on April 10, 2019:

Okay decision made. The rest of the transcripts will be ready on the weekend for sure but I WILL NOT SEND THEM UNTIL I AM PAID. [emphasis in original]

[55] That evening, Mr. Marshall addressed an email to Ms. Adam which pretty much summarizes his position, both then and now. He stated:

I am upset and unhappy, and I really do not like the turn that all of this has taken.

First of all, you are aware of my situation. You must also realize that it is impossible for me to come up with that much money right away. This is especially true after paying you \$1,700 just a few days ago... an obvious sign of good faith, based on my earlier commitment that you would get paid. Considering all of the circumstances, your "decision" is entirely unreasonable.

Secondly, "decision made"??? It was never a condition of our contract that full payment needed to be paid before you would fulfil your obligations (a) to have the work

completed in a timely way and (b) to have it done accurately and in a workmanlike way. It sounds like you are now holding the transcripts for ransom. This is unacceptable. You know that time is of the essence. I am wondering on what basis you feel you can unilaterally change the terms of our agreement??

However, for clarity, I reject your purported "decision" as it significantly affects the contract.

Third, I do not recall any discussions about engaging another transcription service to complete your obligations. And even if you suggested that, you consistently assured me that you could... and would... get the work done to our agreed-upon deadlines. Your assurances fell short.

Fourth, numerous delays, broken promises, unfulfilled commitments, and failure to deliver as and when promised has created problems and added considerable time, cost and stress to this process. To my detriment. This does not mean that I did not appreciate your accepting the job at a discounted rate of \$2.50 per page. Because I did appreciate it and I'm sure you will agree that I have been far more patient than most people would've been... But it has now morphed into something that is awkward and unpleasant for both of us.

[56] Mr. Marshall went on to point out that she had failed to provide him with the promised certified hard copy, something that she acknowledges she had forgotten about. He gave her one last chance to send him the remaining transcripts so that he could complete his appeal book:

[57] On April 11, 2019 Ms. Adam wrote back:

No don't try bullying me or threatening me again. That does not work with me. I went back through my emails just like you did and yes I can read.

First off you broke the contract by telling me you're a "lawyer" when you're not. Going to law school does not make you a lawyer. Delays have happened and I apologized for my part in that quite a few times. I cannot control what happened health-wise in my life or my family's any more than you can.

You did say in one email that you would do a deposit of \$1,000-\$1,500. Because I was under the mistaken impression that you were a lawyer I did waive that but the email I sent does say that I waived it (because I fell for your lawyer story) but that it would give you time to save up the money before the transcript is finished. That implies it is to be paid when the transcript is done like for any other purchase.

If you couldn't afford to pay then you shouldn't have contracted to have it typed. I have already lost over \$1,200 on this job by doing it for \$2.50 a page. You agreed to these terms. You did not ask for a payment plan.

You also told me there were less days than it turned out to be. My email does say a hard copy, I agree. It does not however say how I'm supposed to get it to you.

So I'm giving you two choices. The invoice will be done and ready by Sunday. I will email it to you. You can either send me an e-transfer for the amount still owing and I will email you the Word and PDF versions or it will take me a couple of days to print the transcripts off in hard copy and you can drive to Digby and pick them up and bring me my money.

[58] A later email added a footnote:

And by the way I'm not holding the transcripts for ransom as you say. This is money I've earned and deserve.

[59] Further exchanges of emails took place, and simply hardened the positions. Mr. Marshall gave Ms. Adam one last chance on April 15, 2019 to deliver the transcripts and accept some type of a payment plan. This was not acceptable to her.

[60] In the end, transcripts were delivered for all of the trial dates except October 4, 2017 and October 11, 2017. The invoice sent by Ms. Adam was for \$3,942.50, which included the cost of transcribing those two dates.<sup>1</sup>

[61] One thing that followed was slightly bizarre and provides something of a window into Ms. Adam's state of mind. On April 30, Ms. Adam emailed her final invoice for \$3,942.50. Over the course of the next few days she re-sent the invoice several times purporting to add interest to the outstanding balance. The invoice was emailed on April

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<sup>1</sup> \$1,410.00 was applicable for those two days of transcript, or put another way, the charge for transcripts actually delivered was \$2,532.50.

30, May 3, May 6, May 7, and May 9. Mr. Marshall regards that as a form of harassment. Certainly, it was not normal commercial practice.

[62] Meanwhile, unbeknownst to Mr. Marshall this Claim was filed by Ms. Adam on April 16, 2019 in Digby.<sup>2</sup>

[63] In the meantime, Mr. Marshall was in a tight spot, lacking as he did a final (and substantial) section of transcript. He believed, reasonably, that he had no choice but to seek an expedited transcript from Drake Recording in Halifax, at a premium price, for the last part of the trial. Because that company explicitly required payment up front, Mr. Marshall went to a payday loan-type of company and arranged to borrow \$6,000.00 at 29.99% interest. He continues to make loan payments and will be doing so for some time.

[64] The 551 pages of transcript at \$5.95 per page cost him \$3,278.45, plus HST, for a total of \$3,770.22.

[65] Given the delays that had occurred, Mr. Marshall made another motion to extend his filing deadlines. On June 10, 2019, the Court of Appeal set a new deadline of July 15, 2019 for the filing of the Appeal Book.

[66] In the end, all of the work and expense was for naught. The appeal ended up being dismissed because Mr. Marshall failed to meet that filing deadline. Mr. Marshall testified that he worked furiously to do all of his numbering and copying, and he

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<sup>2</sup> The case was later transferred to Truro as it became apparent that there was no factual connection between the cause of action and Digby County. One cannot, perhaps, fault Ms. Adam for choosing a venue that suited her convenience, but the *Small Claims Court Act* does not regard a Claimant's convenience as a basis for jurisdiction.



actually arrived at the Court House in Halifax about 5 minutes after the office closed - which was too late.

### **Some preliminary findings of fact**

[67] It is appropriate at this point to make several findings of fact.

[68] I find that Ms. Adam did not specifically alert Mr. Marshall to the fact that she was moving her business from Halifax to Digby. I do not believe there was anything sinister intended by this omission, but Mr. Marshall clearly expected that he was dealing with a Halifax-based court transcriber, and to the extent that Ms. Adam's location in Digby might have inconvenienced him, I believe it was Ms. Adam's responsibility to absorb any expense. As such, her suggestion that he might have to drive to Digby to pick up a hard copy of the transcript was totally out of line.

[69] I also find that Mr. Marshall did not misrepresent himself as a lawyer. He appeared to me to be someone who chooses his words very carefully, and I am satisfied that he referred to himself as a member of the Ontario bar. In so doing, he was not trying to convey that he was actively engaged in the practice of law in Ontario, which would have been somewhat unusual for a Truro-based individual, let alone one who presented himself as having various disabilities. He was simply building up his *bona fides* as somebody who could be trusted. If Ms. Adam read more into his statement than was intended, that is not his fault.

[70] The fact that he is a suspended member of the Ontario Bar is also not significant, in my opinion. I accept his explanation that it is common for Ontario

lawyers who leave the province to allow themselves to be administratively suspended for not paying their dues and malpractice insurance premiums. This in no way reflected upon Mr. Marshall's character or *bona fides*.

[71] I also find no basis for Ms. Adam's suggestion that Mr. Marshall misrepresented himself as the single parent of two small children. It is more probable than not that he simply referred to himself as a single parent of two children, which in fact was true. The fact that his children were in their teenage years or approaching twenty does not mean that there was any less of a financial burden upon him. As such, I find that Mr. Marshall did nothing to misrepresent himself to Ms. Adam.

[72] Ms. Adam testified that she also took pity on Mr. Marshall because he has physical disabilities. There is no basis to believe that he misrepresented himself in this way. He is clearly disabled with several physical problems and lives on a disability pension.

[73] As for the scope of the job, I believe that Mr. Marshall may have initially underestimated how many days of court proceedings needed to be transcribed. However, certainly by late December when all of the transcripts had been sent to her via Dropbox, Ms. Adam could have been under no illusion as to the scope of this job. She explicitly accepted the job as it was and made no complaint until later, when she had to begin to explain why she wasn't able to complete it.

[74] Mr. Marshall also complained about typographical and other errors in the transcripts. I do not believe that such errors were so serious as to merit any financial relief, as I expect that, had the appeal proceeded, the Court of Appeal would have

overlooked a few inconsequential errors in a lengthy transcript.

### **Other evidence**

[75] Ms. Adam conceded that she missed many deadlines for the completion of the transcripts, but she appeared to show no appreciation (let alone sympathy) for the difficulties that this caused Mr. Marshall. When she was asked why it took her so long, she responded (candidly) that it was because she really did not want to do the job. As for why she did not want to do it, she said it was because she had a feeling from early on that she was not going to be paid. She said she formed this impression after transcribing the first ten pages of the transcript. I took this to mean that she formed a negative impression of Mr. Marshall from what he, or someone else, said in his 2016-17 court proceeding, and that this impression coloured her dealings with him from very early on.

[76] Essentially, she admits that she did not work diligently on the project that she had taken on, and which she knew was time sensitive. Her many statements suggesting that the transcripts were almost ready were patently false.

[77] As for her belief that she would never be paid - a self-fulfilling prophesy, one might conclude - she did nothing to clarify her payment expectations until the very end. Although she casually mentioned to Mr. Marshall at one point that he was free to hire someone else to prepare the transcript, this was also very late in the piece and cannot be seen as a reasonable suggestion.

[78] Ms. Adam testified that this project seriously impacted her mental health, to the

point where (she says) she spent two and a half months on her couch crying. She described herself as having become seriously depressed, requiring medication. She blames Mr. Marshall for having harassed her, causing these health issues.

[79] I have no doubt that Ms. Adam was being truthful when she described her experience doing this job. However, I cannot fault Mr. Marshall for creating these problems. I believe that Ms. Adam inadvertently took on more of a job than (in retrospect) she ought to have undertaken, given all that was going on in her life. It was clearly a very stressful time with a death in the family, a flare up of her injury and a flu illness affecting her entire family. Perhaps the move to Digby from Halifax was also a factor. She also had an ongoing transcription project - a long trial - which took priority. However, she never communicated to Mr. Marshall that she was unable to do the job. To the contrary, she consistently made promises that she could.

[80] And despite how overwhelmed Ms. Adam seemed to have been, this was not such a big job. I am sure she has done many larger jobs over the course of her career.

### **Broken promises**

[81] It is useful at this point to summarize the promises respecting delivery time that Ms. Adam made, but failed to fulfil:

- a. On October 2, 2018 she promised a two-month turnaround time.
- b. Around the same time, she accepted a target date of December 19, 2018.

- c. As December 19 was looming, she promised transcripts by no later than Friday, which would have been December 21, 2018.
- d. On December 31, 2018, Ms. Adams agreed that she could meet a deadline of January 18, 2019. She also acknowledged that she had in her possession all of the audio files.
- e. On January 15, 2019 citing her injury as a reason for not being able to meet this January 18, 2019 deadline, she promised that they could all be done for the end of January.
- f. On January 29, 2019, Ms. Adam projected that it would be the middle of February when the transcripts could be finished.
- g. On March 14, 2019, Ms. Adam said that she would have them to Mr. Marshall by "Tuesday or Wednesday at the latest," which would have been March 19 or 20, 2019.
- h. On March 22, 2019, having sent a partial set of transcripts, Ms. Adam projected that she would send more over the weekend, which would have been the 22<sup>nd</sup> or 23<sup>rd</sup> of March. No further such transcripts were sent.
- i. On March 30, 2019, Ms. Adam stated that she would have them out to him in the "next few days."

- j. On April 3, 2019, Ms. Adam stated in an email "you will have it all on the weekend."
- k. On April 8, 2019 Ms. Adam stated, "I will send them to you this evening." She then amended that statement to "tomorrow."
- l. On April 10, 2019 she stated that the rest of the transcripts would be ready on the weekend, though by then she was stating that she would refuse to release them unless paid in full.

[82] Mr. Marshall argues that his contract with Ms. Adam was one where time was of the essence. I agree. Ms. Adam would have known that fact, by virtue of her experience, as well as from being told over and over again that there were court-imposed deadlines that Mr. Marshall had to meet.

[83] The bottom line is that Ms. Adam failed repeatedly to perform her obligations in a timely manner, and placed Mr. Marshall in a difficult spot where he had to seek two extensions from the Court of Appeal and, in the end, could not meet his final deadline. While Mr. Marshall is not without some blame for how this ended up, Ms. Adam bears significant responsibility. I find without hesitation that she breached her contract to prepare the transcripts in a timely manner.

### **Harassment?**

[84] Ms. Adam's allegations that Mr. Marshall bullied and harassed her do not stand up to any scrutiny. He was understandably upset when Ms. Adam held up his last

transcripts “to ransom,” as he put it. That characterization, while perhaps a bit blunt, is not far off the truth. At that late stage, Ms. Adam was in no legal or ethical position to insist upon advance payment, given the lengthy history of delays for which she, and she alone, was to blame.

[85] Again, I am not without sympathy for Ms. Adam’s mental health crisis which she experienced following her experiences with Mr. Marshall, but to an objective observer her reactions appear to have been extreme.

[86] In fact, if there was any harassing behaviour taking place, it was Ms. Adam (and not Mr. Marshall) who engaged in it. I refer to the following incidents:

- a. As noted, she sent repeated emails to Mr. Marshall containing the same invoice, sometimes with added interest. This type of obsessive behaviour served no legitimate purpose and was undoubtedly annoying to Mr. Marshall.
- b. On May 13, 2019, Ms. Adam launched a formal complaint to the Law Society of Ontario, which the Law Society eventually dismissed. In the body of the complaint Ms. Adam made extreme accusations, including “*I hope that Gregory Marshall gets what he deserves, jail time and barred for life from law. He is a career litigator always looking to win the big one so he won’t have to work again. He needs to be stopped.*” There is no factual basis for such an attack. Ms. Adam admitted that her allegations against Mr. Marshall were likely defamatory, but she attributed that to her serious depression.

- c. Ms. Adam made attempts to serve Mr. Marshall's elderly mother in Richmond Hill, Ontario, with a subpoena to testify at this trial. She explained her reason for doing so as follows: she learned from transcribing the Family Court proceedings that his mother often paid bills for Mr. Marshall, and she theorized that she must have paid the cost for Drake Recording to prepare the last transcript. By this logic, she sought to argue that Mrs. Marshall could also have supplied funds to pay her bill. This line of reasoning is rather tortured, in my opinion, and had I been asked to strike the subpoena I would have done so on the basis of relevance. In the end, this did nothing but create stress for Mr. Marshall and his elderly mother. And it was proved to my satisfaction that Mr. Marshall borrowed the money commercially to pay for the Drake transcript.
  
- d. Ms. Adam attempted to make a criminal complaint to the RCMP, alleging that she had been defrauded by Mr. Marshall. The RCMP (sensibly) declined to take action on the basis that this was a civil dispute.

### **The fate of Mr. Marshall's appeal**

[87] As noted above, Mr. Marshall missed his filing deadline by minutes. He testified that the stress of his dealings with Ms. Adam were to blame for his having missed his filing deadline. As noted earlier, he had obtained an extension until July 15, 2019 to file his appeal books. I believe that Mr. Marshall was being truthful when he described what held him back as a "state of incapacitation," and in the result he simply could not get it done in time. However, he cannot place all the blame at Ms. Adam's doorstep.



The transcript from Drake was prepared in a timely manner. By May 1, 2019 he had received that transcript, as well as all of the earlier ones from Ms. Adam, and he still had two and a half months before his filing deadline.

[88] As alluded to in one of his emails quoted above, Mr. Marshall was also engaged in a trial against his former spouse in the Supreme Court of Nova Scotia, which occupied a good deal of his time and resources. Indeed, it is a matter of public record that Mr. Marshall was at trial on March 25, 26, 29, May 14 and 17, 2019. As many people know, trial dates are the tip of the iceberg in terms of the effort needed. Preparation time usually exceeds court time. So the fact is that Mr. Marshall was actively engaged in this parallel litigation for much of the same time that he could have been putting his appeal books together.

[89] Ms. Adam's failure to produce the bulk of the transcripts in a timely manner was no doubt a factor in Mr. Marshall's inability to prepare his appeal books in time. But the amount of time he had available to him between May 1, 2019 (when he received the Drake transcript) and July 15, 2019 when his appeal was dismissed, ought to have been adequate.

[90] One might say that Mr. Marshall could, and ought to have mitigated any damage caused by the failure of Ms. Adam to deliver the final transcripts.

### **Arguments**

[91] Ms. Adam seeks to be paid the amount of her final invoice, plus general damages. Also, she seeks to increase retroactively the per page cost to \$3.50, adding

\$1.00 per page, because of Mr. Marshall's arguable default. This is how she arrives at \$6,202.00 as her claimed amount. (It will be recalled that her actual invoice was for \$3,942.50, which included \$1,410.00 for transcripts that she withheld, and which were later prepared by Drake.) She also seeks general damages of \$100.00.

[92] Mr. Marshall says that he is not responsible to pay the Claimant's account, and moreover he counterclaims for significant damages (exceeding the court's monetary jurisdiction), including punitive and aggravated damages as a result of what he says Ms. Adam's defaults cost him.

### **Discussion**

[93] Ms. Adam cannot expect simply to recover her invoice amount, let alone increase it to a greater amount, while ignoring the fact that she was seriously in breach of her obligation to produce the work in a timely manner. The question is how properly to account for the consequences of her default.

[94] Nor can she collect for work that she never delivered, specifically the October 4 and 11, 2017 transcripts.

[95] As I have already indicated, I am not holding Ms. Adam responsible for the fact that Mr. Marshall's appeal was dismissed, with all of the potential losses that could be traced to that. As I have found, Mr. Marshall should have been able to perfect his appeal in the time he had available to him. The fact that he was preoccupied with his Supreme Court trial, and the possibility that he would go through a period of "incapacitation," as he testified, were not foreseeable events. The loss of his appeal

rights was not foreseeable.

[96] However, Ms. Adam's failure to perform her contract did have foreseeable consequences. I hold Ms. Adam responsible for the additional costs that Mr. Marshall incurred as a result of her lateness. This would include:

- a. Mr. Marshall was obligated to make two trips into Halifax to file applications for an extension of time, with all of the copying and driving expenses. I can accept that each of these trips caused him to incur hard expenses of at least \$250.00, for a total of \$500.00.
- b. Mr. Marshall claims to have spent \$966.89 on copying by a commercial outfit known as KKP, which he says would not have been necessary if he'd had the time to be able to do all the copying himself. This was for the last two volumes of the Appeal Book. I am not convinced that this entire expense is traceable to Ms. Adam, but I will allow \$500.00 of it.
- c. Mr. Marshall paid Drake for 551 pages of transcript at \$5.95, instead of the \$2.50 per page that Ms. Adam had promised. This resulted in additional cost of \$2,186.09 (including HST) beyond what Ms. Adam would have charged him.
- d. Mr. Marshall had to borrow \$6,000.00 at a high interest rate (29.99%) only because of Ms. Adam's failure to deliver his transcripts in time. This amount is amortised over 36 months and will cost Mr. Marshall interest expenses of \$3,168.48 over the life of the loan. He claims this against Ms.

Adam. I do not think this is traceable to Ms. Adam, except to a limited extent. The amount borrowed was more than needed for the Drake transcript, and it is likely that Mr. Marshall would have needed to borrow money to pay for the Adam transcripts and other expenses associated with the appeal. I assess his damages under this head at \$500.00.

[97] To summarize, I am allowing the following items under the counterclaim:

Two trips into Halifax to file applications for an extension of time	\$500.00
Commercial copying	\$500.00
Extra cost for Drake	\$2,186.09
Additional costs of borrowing	\$500.00
<b>Total</b>	<b>\$3,686.09</b>

#### **Items not allowed**

[98] I reject Ms. Adam's claim for general damages, as I find no actionable basis for it.

[99] I have already indicated that I do not regard the loss of Mr. Marshall's appeal to have been a foreseeable consequence of Ms. Adam's breach of her obligations.

[100] Mr. Marshall also claims damages, including general, punitive and aggravated

damages by reason of what he describes as Ms. Adam's "malicious and vitriolic campaign of harassment" against him, as well as what he characterizes as her fraudulent misrepresentation concerning his transcription project.

[101] Dealing with the latter claim first, I do not find that Ms. Adam was fraudulently misrepresenting herself. I believe she was overwhelmed with other stressful events in her life, and she found herself struggling to fulfill her contractual responsibility.

[102] As for those actions that Mr. Marshall regards as harassment, I do not consider these to be actionable in this Court. It must be recalled that this Court has no jurisdiction to entertain claims in defamation. Her complaints to the Law Society of Ontario and to the RCMP were perhaps an overreaction, but those two bodies had no difficulty concluding that there was no wrongdoing with which they needed to concern themselves. Her attempt to subpoena Mr. Marshall's mother was no doubt upsetting to Mr. Marshall, and was wrong-headed in my view, but I do not see it as tortious conduct.

[103] Sending him repeated invoices and attempting to charge interest (to which she was not entitled) was no doubt tedious for Mr. Marshall to deal with, but I do not see it as tortious.

### **Punitive and aggravated damages**

[104] I do not think this is the appropriate case to consider in depth the thorny question of whether or not this Court has jurisdiction to award punitive or

aggravated damages.

[105] Punitive and aggravated damages are not the same thing, though they are often lumped together. The distinction is well made in *Snider v. Karpinski*, 2007 SKQB 5 (CanLII):

In this regard, I start with the proposition that aggravated damages have a compensatory component and may be awarded where it is determined that a defendant's conduct has been particularly high-handed or oppressive, thereby contributing to the plaintiff's injury. On the other hand, punitive damages invoke a higher threshold, and should be awarded only in exceptional circumstances where the conduct of a defendant has been so reprehensible that it offends the Court's sense of decency, and where a combined award of general and aggravated damages would not be sufficient to achieve the goal of denunciation and deterrence. Unlike aggravated damages, punitive damages are not compensatory, but are designed rather to achieve a degree of retribution. See: *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130 and *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 (CanLII), [2002] 1 S.C.R. 595.

[106] I note that the Small Claims Courts of some other provinces have allowed such claims and I am grateful for Mr. Marshall's research efforts to educate me on the issue. However, he could not produce (and I am not otherwise aware of) a single Small Claims case in Nova Scotia that has allowed punitive or aggravated damages, or expressly endorsed the idea.

[107] I am sceptical whether a foray into this type of damages would stand scrutiny in the higher courts. I am mindful of the comments of Adjudicator Richardson in *Lukacs v. Dell Canada Inc.*, 2017 NSSM 6 (CanLII):

#### **Is the Claimant Entitled to Punitive Damages?**

[31] The short answer to this question is "no." The Small Claims Court is a statutory court. It can do only what the legislation creating it gives it power to do. This court can award special damages (i.e. out of pocket loss) to a limit of \$25,000.00 and general damages to a limit of \$100.00. Punitive damages are not general damages. They are not

special damages. So this court has no jurisdiction to make such an award. ....

[108] In any event, cases should be decided on applicable facts, and I do not see the facts of this case supporting any claim for punitive or aggravated damages - assuming that the legal jurisdiction exists. Ms. Adam's behaviour was not "highhanded or oppressive" nor offensive to the court's sense of decency. As I have found, she was in breach of her contractual obligations, but her overreactions appear to have stemmed more from the considerable stresses in her life rather than from deliberate, bad conduct.

### **Result**

[109] In the result, there will be recovery on the claim, subject to Mr. Marshall's recovery on the counterclaim. Ms. Adam did eventually deliver transcripts, for which she is entitled to be paid at the contracted for rate. But she must account for the damages that her poor performance caused.

[110] The two amounts will be set off against each other. Ms. Adam is entitled to \$2,532.50 for transcripts actually delivered, and Mr. Marshall is entitled to \$3,686.09 on his counterclaim. This results in a net recovery on the counterclaim of \$1,153.59. I decline to award Ms. Adam any costs, in light of the result. I do award Mr. Marshall his cost of issuing the counterclaim in the amount of \$66.00, for a total net recovery in Mr. Marshall's favour of \$1,219.59.

**Eric K. Slone, Adjudicator**