Date: 1999 05 13
Docket: cv 07483

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GEORGINA BASE

Plaintiff

-and-

DR CLARENCE MOISEY, STANTON REGIONAL HEALTH BOARD and THE STANTON REGIONAL HOSPITAL

Defendants

REASONS FOR JUDGMENT

[1] On April 16, 1999, I granted the application of the Defendants Stanton Regional Health Board and The Stanton Regional Hospital to set aside the noting in default against them. I reserved on their application for an order that solicitor client costs with respect to the application be payable personally by counsel of record for the Plaintiff (not the same counsel who appeared on this application).

[2] Rule 644 of the *Rules of the Supreme Court of the Northwest Territories* provides that in a proper case, the Court may order a solicitor who has acted for a party to an action or a proceeding to pay any of the costs of the action or proceeding. The issues are simply whether this is a proper case for such an order and if it is not, what order as to costs should be made.

The Facts

[3] The Statement of Claim was filed on December 22, 1997. In it, the Plaintiff alleges breach of various duties on the part of the Defendants arising out of medical services rendered to her in 1983, when she was a minor.

[4] The Statement of Claim was served on the Defendants Stanton Regional Health Board and The Stanton Regional Hospital (which I will refer to collectively as "Stanton") on December 15, 1998. By letter dated December 31, 1998, counsel for Stanton wrote to counsel for the Plaintiff advising that he was acting for Stanton. In that letter he made the following request:

> Given, the passage of time since the happening of the events that form the subject matter of your claim, we request your indulgence in not holding us to the deadline for filing a Statement of Defence. Our client does intend to file a Statement of Defence. Would you kindly confirm that you will not note either the Stanton Regional Health Board or the Stanton Regional Hospital in default without reasonable and adequate notice to us.

[5] By letter dated January 11, 1999, counsel for the Plaintiff wrote back, advising that she anticipated making a number of amendments to the Statement of Claim, including "at least" amendment of the year the medical procedure in issue was alleged to have been undertaken and the party from whom consent was allegedly obtained and adding the Government of the Northwest Territories, the Department of Health and Social Services, Government of the Northwest Territories and Dr. Hadley as party defendants.

[6] In the January 11 letter, counsel for the Plaintiff advised, "In the circumstances, I do not require that a Statement of Defence be filed on behalf of your clients at this time". She asked that counsel for Stanton seek instructions to accept service of an amended Statement of Claim and advise as to his instructions in that regard at the earliest opportunity.

[7] In a separate letter also dated January 11, 1999, counsel for the Plaintiff requested medical records from counsel for Stanton.

[8] The next correspondence was a letter dated January 28, 1999, received by counsel for Stanton from counsel for the Plaintiff on the same date. The first paragraph of that letter states the following:

> You have not indicated to me whether or not Stanton Regional Health Board and the Stanton Regional Hospital have instructed you to accept service of an Amended Statement of Claim. Accordingly, please place yourself on the record at this time by filing an Appearance.

[9] That letter went on to request a reply to the January 11 correspondence on the issue of medical records.

[10] Counsel for Stanton next wrote to counsel for the Plaintiff on March 2, 1999, responding to the request for medical records and advising that he would accept service of an amended Statement of Claim.

[11] Counsel for the Plaintiff wrote back on March 4, 1999 as follows:

> By correspondence dated January 28, 1999, you were advised that the Plaintiff required your office to file an Appearance on behalf of your clients. You failed to do so.
>
> By Direction, your clients were noted in default on February 8, 1999.
>
> I will not be responding further to your correspondence dated March 2, 1999.

[12] Thereafter followed correspondence between counsel about obtaining an order setting aside the noting in default in which counsel for the Plaintiff took the position that she would agree to an order only upon payment of certain costs and counsel for Stanton took the position that if he had to seek an order on a contested basis, he would seek solicitor client costs. The correspondence from counsel for the Plaintiff to counsel for Stanton was marked "without prejudice" and counsel for the Plaintiff complains of its disclosure in the affidavit material filed by counsel for Stanton. I will deal with that further on.

[13] During the course of the correspondence, counsel for the Plaintiff took the position that she would continue with the litigation in the normal course and without further notice to counsel for Stanton until such time as the default was set aside. Counsel for the Plaintiff also took the position with respect to the earlier request that she confirm that she would not note Stanton in default without reasonable and adequate notice, that she "did not agree to that term and you do not have such a confirmation from me". She proposed that the Plaintiff has a right to take whatever steps she deems necessary pursuant to the *Rules of Court* to advance her claim.

The Noting in Default

[14] As I made an order setting aside the noting in default when this matter was before me in Chambers on April 16, I do not propose to review the law relevant to that issue except as necessary to consider the application for costs.

[15] Cases in other jurisdictions have referred to the accepted practice of warning before signing default judgment: *Winkler C.U. v. Muz* (1982), 47 Man. R. (2d) 254 (C.A.); *Royal Bank of Canada v. Jensen* (1988), 71 Sask. R. 277 (Q.B.). In *Winkler*, the Manitoba Court of Appeal referred to the practice of giving notice and a fixed time for filing a Statement of Defence before signing final judgment by default as a "time-honoured practice or convention of legal practice in this province, and one would express the hope that it still persists to this day".

[16] Stevenson and Côté, in *Civil Procedure Guide, 1996*, in the annotations to Rule 158 regarding procedure on default refer to the above cases and "the long standing practice of warning before signing default judgment ... which represents the Alberta practice also".

[17] I have no hesitation in saying that the same practice has prevailed in the Northwest Territories for many years. It is simply an aspect of the courtesy with which counsel normally treat each other and reflects the wisdom of experienced counsel in not taking determinative steps in an action in circumstances in which one can reasonably expect that those steps will only be set aside.

[18] The same practice applies to noting in default as to signing default judgment.

[19] The question then is whether counsel for the Plaintiff gave notice or a warning that she was going to note Stanton in default.

[20] In my view, the statement "please place yourself on the record at this time by filing an Appearance" made by counsel for the Plaintiff in her January 28, 1999 correspondence was nothing more than a request. It warned of no consequences or steps that counsel for the Plaintiff intended to pursue should counsel for Stanton not act accordingly. The fact that in the same letter counsel for the Plaintiff again requested medical records that had been requested in a letter two weeks earlier could only lead to the inference that she was going to continue to deal with counsel for Stanton. It is inconsistent with the position that the request for an Appearance was an ultimatum.

[21] As to the position taken by counsel for the Plaintiff in her correspondence that she had not agreed not to note Stanton in default, that position simply has no merit. Counsel for the Plaintiff had been told that because of the passage of time since the circumstances described in the Statement of Claim, Stanton needed more time to file a Statement of Defence. She had been told that Stanton did intend to file a Statement of Defence. She had been asked not to note Stanton in default without notice. Her response to Stanton's counsel was that she did not require a Statement of Defence "at this time". Although she did not specifically say that she would not note in default, any reasonable person would have inferred that from what she did say. At no time did she give notice that she did require a Statement of Defence. Nor would it have been reasonable for her to require one, since she had already indicated her intention to amend the Statement of Claim, a step which would have given Stanton yet further time to file its Statement of Defence (Rule 130).

[22] The request that an Appearance be filed was clearly made in the context of service of the proposed amended Statement of Claim. It is not reasonable to expect that counsel would understand that request, either on its own or in that context, as a warning or notice that Stanton would be noted in default if the Appearance was not filed.

[23] Ms. Murray, who appeared for counsel for the Plaintiff on this application, attributed what happened here to the fact that the letter of January 28 requesting an Appearance was the third letter sent by counsel for the Plaintiff to counsel for Stanton

and to which the latter had provided no response. However, two of the three letters bear the same date (January 11) and Stanton was noted in default without warning on February 8, less than a month after the three letters were sent. It cannot be said that to that point there was any delay of any note. And in any event, the lack of an immediate response is irrelevant because counsel for the Plaintiff made no request that an Appearance be filed within a certain time and nothing in any of the correspondence would clearly suggest to counsel on the other side that counsel for the Plaintiff was about to take the significant step of noting in default.

[24] Finally, on this issue, it should be noted that The Canadian Bar Association's *Code of Professional Conduct*, adopted by the Law Society of the Northwest Territories on December 9, 1989, provides in Chapter XVI that:

> 3. The lawyer should accede to reasonable requests for trial dates, adjournments, waivers of procedural formalities and similar matters that do not prejudice the rights of the client. The lawyer who knows that another lawyer has been consulted in a matter should not proceed by default in the matter without enquiry and warning.

[25] I find that there was no enquiry and no warning in this case. The accepted practice was not followed.

Costs

[26] As I have indicated, counsel for Stanton seeks solicitor client costs against counsel for the Plaintiff personally. Counsel for the Plaintiff seeks thrown away costs of the noting in default and costs of this application.

[27] Rule 644, set out above, provides that counsel may be ordered to pay solicitor client costs in a proper case. The Supreme Court of Canada gave some guidance on what may or may not constitute a proper case in *Young v. Young*, [1993] 8 W.W.R. 513 at 542, per McLachlin J.:

> The basic principle on which costs are awarded is as *compensation* for the successful party, not in order to punish a barrister. Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging this abuse and

> delay. It is clear that the courts possess jurisdiction to make such an award, often under statute and, in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court. But the fault that might give rise to a costs award against Mr. How does not characterize these proceedings, despite their great length and acrimonious progress. Moreover, courts must be extremely cautious in awarding costs

[28] I interpret the ruling in *Young* as meaning that there should be a continued course of conduct on the part of the lawyer, something which results in deliberate delay and abuse of the court's process, before counsel should be made liable for costs. It may, however, be that in an egregious case, the lawyer's conduct on only one aspect of the case would justify making him or her liable for costs.

[29] Counsel did not refer me to any cases, nor was I able to find any cases where solicitor client costs were ordered against counsel in circumstances like those before me. That may be because what counsel for the Plaintiff did in this case is not a common occurrence.

[30] In a case that is similar, *Assiniboia Credit Union v. McGowan*, [1989] S.J. No. 375 (Sask. C.A.), the defendant which had been noted in default asked for a ruling that the conduct of counsel for the plaintiff was unethical. The Court of Appeal declined to deal with the question as the answer was not necessary to resolve the appeal. The Court did, however, state that, "Any matter such as this has its appropriate forum in the committees of the Law Society if anyone is disposed to refer it there".

[31] I conclude that <u>generally</u> the Court should not order solicitor client costs against counsel personally as a result of counsel's conduct in relation to one occasion or issue in a proceeding. If disciplinary action is sought as a result of such conduct, it should be sought from the Law Society and not the Court through relief in costs. If there is an issue of contempt of court, which was not suggested in this case, it should be raised as such.

[32] I therefore decline to order solicitor client costs payable by counsel for the Plaintiff. This ruling is not to be taken in any way as condoning the conduct complained of. In the circumstances, I would describe the conduct of counsel for the Plaintiff in the same terms used by McEachern C.J.B.C. in *Foreman v. Gerling*, [1991] B.C.J. No. 3206 (B.C.C.A.); it is at the very least "professionally regrettable".

[33] The final issue is whether or what costs should be ordered in this matter. In requesting that thrown away costs and the costs of this application be awarded to the Plaintiff, counsel for the Plaintiff complained of the disclosure of "without prejudice" correspondence by counsel for Stanton and that the position taken by counsel for Stanton in demanding costs of a court application to set aside the noting in default was threatening and intimidating. There is no evidence whatsoever before me that substantiates the latter.

[34] For "without prejudice" correspondence to be inadmissible, it must relate to a dispute or negotiation and the correspondence must include suggestions for settlement: *312630 British Columbia Ltd. v. Alta Surety Co.*, [1995] 10 W.W.R. 100 (B.C.C.A.). The fact that counsel marks letters "without prejudice" does not in itself make them inadmissible.

[35] Those portions of the correspondence disclosed by counsel for Stanton in his affidavit relate to amending the Statement of Claim, not requiring a Statement of Defence, requesting an Appearance, the demand by counsel for the Plaintiff for costs as a condition of agreeing to an order to open up the default and her assertion of her client's right to proceed in accordance with the *Rules of Court*. None of what was disclosed includes suggestions for settlement. Counsel for the Plaintiff herself chose to disclose the remainder of the correspondence and it should be noted that all of her correspondence attached to her affidavit is marked "without prejudice", including correspondence to which that term is clearly inapplicable because it merely requests disclosure of medical records.

[36] I find that the correspondence that was disclosed by counsel for Stanton was not inadmissible as "without prejudice" correspondence and that there was nothing improper in his disclosure of it.

[37] Having considered all the circumstances, I see no reason why the Plaintiff should have the costs thrown away resulting from the noting in default, since the noting in default ought not to have been directed. Counsel who appeared for the Plaintiff on this application did not, quite properly in my view, dispute that the noting in default should be set aside.

[38] As to the costs of this application, although Stanton has not been successful on its application for costs, it is clear to me from the material filed that the application resulted from the unusual position taken by counsel for the Plaintiff. Costs of this application will accordingly be in the cause. personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
13th day of May , 1999

Counsel for the Plaintiff;	Jill Murray
Counsel for the Defendants: Stanton Health Board and The Stanton Regional Hospital	Katherine R. Peterson, Q.C.
Counsel for the Defendant: De. Clarence Moisey	Margo Engley, Student-at-law