CITATION: Ashrafian v. Kavarana, 2024 ONSC 2420
COURT FILE NO.: CV-18-136386-0000
DATE: 20240430

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
ALI ASHRAFIAN	)	
Plaintiff	)	No one appearing for the Plaintiff
– and –	)	
CYRUS KAVARANA and NISSAN CANADA INC.	)	Loretta De Thomasis and Colleen Mackeigan, for the Defendants
Defendants	)	Counsel for Georgina Masgras, Gavin MacKenzie
	)	**HEARD VIA ZOOM:** February 13, 2024

REASONS FOR DECISION RE COSTS CLAIM AGAINST PLAINTIFFS COUNSEL

M.L. EDWARDS, R.S.J.

Overview

[1] On December 8, 2023, I released my Reasons detailing why I had declared a mistrial in this matter. In my reasons I gave notice to Ms. Masgras, that she might be found responsible for the costs of the mistrial. These reasons address what if any responsibility Ms. Masgras has for those costs.

[2] Ms. Masgras was represented at the hearing of this issue. She sought leave (which I granted) to file affidavit evidence that she says would respond to some of the concerns raised in my earlier reasons granting a mistrial.

[3] The mistrial was declared largely as a result of the non-disclosure of a conflict of interest involving Ms. Masgras, her husband Mr. Irshidat, Mr. Irshidat's company Meditecs and the retainer by Meditecs of two doctors who prepared medical legal reports for Ms. Masgras' law firm (Masgras Law). These reports were then forwarded to the lawyers for the defendant without any disclosure of the aforesaid conflict. There was also no disclosure of the fact the fee charged by one of the doctors to Meditecs was approximately $2,000.00. This became relevant to my analysis in granting a mistrial because Meditecs then charged Masgras $5,000.00 – the amount that was then sought by Masgras from the defendant when this matter proceeded to a failed pretrial.

Additional Facts from Ms. Masgras' Affidavit

[4] Counsel for Ms. Masgras helpfully summarized the additional facts from Ms. Masgras' affidavit in his factum. The relevant facts from the factum are as follows:

(a) Ms. Masgras has been acquainted with the Plaintiff Ali Ashrafian since the fall of 2014, when he was employed by Masgras Professional Corporation on a field placement while he was a student at Seneca College's School of Legal and Public Administration. He met Omar Irshidat, who married Ms. Masgras in 2015, at that time.

(b) When Mr. Ashrafian was involved in the automobile accident that gave rise to this action on June 28, 2016, he approached Ms. Masgras and Mr. Irshidat and they met with him together. With input from Mr. Irshidat, Ms. Masgras advised Mr. Ashrafian on what approach to take to pursue his claim for damages. He commenced both an accident benefits claim and a tort claim.

(c) In January 2019, Ms. Masgras assigned her colleague Paul DeLuca to assume carriage of Mr. Ashrafian's claim. Mr. DeLuca passed away in October 2020. Ms. Masgras' colleague Mark Stoiko assumed carriage of Mr. Ashrafian's claim; he readied the case for trial and acted as counsel at the trial. Ms. Masgras says she has not been involved in the case since 2018.

(d) Ms. Masgras was unaware until she read my Reasons that a loss of income report was delivered outside the time prescribed by the *Rules of Civil Procedure.*

(e) Ms. Masgras was also unaware until she read my Reasons that on December 15, 2020, Mr. Stoiko had written Meditecs to ask that Meditecs retain a chronic pain specialist or an orthopaedic surgeon to assess Mr. Ashrafian and prepare an independent medical report.

(f) Meditecs is a private business. Its services include identifying appropriate doctors or other health care professionals to provide independent and objective medical assessments. Other businesses that compete with Meditecs provide similar services.

(g) The network of doctors and other health care professionals to which Meditecs and its competitors have access are independent practitioners, not employees of Meditecs. They are paid by Meditecs just as they would be paid by Masgras Professional Corporation or another law firm if retained directly (though, as mentioned below, generally in a lesser amount). Ms. Masgras says there is no reason to suspect bias on the part of independent specialists such as Dr. Friedlander or Dr. Shahmalak in the present case merely because they are retained through Meditecs. Ms. Masgras notes that both Dr. Friedlander and Mr. Irshidat testified in a *voir dire* that neither Meditecs nor Masgras Professional Corporation exercised any influence over Dr. Friedlander's assessment or report.

(h) Ms. Masgras states in her affidavit (in what I would describe as her opinion) that the services independent medical assessment businesses provide include finding qualified specialists to conduct assessments, arranging appointments, and assisting the specialists to prepare reports for the purpose of use in litigation. Ms. Masgras expresses her opinion that because a medical assessment business adds value to the law firm that retains them the law firm's charges are higher than the account of the specialists they retain. Ms. Masgras expresses her opinion that if the law firm simply billed the amount the specialists charged, the law firm would not be paid for their own services. As a private business , Ms. Masgras says the law firm is entitled to realize a profit.

(i) Ms. Masgras goes on in her affidavit and states that from her experience, doctors who are retained directly by law firms such as Masgras Professional Corporation charge higher fees than they charge independent assessment services such as Meditecs.

(j) Ms. Masgras suggests in her affidavit that medical practitioners who prepare expert reports based on independent assessments expect, and generally insist, on being paid immediately, though claims may continue for years before they are settled or result in final judgment. Meditecs pays doctors and other healthcare professionals it retains promptly but does not recover payment itself for the independent expert's fee or its own services until claims are settled or result in final judgment. Thus Ms. Masgras argues Meditecs is compensated not only for its services, but for the time value of money. Meditecs shares the financial burden of pursuing clients' claims.

(k) In the present case, Meditecs was charged $2,034 by Dr. Friedlander, including HST. That amount was paid by Meditecs to Dr. Friedlander. Meditecs sent an invoice to Masgras Professional Corporation for $5,000 including HST. That invoice has not been paid to date. Ms. Masgras suggests that interest that would have accrued to date on the $2,034 invoice from Dr. Friedlander if Meditecs was required to borrow from a bank would be in the approximate amount of $1,390.60, for a total of $3,424.60. According to Ms. Masgras she estimates Meditecs expenses to comprise approximately 15% of the amount of its invoice to Masgras Professional Corporation, or approximately $663.71, which would result in a profit for Meditecs of $336.46.

(l) The use of an independent assessment business such as Meditecs, it is suggested by Ms. Masgras, reduces the expense of prosecuting clients' personal injury claims for the entire time the claim is outstanding. Mr. Ashrafian has not been and will not be required to pay Meditecs' account or any other disbursements. Masgras Professional Corporation *never* requires clients to pay disbursements personally. Where cases are settled or result in final judgement in a client's favour, Defendants (or, generally, their insurers),are asked to pay disbursements, in which case they are entitled to challenge the reasonableness of the disbursements incurred. Where cases are not resolved in clients' favour Masgras Professional Corporation never seeks payment of disbursements from clients.

(m) Ms. Masgras plays no part in what fees Meditecs charges for its services. Nevertheless, Ms. Masgras has realized for several years that it may be suggested that her relationship to Mr. Irshidat may give rise to an apparent conflict of interest. For this reason, Ms. Masgras has endeavoured to obtain the informed consent of clients where Meditecs has been retained to arrange for independent medical assessments and reports.

(n) In the present case Ms. Masgras has been unable to locate a consent form signed by Mr. Ashrafian. In her affidavit Ms. Masgras deposes that she knows that Mr. Ashrafian knew that (1) Mr. Irshidat and Ms. Masgras are married, (2) Mr. Irshidat is the owner of Meditecs, (3) Mr. Irshidat, and Meditecs, were collaborating with Masgras Professional Corporation in pursuing Mr. Ashrafian's claim, and (4) that Meditecs was retained to arrange for independent medical reports to be prepared by Dr. Friedlander and Dr. Shahmalak.

(o) Ms. Masgras acknowledges that Mr. Ashrafian did not sign the consent form that was sent to him by a member of Masgras Professional Corporation's staff as referred to in my Reasons. Ms. Masgras then goes on to suggest in her affidavit that Mr. Ashrafian did not object to Masgras Professional Corporation continuing to act on his behalf, though the basis of the apparent conflict was explained to him. In Ms. Masgras' view, the conflict waiver form he was asked to sign was simply confirmatory of his agreement that Masgras Professional Corporation continue to act for him despite the presence of an apparent or actual conflict.

(p) Ms. Masgras notes in her affidavit that her duty of loyalty (including her duty of candour) to her clients, together with her duties as an officer of the court, are at all times Ms. Masgras' first priorities. Ms. Masgras believes she enjoys a deserved reputation for advancing her clients' interests even in preference to her own.

The Position of the Defence in Seeking Costs against Ms. Masgras

[5] Counsel for the defendants acknowledge that the imposition of a costs award against a lawyer should only be exercised in exceptional circumstances and with great care. The defendants do not argue that Ms. Masgras was unprepared or made errors in judgment in the presentation of the plaintiff's case at trial. Rather it is the position of the defendants that the mistrial was declared due to what counsel argues was the "deliberate, dishonest and concerning conduct of counsel, namely, that Ms. Masgras and Masgras Law Firm failed to disclose to their client, the defendants and the court that they were in a direct conflict of interest with respect to their form 53 experts".

[6] What underlies the position of the defendants is the suggestion that the evidence establishes that Ms. Masgras was dishonest in deliberately failing to disclose a direct conflict of interest of which she was clearly aware. In that regard, the defence points to the following evidence:

a. Ms. Masgras has been married to the owner of Meditecs since 2014;

b. The email communication from Masgras Law to the plaintiff dated April 2, 2021, which included the "consent document" evidences the knowledge of Ms. Masgras that she knew she was in a conflict and was equally aware of her obligation to obtain consent from her client to waive the conflict;

c. The medical legal assessments which were facilitated by Meditecs were completed in 2020, more than one year before any consent to waive the conflict was sent to the plaintiff;

d. The assessments were completed by Meditecs despite Ms. Masgras representing to the Law Society that she had stopped referring clients to Meditecs in March 2016.

[7] The defence does not argue that costs should be imposed against Ms. Masgras because of any negligence or error on her part. Rather the defence fundamentally argues that the conduct of Ms. Masgras amounted to deliberate and dishonest actions that resulted in the squandering of judicial time and resources.

The Position of Ms. Masgras

[8] As it relates to the potential conflict between Masgras and the plaintiff it is argued that while no signed consent by the plaintiff has been located, the evidence from Ms. Masgras is to the effect that her client, Ms. Ashrafian, was expressly informed in writing that the relationship between herself and Mr. Irshidat could be considered a potential conflict and that Mr. Ashrafian never objected to her firm continuing to act on his behalf.

[9] As it relates to the issue of the independence or neutrality of Dr. Friedlander and Dr. Shamalack it is argued there is no reason why this court should be concerned about their independence or neutrality simply because they were retained through Meditecs. In that regard it is argued both doctors received the same fee that they would have received had they been retained directly by Ms. Masgras and as such, it is argued there is no reason for

the court to suspect that either doctor would not honour their duty to provide objective, non-partisan evidence as they had certified that they would do pursuant to r. 53.03.

[10] As it relates to the fee charged by either doctor and the account then submitted by Meditecs it is argued that if the defendants or their insurers were asked to pay or challenge the reasonableness of Meditecs' fees, they could do so at the appropriate time. Ms. Masgras argues that she plays no part with respect to the setting of Meditecs fees and as such, the reasonableness of the fees do not justify an award of costs against her personally.

[11] As it relates to the two-part test for the imposition of costs against a lawyer personally it is argued that costs cannot be awarded personally against Ms. Masgras because she has not had carriage of the proceeding for years and as such, there is no element of unwarranted proceedings in this case.

[12] Finally, and perhaps most importantly it is argued on behalf of Ms. Masgras that the court must apply "extreme caution" and only award costs personally against a lawyer in rare and exceptional cases, not simply because the lawyer's conduct appears to fall within the wording of r. 57.07(1). It is also noted by counsel for Ms. Masgras that the court must bear in mind the potential reputational harm that any order for costs against Ms. Masgras would cause.

Legal Principles

[13] The court can only exercise its discretion to make an award of costs against a lawyer where the lawyer has been put on notice of their potential responsibility to pay costs. In this case

in my reasons granting the mistrial Ms. Masgras was put on notice of the potential for an award of costs to be made against her.

[14] The jurisdiction pursuant to which the court may make an award of costs against a lawyer is found in r. 57.07(1) of the *Rules of Civil Procedure* which provides as follows:

> 57.07 (1) Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,
>
> (c) requiring the lawyer personally to pay the costs of any party.

[15] The Supreme Court of Canada has considered the principles which are applicable where a request is made for a lawyer to be personally responsible for costs. In that regard Gascon J. in *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, [2017] 1 SCR 478 at para. 18 stated that:

> …that the awarding of costs against lawyers personally flows from the right and duty of the courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice. (citations omitted). As officers of the court, lawyers have a duty to respect the court's authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct.

[16] It is clear from the jurisprudence that the power of the court to make an award of costs against a lawyer personally is to be exercised sparingly, with restraint, and only in rare or exceptional cases: see *Standard Life Assurance Company v. Elliott*, [2007] O.J. No. 2031 at para. 25 and *Nazmdeh v. Spraggs*, 2010 BCCA 131.

[17] It is equally clear that trial judges must exercise extreme caution in awarding costs against the lawyer personally whether that jurisdiction is being exercised pursuant to the court's inherent jurisdiction or pursuant to r. 57.07(1): see *Carmichael v. Stathshore Industrial Park*, 121 OAC 289 applying *Young v. Young*, [1993] 4 SCR 3.

[18] In a recent decision of the Court of Appeal *Leaf Homes Limited v. Khan*, 2022 ONCA 504 the Court of Appeal set aside an award of costs against the lawyer personally because of a breach of the procedural requirements of r. 57.07(2). The Court of Appeal went on to provide guidance at para. 127 of its reasons as follows:

> A two-part test must be followed to determine the liability of a lawyer for costs under r. 57.07(1). First, the court must consider whether the lawyer's conduct falls within r. 57.07(1), in the sense that it caused costs to be incurred unnecessarily. Second, as a matter of discretion and applying extreme caution, the court must consider whether the imposition of costs against the lawyer personally is warranted. Such awards are to be "made sparingly, with care and discretion, only in clear cases, and not simply because the conduct of a lawyer may appear to fall within the circumstances described in [r]ule 57.07(1)". (citation omitted)

[19] A useful summary of when the courts have found it appropriate to make an award of costs against a lawyer personally can be found in the reasons of Reid J. in *Mitchinson v. Marshall*, 2018 ONSC 5632 at para. 21 where Reid J. held:

> The threshold for making an order to award costs against a lawyer personally is a high one, to be exercised in exceptional circumstances. Examples include cases that involve abuse of process, frivolous proceedings, misconduct, dishonesty or actions taken for ulterior motives where the effect is to seriously undermine the authority of the courts or seriously interfere with the administration of justice. Virtually all the cases involving an order to pay costs personally, whether under the *Rules of Civil Procedure* or otherwise, are based on a marked and unacceptable departure from the standard of reasonable conduct expected of a

> lawyer in the judicial system. Mistakes, negligence or errors in judgment are not typically sufficient to justify the costs award.

[20] In upholding an award of costs against Ms. Masgras personally, the Court of Appeal in *Ferreira v. St. Mary's General Hospital*, 2018 ONCA 247 at para. 34 held:

> It is not clear to me how Ms. Masgras derives any support for her position from the decision in *Jodoin*. The authority of a court to award costs against a lawyer personally was reviewed in that decision. The general requirement was stated by Gascon J., at para. 29:
>
> > In my opinion, therefore, an award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice.

[21] The Court of Appeal in its reasons in dealing with an entirely different factual situation than that which is before this court went on in para. 35 of its reasons in *Ferreira* as follows:

> …Ms. Masgras misused the court process and, in doing so, she brought the integrity of the administration of justice into disrepute. On this point, I refer to rule 2.1-1 of the *Rules of Professional Conduct* which reads:
>
> > A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

[22] While the factual basis upon which a costs award against Ms. Masgras was upheld in *Ferreira* the principles are clear and well known to Ms. Masgras.

Analysis

[23] Much of Ms. Masgras new evidence suggests that she knew nothing about the conduct of Mr. Ashrafian's claim until after she reviewed my Reasons granting a mistrial. There are a number of issues with her evidence in this regard. First almost all of the court filings show Ms. Masgras as the lawyer of record. In this regard by reference to court documents filed on CaseLines the following are noteworthy.

(a) The Plaintiffs pretrial memo for the pretrial on September 15, 2022, shows counsel for the Plaintiff as "Georgina Masgras/Mark Stoiko;

(b) The Plaintiffs pretrial memo for the pretrial on June 22, 2023, shows counsel again as "Georgiana Masgras/Mark Stoiko;

(c) The plaintiffs *Ontario Evidence Act* Notice of Intention shows Georgiana Masgras and Mark Stoiko as the lawyers of record;

(d) The factum filed on behalf of the Plaintiff in support of the motion to late serve his loss of income report is signed by Mr. Stoiko with a backing sheet showing Ms. Masgras as the lawyer of record. The Motion Record filed in support of the motion shows Ms. Masgras as "the lawyer for the plaintiff". Ms. Masgras deposes in her affidavit she knew nothing about the late service of the loss of income report which seems inconsistent with the Notice of Motion filed in her name. Noteworthy is the fact the affidavit in support of the motion was sworn by Mr. Stoiko and he appeared on the motion and argued it.

(e) On November 17, 2023, the back sheet of the Affidavit of Service of Mr. Stoiko in relation to the motion record and factum filed in relation to the late service of the loss of income expert report, shows Ms Masgras as the lawyer for the Plaintiff

(f) On November 21, 2023 the back sheet of Mr Stoiko's Affidavit of Service of the Plaintiff's Request to Admit shows Ms Masgras as the lawyer for the Plaintiff

(g) On November 28, 2023, the back sheet of the Affidavit of Service of Mr. Stoiko in relation to a Motion Record that was served in relation to the plaintiff's request to cross examine the defendants investigators shows Ms Masgras as the lawyer for the Plaintiff .

[24] The Court is entitled to rely on pleadings filed by counsel as accurately describing the lawyer of record who is retained to act on behalf of a client. In this case the Court record

as reviewed in paragraph 23 above reflects that Ms. Masgras was the lawyer for the plaintiff. I simply do not believe Ms. Masgras when she says she has not been involved in the case since 2018. As recently as November 2023 Ms. Masgras is described on the back sheet of affidavits of service as the lawyer for the plaintiff .

[25] As it relates to the evidence about Mr. Ashrafian being employed at Masgras, it is worth noting that in his evidence at trial Mr. Ashrafian testified at length about his employment history pre and post accident. There was no mention in his evidence that he had been employed by Masgras on a field placement nor was there any attempt to elicit this evidence by his counsel.

[26] Ms. Masgras maintains in her affidavit she was unaware until she read my Reasons declaring a mistrial that Mr. Stoiko had written to Meditecs requesting that Meditecs retain a chronic pain expert. Her evidence in this regard is inconsistent with an email from Dr. Friedlander dated January 5, 2021, which was addressed to staff@meditecs.ca Dr. Friedlander also sent a copy of his email to Georgiana Masgras. In his email Dr. Friedlander confirms that he would see "this client" i.e. Mr. Ashrafian on January 15, 2021. Either Ms. Masgras does not read her emails or her evidence to this Court does not line up with the documentary evidence.

[27] Ms. Masgras deposes in her affidavit that she plays no part in the fee charged by Meditecs. She acknowledges that for several years she has realized that it could be suggested there is an apparent conflict of interest between her law firm and Meditecs because she is married

to Mr. Irshidat who is the sole shareholder of Meditecs. For this reason, she deposes she has endeavoured to obtain "the informed consent" of her clients when Meditecs is retained. From this I infer that Ms. Masgras and her firm continue to use Meditecs but only when they have received their clients consent to do so i.e. the client has waived the apparent conflict.

[28] The acknowledgement of Ms. Masgras that she continues to use Meditecs is concerning. I say this because she told the Law Society of Ontario as reflected in the Reasons of the Law Society Tribunal – see *Law Society of Ontario v Ortiz* 2023 ONLSTH 80 at para 20 that, "In March 2016 she stopped sending clients to or accepting referrals from the clinics (Meditecs)." This assertion is in direct contrast with Ms. Masgras' affidavit where she says she only retains Meditecs after she has the client's informed consent. No where in her affidavit does Ms. Masgras dispute, she told the Law Society she had stopped sending clients or accepting referrals from Meditecs. I can only conclude that both versions can not be true.

[29] What is also troubling from the reasons of the Law Society in *Ortiz* is another apparent inconsistency in the story about how experts are retained by Masgras and how the apparent conflict of interest has been addressed by Masgras. The conflict of course is not just the conflict of interest as it relates to the solicitor client relationship but also the fact the conflict was never disclosed to the defence. In that regard at para 46-47 of *Ortiz,* The Law Society Tribunal noted as follows:

> The LSO letter arose out of a prior inquiry into Ms. Masgras' alleged conflict based on her relationship with Mr. Irshidat. In 2015, two

> insurers complained to the Law Society that Ms. Masgras acted in a conflict of interest when she acted for eight clients who received medical assessments at one of the clinics owned by her husband. The Law Society investigated.
>
> In the December 5, 2017, LSO letter, the LSO investigator advised the investigations into the alleged conflict of interest complaints were being closed without initiating regulatory proceedings. In the letter, the investigator advised that the relationship between Ms. Masgras and her husband amounted to a conflict of interest but **that regulatory proceedings were not warranted because Ms. Masgras had instituted procedures pursuant to which she disclosed the conflict to the insurer (insurer notification) and had her clients sign the consent form." (emphasis added)**

[30] It would appear that Ms. Masgras advised the Law Society that if and when she retained Meditecs not only did she get the consent of her client, but she went one step further and told the Law Society that she would disclose the conflict to the insurer as well. Ms. Masgras maintains in her affidavit (see sub para (o) above) that Mr. Ashrafian had the conflict explained to him and he did not object to the involvement of Meditecs in retaining Dr. Friedland. It is particularly noteworthy that there is no evidence from Mr. Ashrafian confirming this important detail. As of the time of the hearing of this motion Ms. Masgras still represents Mr. Ashrafian. While there may very well be a potential conflict in Ms. Masgras continuing to represent Mr. Ashrafian the absence of any confirmatory evidence from Mr. Ashrafian is unexplained by Ms. Masgras.

[31] Ms. Masgras told the Law Society that she would disclose the conflict to the insurer. There is also absolutely no evidence that Ms. Masgras ever advised counsel for the defendants in this case of the conflict. If that conflict had been disclosed at the time when Dr. Friedlander's report was served on defence counsel, the issue of the conflict should never have materialized in the mistrial in this action. I say this because if the defence knew

of the conflict it would have been incumbent on the defence to raise the conflict before the trial ever began.

[32] Ms. Masgras seeks to justify the increase in the cost of Dr. Friedlander's account from $2000 to $5000 as something that was for the benefit of Mr. Ashrafian i.e. he did not have to pay Dr Friedlander at a point in time when Dr Friedlander expected payment. There are factual and legal issues related to this position asserted by Ms. Masgras. There is no evidence from Dr. Friedlander as it relates to his expectations regarding the timing of the payment of his fee. As explained below the nature of the retainer between Masgras and Mr. Ashrafian is not disclosed to the court but the suggestion that the increased cost from $2000 to $5000 was somehow beneficial to Mr. Ashrafian defies logic. Mr. Masgras suggests it was beneficial because Mr. Ashrafian didn't have to pay Dr. Friedlander. Apart from the lack of any evidence that Dr. Friedlander expected immediate payment Ms. Masgras has presented no evidence in the nature of the retainer agreement that would have required Mr. Ashrafian to pay disbursements as they were incurred.

[33] In her affidavit Ms. Masgras suggest that the interest on Dr. Friedlander's invoice would have attracted an interest cost to date of $1390.00. Ms. Masgras asserts in her affidavit that using an independent assessment business like Meditecs "reduces the expense of prosecuting clients' personal injury claims". These arguments together with the assertion Mr. Ashrafian would never have to pay the disbursement from Meditecs are all put forward by Ms. Masgras to justify the use of Meditecs.

[34] The suggestion that Dr. Friedlander's invoice of $2,024 rendered on February 17,2021 would today attract an interest cost of $1,390 is very difficult to accept. In 2021 the Bank

of Canada key lending rate was 0.5%. Interest rates that would have been charged on a line of credit in 2021 would undoubtedly have been higher than 0.5%. Interest rates since 2021 to date have of course also increased. A simple mathematical calculation enables the court to conclude that a simple interest accrual of $1390 over 38 months to date would require that the lender charge approximately 21% on the invoice of $2,024-a rate of interest difficult to align with Ms. Masgras' assertion that using an independent assessment business like Meditecs somehow reduces the expense of prosecuting a personal injury claim. Such an assertion simply can not be true. To the contrary where a so-called independent assessment business is used to facilitate medical examinations there needs to be transparency in terms of the costs involved. To simply more than double Dr. Friedlander's invoice lacked transparency and rendered the disbursement from Meditecs unreasonable.

[35] It is somewhat remarkable that Ms. Masgras in her affidavit states that she "estimates that Meditecs expenses comprise approximately 15% of the amount of its invoice to Masgras Professional Corporation or approximately $663.71 which would result in a profit for Meditecs of $336.46". I comment that this statement is somewhat remarkable because Ms. Masgras is not the owner of Meditecs (her husband is) and she asserts in her affidavit she plays no part in what fees Meditecs charges. It is therefore difficult to understand let alone give much credence to her assertion that Meditecs expenses compromise 15% of the invoice to Meditecs from a doctor like Dr. Friedlander.

[36] What is of particular concern is the suggestion in Ms. Masgras' affidavit that because" a medical assessment business adds value to the law firm that retains them the law firm

charges are higher than the account of the specialist". Ms. Masgras goes on to suggest "if the law firm simply billed the amount the specialist charged the law firm would not be paid for their own services". In short Ms. Masgras says the "law firm is entitled to make a profit".

[37] Ms. Masgras fails to understand the difference between the legitimate time cost reflected in a lawyers account and the disbursements incurred by the lawyer to pursue a claim on behalf of the client. While the word disbursement is not defined in the *Rules* it is understood to mean an expense incurred by a lawyer on behalf of a client to advance the litigation. Disbursements must be reasonable. An assessable disbursement for an expert's report must be reasonable and it must be provided to the other party – see Rule 57.01 Tariff A.

[38] It simply can not be the case as suggested by Ms. Masgras that a law firm which utilizes the services of a medical assessment business can somehow charge a higher fee or added cost to the disbursement so the law firm can realize a profit. In this case Dr. Friedlander submitted an invoice of $2024. No one would dispute such a cost as being anything other than reasonable. The justification suggested by Ms. Masgras for then increasing that cost to $5000 is untenable.

[39] The affidavit evidence of Ms. Masgras does not specifically mention that her retainer with Mr. Ashrafian involved a contingency fee arrangement (CFA). Her affidavit does however suggest some of the usual features of a CFA such as her evidence that "if cases are not resolved in a client's favour Masgras Professional Corporation never seeks payment of disbursements from clients".

[40] Part of the reason why a CFA is now a common part of personal injury litigation is that the Law Society has approved the use of CFAs. As well the court has embraced the use of CFAs because they have provided access to justice for some litigants who might not otherwise be able to afford to litigate a personal injury type claim. Part of the reason why lawyers receive a not insignificant percentage of the settlement and or judgement recovered by a plaintiff/client is because the lawyer has assumed a financial risk. The financial risk often means the lawyer funds the disbursements needed to advance a claim.

[41] While it would be difficult to endorse the use of Meditecs or any other similar arrangement, at the very least there is an obligation on the lawyer to make full, fair and frank disclosure to the client; opposing counsel and the court. By that I mean the client must be made aware of the arrangement and consent obtained. Consent must mean informed consent-not implied consent. In this case there is no written record that Mr. Ashrafian understood the nature of the arrangement; the conflict; and its implications. There is also no evidence that the conflict was ever disclosed to the defence in the manner that Ms. Masgras told the Law Society in *Ortiz* that she would. There was also no disclosure to the court until the Court requested it from Mr. Stoiko during the mistrial motion.

[42] The two part test the court must apply where costs are sought against a lawyer requires this court to consider: 1) did the conduct of Ms. Masgras cause costs to be incurred unnecessarily and 2) using extreme caution to consider whether the imposition of costs against Ms. Masgras is warranted. -see *Leaf Homes* para 127.

[43] The court must also consider whether there was any conduct on the part of Ms. Masgras that was of such a nature that it could be said to have frustrated or interfered with the administration of justice. Such conduct would require this court to consider an award of costs against Ms. Masgras as part of its duty to supervise the conduct of lawyers appearing before this court.

[44] The costs of the mistrial, whatever those costs might be, are costs that have been incurred unnecessarily. If Ms. Masgras had lived up to her representations to the Law Society the mistrial would never have occurred. It would not have occurred because the conflict with Meditecs would have been disclosed by Ms. Masgras not only to Mr. Ashrafian but also to defence counsel. The only remaining question is whether the conduct of Ms. Masgras can be said to have frustrated or interfered with the administration of justice.

[45] Ms. Masgras is no stranger to the potential for a costs award being made against her. In *Ferreira v. St Mary's General Hospital* 2018 ONCA 247 in a fact situation very different from the facts before me Nordheimer J.A. stated:

> [34] It is not clear to me how Ms. Masgras derives any support for her position from the decision in *Jodoin*. The authority of a court to award costs against a lawyer personally was reviewed in that decision. The general requirement was stated by Gascon J., at para. 29:
>
> > In my opinion, therefore, an award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice.
>
> [35] In my view, the facts of this case amply establish that Ms. Masgras' actions "seriously interfered with the administration of justice." She acted without instructions. She acted in a manner that

> was directly contrary to the wishes of Mr. Ferreira's family. And she did so when one of the most difficult, emotional, and personal of decisions was being undertaken by them. Further, Ms. Masgras' actions potentially interfered with the ability of another individual to receive what might well have been a life-saving organ transplant. Ms. Masgras misused the court process and, in doing so, she brought the integrity of the administration of justice into disrepute. On this point, I refer to rule 2.1-1 of the *Rules of Professional Conduct* which reads:
>
> > A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

[46] While the facts in *Ferreira* are quite different from the facts before this Court, I take from the Reasons of Nordheimer J.A. that where a lawyer's conduct seriously undermines or interferes with the administration of justice then the court can and should step in and consider making an award of costs against the lawyer. In this case Ms. Masgras knew as of when the *Ortiz* matter was decided by the Law Society Tribunal (April 27,2023) that she needed to have her clients consent as it relates to the continued involvement of Meditecs. More importantly she would have been well aware of her representation to the Law Society that the conflict should be disclosed to the defendant's insurers.

[47] Ms. Masgras maintains in her affidavit she didn't know that Mr. Stoiko had requested Meditecs assistance in retaining the services of doctor with a speciality in chronic pain. I simply do not believe Ms. Masgras. She received a copy of an email from Dr. Friedlander dated January 5,2021 in which Dr. Friedlander confirmed he would see Mr. Ashrafian on January 15,2021. As I have already indicated I also don't believe Ms. Masgras when she says she knew nothing about the carriage of the Ashrafian file since 2018. The Court record demonstrates otherwise.

[48] Ms. Masgras' conduct as it relates to the Friedlander account is also extremely problematical. She seeks to justify the more than doubling of Dr. Friedlander's invoice as being designed to "reduce the expense of prosecuting clients' personal injury claims for the entire time the claim is outstanding". I fail to see how it can be argued there is any saving of expense. Rather there is a more than twofold increase in the disbursement cost attributed to Dr. Friedlander – an increase that is never disclosed to the defence or the client. This is troubling in two ways. First assuming Mr. Ashrafian's claim was settled for a hypothetical amount of $100,000 inclusive of costs and disbursements, Mr. Ashrafian would receive an account from Ms. Masgras for her fees plus disbursements. One of the disbursements would have been the Meditecs account which included the $5000 for Dr. Friedlander's invoice. Mr. Ashrafian would never have known that the actual invoice cost of Dr. Friedlander was just over $2000. Equally troubling is if the case settled at the pre-trial when the defence was given the list of the plaintiff's disbursements the defence would also not have known of the inflated cost of the invoice from Dr. Friedlander.

[49] The inflated cost of Dr. Friedlander's account is also of concern in a larger sense. All to often as a trial judge and as a pre-trial judge I see the costs of experts continually rising. No one can doubt that an expert with professional expertise should be properly compensated for his or her time and in this case the account of Dr. Friedlander was reasonable. Nothing that Dr. Friedlander did in this case was improper. What was improper, and misleading was to represent to the defence that the invoice from Meditecs was a true reflection of Dr. Friedlander's invoice. It was not.

[50] Everyone associated with the personal injury Bar and for that matter all civil cases, needs to do everything in their power to reduce the reliance on medical-legal experts which only add to and increase the cost of litigation. At the very least the disbursement cost of an expert must be fair, reasonable and proportionate to the realistic recovery at trial. Most important of all the disbursement cost for which payment is sought-whether from the client or the opposite side, must represent the uninflated cost of the expert.

[51] This is one of the rare and exceptional cases where the conduct of Ms. Masgras requires the court to exercise its responsibility to supervise the conduct of a lawyer where the conduct is of such a nature that it both frustrated and interfered with the administration of justice. Ms. Masgras has not in my view been candid with the court for reasons I have reviewed above. Ms. Masgras made representations to the Law Society which were either false or in the alternative were representations that she never adhered to in her practice Ms. Masgras despite her representations to the Law Society continues to use Meditecs and contrary to her representations to the Law Society she did not disclose her conflict to the defendant's insurer. The mistrial in this case would not have happened if Ms. Masgras had not only adhered to what she told the Law Society but equally important it would not have happened if she had been candid with the Court and the defendants.

[52] The mistrial was entirely avoidable. Ms. Masgras represents in her affidavit that her priorities are her duty of loyalty and candour to her client and to the court. Ms. Masgras' actions in this case demonstrate otherwise. Regrettably, what underlies Ms. Masgras' actions is a complete misunderstanding of what the word candour means. Candour required disclosure of the conflict to the client; to the defendants and to the court. Candour required

full disclosure of the inflated cost of Dr. Freidlander's invoice to the client; the defendants and to the court. None of this happened. This is the rare case where the court should exercise its discretion to award costs of the mistrial against Ms. Masgras. To do otherwise would be to countenance such conduct and to potentially have the client pay the mistrial costs-which would be patently unfair to Mr. Ashrafian where his conduct in no way caused the mistrial.

[53] The costs of the mistrial will be paid by Ms. Masgras. The only remaining issue is the quantum of such costs. Counsel are encouraged to agree on such quantum. If agreement can not be reached the court will entertain written submissions limited to five pages to be received no later than June 1, 2024. If no submissions are received after June 1 the court will assume the issue of the quantum of costs has been resolved.

[54] As for the continuation of these proceedings I am inclined subject to the input of counsel, to place this matter on the September 2024 blitz list. Counsel may make arrangements with my judicial assistant for a case conference to address the trial of this matter.

[55] Before I leave these reasons Mr. Mackenzie correctly urged this court in his submissions to reflect on the potential reputational harm that an order for costs against Ms. Masgras might have. I agree with Mr. MacKenzie. While reputational harm should not be an overriding consideration it is something that can not be ignored. In this case I fully understand that my decision may have an impact on Ms. Masgras' reputation. Her reputation and the reputation of any lawyer is something that must be assiduously guarded by the lawyer. Once a reputation is lost it is difficult to regain. Ms. Masgras must reflect

on what she did that caused the mistrial as well as this court's order in awarding costs against her. It will be up to Ms. Masgras to regain the confidence of the court.

EDWARDS, R.S.J.

Released: April 30, 2024

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ALI ASHRAFIAN

Plaintiff

– and –

CYRUS KAVARANA and NISSAN CANADA INC.

Defendants

REASONS FOR DECISION ON COSTS

EDWARDS, R.S.J.

Released: April 30, 2024