CITATION: Nadarajah v. Lad, 2015 ONSC925

COURT FILE NO.: 11-CV-421339

Heard: December 8, 2014

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **Nadarajah v. Lad**

BEFORE: Master Joan Haberman

COUNSEL: Van Allen, J. for the plaintiff

Fiorita, D. for the defendant

REASONS

Master Haberman:

[1] The plaintiff seeks to set aside an Order of the Registrar dated **October 25, 2011**, by which he dismissed this action as abandoned.

[2] The plaintiff's submissions on this motion focus on the involvement of an articling student (referred to as "AS") on this file. AS suffered from substance abuse problems and the plaintiff has set him up as being, in large part, responsible for the file having been neglected.

[3] To the extent that AS's handling of the file was a catalyst for these events, the defence points out that, as AS was a student, there was an expectation that he would be mentored, that his work would be supervised and that his work product would be reviewed. Thus, simply blaming AS for this outcome does not address the root problems of delay and neglect that have plagued this file.

[4] AS's illness may have contributed in a small way to the dismissal order not having been dealt with in a timely way. However, on the evidence, it is clear that the lack of supervision provided to him; the firm's apparent lack of recognition that having no system in place to monitor how dismissal orders are dealt with; and their cavalier approach to the file while AS was away in treatment and after he left the firm are what actually led to this result. Although the firm was aware from a certain point of AS's problems, he was essentially left to his own devices to deal with this file and even when he was on leave, and after he left his employment, no one made a point of reviewing his work or lack thereof.

[5] The firm also had no system in place for keeping track of deadlines, dismissal notices or orders, and it appears no mentoring was provided to AS or to their articling students generally, in terms of how to go about managing these files.

[6] I am therefore unable to simply excuse the extraordinary delays here on the basis of a student not having attended to an assigned task. He was, after all, a student, and one who was not well, a fact known to his firm. It is the firm that has carriage of the action and lack of activity by the firm, not simply the student, is the critical factor and where the court's focus must be. In any event, AS's responsibility for the file accounts for a period of no more than 3-4 months.

[7] As I explain below, this was not a case of inadvertence but rather, it involved of a series of unfortunate and deliberate decisions made by the firms and its members.

[8] For the Reasons that follow, the motion is dismissed. While this result, caused by his counsel, may seem unfair to the plaintiff, I am required to do justice as between the parties. Where a client has retained counsel who makes a series of bad choices that leads to a bad result, it is also not fair to the defendant if all of that can simply be overlooked and the action reinstated.

BACKSTORY

[9] A statement of claim was issued on **March 2, 2011** in this action for damages as a result of injuries allegedly sustained in a motor vehicle accident that occurred in

March 2009. It is, therefore, almost 4 years since the claim was issued and almost 6 since have passed since the events giving rise to the action.

[10] The plaintiff seeks damages totalling $1 million. The statement of claim is what is referred to as "boiler plate" in the industry, so it is difficult to assess much about this plaintiff's actual losses or injuries form the pleading.

[11] On **August 31, 2011,** the court issued a Notice that the Action will be Dismissed ("dismissal notice"). As no efforts appear to have been taken to address it, the action was dismissed by the Registrar **about two months later, in October 2011.**

[12] These events were followed by a long series of missteps in getting and appearing at a hearing for a motion to set aside the dismissal order. Even when a date was obtained, it was lost on more than one occasion due to the firm not having done as required. The saga follows.

[13] The motion was initially scheduled for **April 26, 2012** but as counsel failed to confirm it, it was marked as withdrawn. According to the case history, the motion could not have proceeded on that date, in any event. The date was scheduled unilaterally, without input from the responding party and the motion materials had not yet been served or filed. Simply booking a motion date without taking any steps to ensure the date will be used cannot be viewed as taking a step to deal with a dismissal order.

[14] The motion was not rescheduled until **January 29, 2013**, at which time it was adjourned on consent, but, again, only 15 minutes were booked for it. This was almost two years after the action had been dismissed. The time booked was not a reasonable estimate to argue what counsel already knew would be a contested motion.

[15] That was not the only problem that day. Although the motion had been booked **in September 2012,** again without consultation with responding counsel, the motion record was not served until **January 17, 2013**, and then by regular mail. When service is affected by mail, it is deemed to have occurred 5 clear days after the

material has been posted. Thereafter, a party is entitled to 7 clear days' notice. As a result, 12 days between mailing and a hearing date will never be enough, as it ignores weekends, which the Rules dictate must be omitted from the count.

[16] Thus, though defence counsel sought the adjournment, it is something they were entitled to, as the materials had been short-served. An adjournment was also required in view of the short amount of time that had been booked. **It is important to note that the defendants were not served with any motion materials until more than 15 months after the action had been dismissed.**

[17] The matter turned up on my list on **May 16, 2013**, and I adjourned it to October for an hour, as, once again, the time booked would clearly not suffice.

[18] When the matter returned before me on **October 17, 2013**, I adjourned it yet again, as, this time, Mr. Wilkins, counsel with carriage, filed an affidavit from someone who appears to have relied extensively on what they were told by him. He then turned up to argue the motion, based on what was effectively his own evidence. I told him I would have to disregard all of the evidence that was based on what he said, knew or did, to the extent that it was contentious. He agreed to putting the matter over to May 2014 and paying costs thrown away.

[19] At that time I also made the following order:

> *Mr. Wilkins will file his own affidavit by the end of October 2013 and that is the only evidence that will be relied on by the moving party next day.* ***His affidavit will in no way add to or embellish anything Mr. Pazuki already stated****. It is understood that Mr. Pazuki will now argue the motion, such that his affidavit can simply be ignored in its entirety. The new affidavit should be bound in a supplementary motion record.*

[20] At the same attendance in October, I queried Mr. Wilkins as to why Law Pro was not involved. As the action has already been dismissed there was serious potential exposure for him and the firm, and in most cases of this nature, counsel reports the potential loss to the insurer. Had Wilkins done as suggested at that

time, LawPro would have been on hand for the next attendance. At that time, Wilkins expressed the view that he was not going to get the insurer involved.

[21] Instead, it seems that Wilkins waited until **December 6, 2013** to notify his insurers. This was well over two years after the dismissal order.

[22] When the matter returned before me on **May 22, 2014**, the plaintiff sought yet a further adjournment, as a result of LawPro counsel having finally become involved. Had Wilkins involved them at the outset, much of the delay in getting the motion on would have been avoided. Even if he had done it in response to my suggestion 7 months earlier, the parties would likely have been ready to participate in the hearing on this scheduled date.

[23] Despite serious misgivings, in view of the nature of the relief sought at that time, I granted the adjournment and set a tight timetable. I also allowed new materials to be filed.

[24] In view of materials filed and to be filed, it was clear that a long motion slot was now needed. The motion was finally scheduled for and heard on **December 8, 2014, more than three years after the action was dismissed.** In large part, this delay was caused by counsel – failing to prepare and serve motion materials in time for a scheduled motion date; failing to confirm or withdraw and rebook that motion; failing to book enough time repeatedly; late service of motion materials; failing to consult with responding counsel regarding mutually convenient dates; filing what was effectively counsel's own evidence and failing to notify the insurer until very late in the piece.

PLAINTIFF'S EVIDENCE and the GAPS IN IT

[25] In view of the relief sought, the plaintiff was given considerable latitude with respect to his evidence. The original record with the Pazuki affidavit was put to one side, as had been agreed, and the plaintiff was permitted to refile his evidence, as related by Paul Wilkins, his counsel. LawPro counsel then filed three new motion records.

[26] The plaintiff, himself, filed two identical affidavits, the first sworn on **June 12, 2014**, the second on **September 15, 2014**. It appears that only the second affidavit was translated for Nadarajha before he swore to the truth of its contents.

[27] The plaintiff has included the affidavit of Guna Ponnampalan, a certified community interpreter, in his materials. Her affidavit is sworn **September 15, 2014**, the same date as the second Nadarajah affidavit. Ms. Ponnampalam states that she translated the Nadarajah's affidavit and attached exhibits from English to Tamil for the plaintiff before he swore the contents of the affidavit were true. Ms. Ponnampalam also acted as the interpreter for Nadarajah when he was cross-examined on this affidavit.

[28] In view of Ms. Ponnampalam's evidence, it appears that it was determined that the plaintiff required the services of an interpreter. How then did Nadarajah generally communicated with the firm or with Wilkins? There is no evidence explaining this.

[29] Further, if the plaintiff required the aid of a Tamil interpreter in order to understand the draft affidavit, how was he able to convey his evidence to the firm which they then used as the basis for the affidavit and for the previous version? Nadarajah confirmed, when cross-examined, that had not had the benefit of an interpreter when he swore his affidavit of June 12, 2014.

[30] All of this raises questions about the weight of the plaintiff's evidence.

[31] In both of his affidavits, Nadarajah asserts that it was always his intention to proceed with this action. He left the matter in Wilkins' hands and saw no need to follow up regularly to inquire about its status. From time to time, he says, he was in touch with the firm, and understood from them that the matter was proceeding along a normal course. He does not explain who he spoke with or how they were able to communicate. He confirmed when cross-examined that he was not even aware of the Notice of Dismissal or the Dismissal Order until June 12, 2014, when he swore his first affidavit. This was long after these documents were

issued by the court and contrary to the firm's obligation to convey this information to him as it become available to them.

[32] The more significant aspects of the plaintiff's evidence was introduced through his counsel, Paul Wilkins. He states that his affidavit of June 13, 2014 is supplementary to one he swore in October 2013. The earlier affidavit was not placed before the court on the return of this motion so was not relied on.

[33] Wilkins indicates that at the time of the events giving rise to this motion, he worked with SLS, though he has since left that firm. Nadarajah apparently retained the firm on **June 25, 2010** to pursue his claim for damage, and the matter was assigned to Wilkins at that time.

[34] In **July 2010**, Wilkins wrote for the complete police report. **He did not provide notice to the defendant, however, until February 26, 2011. This was more than a year after SLS was retained, only days before issuing the claim, and shortly before the expiry of the limitation period**. This timeframe is not explained in the evidence.

[35] Economical General Insurance ("EG") responded on **March 1, 2011**, to advise that they did, indeed, insure the defendant for up to $1 million for liability. The statement of claim was issued the following day and the **defendant was served on March 30, 2011**.

[36] There is nothing in the evidence to suggest that Wilkins took any steps to ensure that the defendant was told they must deliver their statement of defence within 6 months, to avoid the plaintiff going offside Rule 48.15. In fact, the evidence suggests quite the opposite.

[37] Wilkins conceded when cross-examined that he did not maintain his own bring forward system to ensure that he received some form of alert before the expiry of this critical 6-month period approached. It appears he relied solely on the court-issued notice to track the time. This, in itself, is problematic, as it put him in the position of not knowing when to seek an extension of the Rule 48.15 deadline.

[38] On **April l2, 2011**, Wilkins spoke with Brian Schnider, the adjuster assigned to the file by EG. At that time Wilkins agreed to review the matter with an eye to early settlement. This conversation was confirmed by Schnider in a letter sent that day, in which the latter noted that *if at any point negotiations break down, **we will file a Statement of Defence within 30 days of your request that we do so***. Thus, had Wilkins diarized the matter to come forward 30 days before the expiry of the 6 month period, the dismissal order would have been avoided. But, again, it appears Wilkins took no steps to keep track of timing, to ensure that he sought a defence from EG with at least 30 days to run before action dismissal.

[39] It is not clear if Wilkins even made Schnider aware of the fact that he had yet to gather any relevant documents to assist him in evaluating the claim and that he was, therefore, in no position to begin settlement discussions. In view of the fact that he had yet to amass the necessary damage documents, it ought to have been clear to Wilkins that settling the case before the expiry of the Rule 48.15 deadline was going to be very difficult. All the more reason for him to have diarized the deadline.

[40] On **April 4, 2011**, ten months after SLS was retained, Wilkins wrote for the medical file of Dr. Shalini (it is not clear if this was the plaintiff's family doctor and his/her speciality is not described in the evidence): the employment file of RIM (presumably where the plaintiff worked, but Wilkins does not say); the medical file of the Brar Medical file (there is no evidence at all about their involvement in the matter); and the plaintiff's tax returns from 2005 – 2011 (though notices of assessment are not mentioned). The delay in seeking these documents is not explained in the evidence.

[41] As noted, Wilkins conceded when cross examined that he had no personal system for keeping track of dismissal timelines. Neither, it seemed, did the firm. When cross-examined he was asked:

> *...what system did you have in place in terms of a diary system or a tickler system to ensure that matters didn't get dismissed (sic) what did you have in place at that time?*

[42] He stated:

> *...we gave it to the articling students, that was the system.*

[43] Yet, in his affidavit, Wilkins claims that his failure to diarize or follow up with EG to have them file their statement of defence was through inadvertence. There is no evidence that Wilkins had any system for keeping track of the Rule 48 deadlines. In fact, his evidence when cross-examined is clear: there was no system for keeping track of these deadlines.

[44] When clarification was sought on cross-examination, Wilkins stated:

> *...they (the **articling students) were largely unsupervised** and if they had any issues, if they had any concerns, **they would have brought it (sic) to my attention**. That's how SLS worked and I was working within that framework.*

[45] The Notice of Action Dismissal was issued by the court on **August 31, 2011.** Wilkins claims he did not receive a copy of it and that if it was received by SML, it was misfiled or mislaid. According to his cross-examination evidence, however, it appears that when these notices came in, *the policy at SLS was **just to give it to an articling student***, so it is not clear that Wilkins would have ever received this notice personally. If the notice had been received, it likely would have been given to a student.

[46] There also appears to have no system to record these notices when they came in or to track the deadlines they prescribed before dismissal orders were issued – at least, the evidence is silent on this point, so I am left to infer it.

[47] Wilkins states that he became aware that the action had been dismissed during the **week of October 25. 2011**. As he claims he was not aware of receipt of the

Dismissal Notice, it is not surprising that there is nothing in his evidence to indicate that he at any time followed up with any articling student about how he was dealing with it. It seems there was no master list as to which students were given which matters and when.

[48] Wilkins notes that he gave the dismissal order to AS, *with instructions to schedule a motion date to set aside the Dismissal Order and prepare the requisite material.* This would have been after October 25, 2011. Wilkins does not say that he discussed how to go about this with AS; that he gave him precedents to assist him; that he asked for a progress report by a certain date; that he indicated in whose name the supporting affidavit should be drafted; or that he followed up with AS at any time in any way. There is no written memo to AS in evidence.

[49] Wilkins essentially explains why that was the case in paragraph 18 of his affidavit, where he states:

> ***During the fall of 2011**, AS's **primary assignment** was to deal with all incoming notices of dismissal and dismissal orders. AS was **largely unsupervised** in this assignment.*

[50] As this became AS's assignment in the fall of 2011, he would not have been the student who received the dismissal notice, assuming it had been received by the firm.

[51] Wilkins then discusses AS's personal situation. He states in his affidavit that, in **November 2011**, so possibly within days of, and certainly no longer than a month, after having received this assignment, the firm learned that AS suffered from substance abuse problems. At that time *at the urging of the Law Society*, he entered a rehabilitation program. Wilkins does not discuss what became of AS's time sensitive work. There is no indication that he took it back or reassigned it in his affidavit.

[52] What is clear of that SLS must have been aware of AS's problems before he began his leave. Wilkins points out that the firm paid for the treatment so presumably they got the Law Society involved. Yet, it does not appear that Wilkins or anyone else at SLS reviewed AS's work at any time, despite becoming aware of his substance abuse issues.

[53] Wilkins was asked about this on cross-examination. All he had to say was that *there were* ***limited resources and I was already tasked.*** **He agreed that he was** ***too busy.***

[54] Wilkins also speaks of having been overwhelmed by AS's departure, noting that he had been advised he would be back by January. Although he agreed that he knew of the January return date, he also insisted he was only going to be gone for 4 weeks – no matter how you count the time, even if AS had left on November 30 and returned on January 1, that would have been more than 4 weeks.

[55] In his affidavit, Wilkins says that when AS returned to the firm in **January, 2012**, he asked him to resume work on this file. There is no evidence that Wilkins reviewed the file during AS's absence. Thereafter, it appears Wilkins and SLS again simply left AS to it, though by this point, they were well-aware of the young man's issues. Wilkins' evidence is as follows:

> *For a time,* ***I believed that AS had dealt with his substance abuse problems*** *and was working on the matter as I had requested.*

[56] Wilkins provides no basis for his belief, aside from a month of therapy. He goes on:

> *However, due to his ongoing struggles,* ***AS resigned from employment at SLS in March 2012 and sadly took his own life in July 2012****.*

[57] Wilkins was candid when he conceded during cross-examination that he never followed up with AS between his return to the firm in January 2012 and his final departure in March of that year. Had he done so in January 2012, he could have managed to get this motion scheduled within three months of the dismissal order.

Had he done so in March 2012 when AS left the firm, he still would have been within 5 months of the order.

[58] Instead of taking control of this problem, Wilkins' approach was to simply reassign it. He claims that in **March 2012,** he asked another SLS associate, Harit Dubb *to assist in addressing the matters that were previously assigned to AS,* as the firm could not allocate anyone to him. Wilkins failed to note how many matters were involved.

[59] Wilkins added that by this time, there were ***a number of notices and dismissal orders that had been received by SLS and accumulated as a result of AD's leave of absence and his departure*** *from SLS.*

[60] As a result, Wilkins ***cannot be certain if I specifically asked Dubb to assist me with this particular matter.*** Some clarification was provided on cross-examination:

> *There* ***were previous dismissals in the line of importance****, and to be quite honest with you* ***we were more concerned about dealing with the dismissals that had a longer time period,*** *right? So…. And that's what Harjit Dubb did.*

[61] Wilkins went on to explain that they reviewed all of the dismissal orders and put them in the order of importance. Dubb, he claims, was doing a good job, but again, Wilkins conceded that there is no record of him ever following up with Dubb.

[62] Although Wilkins was well aware that the action had been dismissed in October 2011, he waited until **May 2012** before following up with RIM for the plaintiff's employment records, initially sought in **April 2011**, more than a year earlier. This is the first indication of any follow-up on that request.

[63] Soon after, Wilkins appears to have attended to his own plans to leave SLS. In his affidavit, he claims he gave him notice in July, but when cross-examined, he says he told the firm in June that he would be leaving in September. In his

affidavit, he states that in July and August, he was ***preoccupied*** *with extensive administrative tasks associated with the transfer of my practice from SLS to my own firm, Pazuki Wilkins LLP.* ***Unfortunately, I failed to ensure that this matter was properly prioritized and assigned.***

[64] When cross-examined, Wilkins stated that at some point during the summer of 2012, he had the plaintiff come in and he explained to him what ***has happened with our articling student*** and he understood. Wilkins does not explain how he communicated with the plaintiff. This statement also conflicts with Wilkins' evidence on cross-examination where he states that on September 25, 2012, Pazuki wrote to the plaintiff to advise of him of the dismissal order and provide him with a copy of it and it is not consistent with the plaintiff's own evidence as to when he learned of this, which was considerably later.

[65] As Wilkins stated when cross-examined that he brought the motion without formal instructions from the client to do so, it is more likely that he had no such conversation with the plaintiff about the dismissal order in the summer of 2012. If he had done so, why would he not have sought instructions to bring this motion at that time?

[66] As a result of all of the above, it was not until **September 25, 2012** – 11 months after the action was dismissed – that a date for a motion to set aside the dismissal order –was first requested from the court. There is no evidence that EG was contacted at any time about this plan of action; that they were asked to appoint counsel; that they were consulted regarding their position or asked about availability of counsel for a motion date.

[67] Instead, on **November 12, 2012**, Pazuki wrote to alert EG to the fact that Wilkins has taken the file from SLS, and would provide the long awaited documents that would be needed to begin settlement discussions. **This was more than a year after the action had been dismissed, yet the letter makes no reference to that critical fact.**

[68] Wilkins includes hearsay evidence from Sharndip Kaira, a law clerk at his new firm, in his affidavit. He claims that in the **fall of 2012**, he was in the room when she spoke with Schnider of EG and explained the circumstances and AS's involvement. According to Wilkins, Schnider said he would not oppose the motion. Wilkins is not specific as to the date and it appears no one sent EG a confirming letter or e-mail or even made a note of this extremely important conversation, something one would have expected to see in the circumstances.

[69] Wilkins claims that he, himself, called Schnider after that – again no date is provided- and that he was told that "we (EG) take no position." Again there is no record of this conversation in the evidence and it conflicts with EG's evidence.

[70] Wilkins notes that a motion date was set for **January 29, 2013** but that it was adjourned at EG's request. Wilkins fails to note that the motion date was booked unilaterally and that the motion materials were short-served, so EG were entitled to additional time. Wilkins' affidavit is also silent about the earlier date that was booked unilaterally for which materials were never served.

[71] All that Wilkins has to say about the issue of potential prejudice is found in paragraph 57 of his affidavit, where he sets out what Pazuki has in his file. While Dr. Manucha's records are now available, as the OHIP summary has not been annexed as an exhibit, I am unable to satisfy myself that Dr. Manucha was the only physician that saw the plaintiff and there is no statement from the plaintiff or from Wilkins to that effect. The request letter sent to the Brar Medical clinic in April 2011 was not pursued until LawPro counsel came on board in 2014. It is not clear that the plaintiff's productions are complete.

[72] There is also some confusion about the name of the one physician referred to in paragraph 57 of Wilkins' affidavit– there, she is referred to as Dr. Shalini Manucha, whereas in paragraph 13, the names are reversed, so Wilkins speaks of having sought the records of Dr. Manucha Shalini. This is cleared up by Nadarajah during his cross-examination (it should be Dr. Manucha). The lack of attention to detail in the context of a motion of this kind is troubling.

[73] Wilkins ends his affidavit by stating that the notes and records of treating physicians are available and must be maintained under regulations to the *Public Hospitals Act*. Bearing in mind that this statute sets a finite time frame for retention; that the accident giving rise to the action occurred almost 6 years ago and that the court generally allows a defendant access to medical records going back 3-5 years, depending on the circumstances of the case, it is not clear that entitlement will not surpass that retention period.

[74] Nadarajah agreed that he had been having migraine headaches before this accident, so production of medical records that pre-date the accident would be in order in this case. This issue is not addressed in Wilkins' evidence.

EG'S EVIDENCE

[75] Jonathan Schwartzman, counsel, swore an affidavit on **July 18, 2014**. He began by pointing out the plaintiff's failure to comply with s. 258.3(1) of the *Insurance Act*, as they failed to give the insurer notice of the action within 120 days. Notice was only provided on **February 26, 2011**, a few days before the claim was issued.

[76] Schwartzman's evidence is important as he states that Wilkins never asked EG for their defence at any time, though they had agreed he would do so if required. Wilkins has now conceded this point. Schwartzman also makes it clear that repeated efforts were made by the adjuster to speak with Wilkins soon after the dismissal order was issued, but these attempts were futile as Wilkins never returned calls. Schwartzman's evidence is based on a review of the notes of Schnider, EG's adjuster on the file, which he has appended as exhibits. His evidence has not been challenged.

[77] Schnider's first attempted to reach Wilkins was on **November 7, 2011,** after he received the dismissal order. He left a voicemail message, asking Wilkins to call him as soon as possible.

[78] Schnider called again the following day, **November 8, 2011** when he had not heard back from Wilkins, this time asking to speak with Wilkin's assistant on learning that Wilkins was not available. She agreed to have Wilkins call him back to discuss the matter.

[79] As there was no return call from Wilkins, Schnider tried to reach him yet again on **November 16, 2011** but again, Wilkins was not available. Schnider left a lengthy voice mail, asking if the action was being abandoned or if Wilkins had secured a motion date to set the order aside. **Schnider also pointed out that had not yet received any productions pertaining to this plaintiff**.

[80] Wilkins never returned any of Schnider's three November 2011 calls, which were placed in or around the time that AC was on temporary leave from SLS, undergoing therapy for his substance abuse. The fact that EG was trying to find out if a motion was being booked ought to have prompted Wilkins to review this file as it was clear the dismissal order had not yet been addressed. At the very, least, he ought to have returned these calls. There is no evidence from Wilkins explaining his failure to do so.

[81] Months passed and on **May 1, 2012**, Schnider reviewed an ISB Canada report regarding the status of this court file, which confirmed that the last document in the court file was the dismissal order. In the circumstances, and as no court date had been booked to set the dismissal order aside and as there was no response from Wilkins or anyone else at SLS, Schnider formed the view that it was time to close his file and he did so.

[82] On **November 19, 2012**, more than a year after the action had been dismissed and after Schnider had tried to reach Wilkins without success, Schnider received a voicemail message from Wilkin's clerk, Sunny, advising that they wanted to re-open the file. Schnider returned the call but Sunny was not available. Schnider left a voicemail message. His file note of that day indicates that the message pointed out that EG's file had been closed in **May 2012** as they had not received a response to their phone calls regarding the matter. Schnider also added that **EG**

would not consent to anything on the file, so that it would be up to the plaintiff to have the action reinstated if they felt it necessary. He ended the message by inviting Sunny to contact him if he wanted to discuss the matter further. He heard nothing in response.

[83] The above in direct conflict with Wilkins' evidence. I prefer Schwartzman's evidence to Wilkins' on this point. Wilkins claims he was "in the room" and overheard a conversation between Schinder and his clerk, but he does not explain how he overheard Schnider's side of the discussion. He has no notes of the conversation and has provided no file date for this event.

[84] Similarly, when he discusses the call he had with Schinder, his comments are light on detail. What is most telling it the lack of letter confirming what he overheard the first time or what was discussed the se cond. There is also no note from his clerk. In view of the time that had passed since the order was issued, one would have expected Wilkins to commit the purported agreement to writing. The absence of such a letter is, in my view, telling.

[85] What is astonishing is that much Schwartzman's evidence already appeared in an earlier version of his affidavit, sworn April 26, 2013. This was served on the plaintiff well before the plaintiff had completed all of his supplementary materials. Yet, the plaintiff filed no evidence addressing the obvious conflict between what Wilkins claims occurred and Schwartzman's version of events in terms of whether the motion to set aside the order would proceed without opposition. There is also no explanation for why Wilkins failed to return any of the three phone messages left for him in November 2011, and no direct explanation for why his office waited a full year before contacting EG about a motion.

[86] Schwartzman ends his second affidavit by asserting that the defence will be prejudiced if the action is permitted to proceed and that this is not a form of prejudice that can be compensated for by costs or an adjournment.

[87] In his earlier affidavit, Schwartzman has more to say about prejudice. At the time the affidavit was sworn (April 2013) it has already been almost 4 years since the accident of March 2009 giving rise to the action. At that point, Schwartzman expressed concern that there is now a substantial risk that his insured would not receive a fair trial as a result of that delay. That delay has continued to grow such that it is now almost 6 years since the accident.

[88] Schwartzman speaks of fading memories and points out that this is problematic as discoveries have yet to occur. In fact, the action, started almost 4 years ago, is in its infancy as pleadings have not yet closed.

THE LAW

[89] Although there have been a few twists and turns in this area as a result of an ongoing series of decisions that have emerged from the Court of Appeal, the general approach the court is mandated to take on motions to set aside dismissal as abandoned orders has effectively been, more or less, the same for some time.

[90] The approach that has been developed is aimed at reconciling two competing principles. Administrative dismissal orders bring into sharp relief the tension that exists between the desire to have cases tried on their merits and the obvious public interest in promoting timely resolutions to legal disputes (see *Hamilton (City) v. Svedas Koyanagi Architects Inc.,* [2010] OJ No. 5572; *Marche D'Alimentation Denis Theriault Ltee v. Giant Tiger Stores Ltd.*, [2007] OJ No. 3782). Subrules 48.14 and 48.15 were intended to address the latter, as justice delayed is often viewed as justice denied. The intent, however, was always to do so in such a way as not to eliminate the opportunity for a hearing on the merits unnecessarily.

[91] To assist in finding the right balance between these dueling principles, the courts have crafted an approach which has been refined by case law over time. It is now trite law to say that the starting point for the analysis are the four factors set out in *Reid v. Dow Corning Corp.*, [2002] OJ No. 3414, but that any other relevant factors must also be considered, as the court is bound to take a contextual approach.

[92] The four *Reid* factors involve:

1) An explanation of the litigation delay: the plaintiff must provide an adequate explanation for the delay and demonstrate what steps were taken to advance the litigation from its inception. A deliberate decision not to move forward by client or lawyer will result in the motion failing (see *Bagus v. Telesford,* 2014 ONSC 3512);

2) Inadvertence in missing the deadline to either extend the deadline under Rule 48.15; to ensure that a statement of defence is filed or to move for default judgment is a further factor that must be established on evidence. The end result of action dismissal must have resulted from inadvertence;

3) The plaintiff must show that they brought the motion to set aside the dismissal promptly. Rule 37.14 applies to these motions and it mandates that the notice of motion to set aside the order must be served *forthwith after the order comes to the person's attention* and that it *names the first available hearing date*; and

4) There must be no significant prejudice to the plaintiff caused by the delay. Prejudice is presumed where a lengthy period has passed since the order was made or where the limitation period has expired. When prejudice is presumed, the plaintiff has the onus of showing there has been no significant prejudice. This is best accomplished by demonstrating, on evidence, that all relevant documents have been sought and obtained and that all necessary witnesses remain available for trial. If the plaintiff meets this burden, presumed prejudice will no longer suffice. The onus then shifts to the defendant to prove actual prejudice.

[93] All relevant factors must then be weighed and balanced. The plaintiff need not succeed with respect to all four factors. Instead, a contextual approach is required. This allows for flexibility in how these motions are to be dealt with, in order to accommodate different factual scenarios. The key factor, however, remains prejudice (see *Habib v. Mucaj,* 2012 ONCA 880).

[94] While the court should avoid engaging in speculation regarding the rights a party might have against their own solicitor, where the lawyer's conduct has been deliberate, this may be a relevant factor in some cases for the court to consider (see *Finlay v. Van Paassen* (2010) ONCA 204; *Bagus v. Telesford* (2014) OJ No. 2733).

ANALYSIS and CONCLUSIONS

[95] In view of the emphasis of the contextual approach, it is clear that these cases are fact-driven. There is no simple formula that can be applied, so that a two year delay in bringing the motion to set aside the dismissal order may be fatal in one case, but not in another. Whether or not it is will depend in large part on all of the surrounding circumstances.

[96] Because these cases are fact-driven, the evidence filed is critical. Broad general statements devoid of detail are not helpful when the court is faced with examining the issue of delay. When there are gaping holes in the evidence, so that it is unclear why nothing appears to have been done from one point in time to another, the court will be left to infer that things are as they appear to be and that nothing, in fact, was done. Absent an explanation for why that was so, the court is again left to draw its own conclusions.

[97] This is an unusual case, in view of the role AS is said to have played. He was not healthy of mind and body when he began his articles, something that SLS was aware of by at least November 2011, as they arranged, after speaking with the Law Society, to send AS for treatment for his substance abuse problem. He was gone for only about a month, perhaps a bit longer, and then returned to the firm, only to leave again about two months after that. He was not involved with the file when the claim was filed, not does it appear that he was given the dismissal notice and asked to deal with that. He only became involved after the dismissal order was issued and sent to SLS.

[98] In short, as AS was away for only about a month, and only after the action had already been dismissed, his involvement with this file amounts to a small part of

what went wrong here and why. The rest of the factual matrix must be examined, starting with the *Reid* factors.

1. Explanation for the delay

[99] Delay has plagued this case from the outset. The accident that gave rise to the action took place in **March 2009** and SLS was retained in **June 2010**, yet there is no evidence that they did anything at all with the file until after they issued process more than 8 months later.

[100] SLS failed to serve requisite notice on the insurer within 120 days, or at all until only days before issuing process. They also failed to seek relevant documents that would allow them to assess the value of the claim until after the claim was issued.

[101] In fact, there is no evidence of anything having been done from **June 2010 until February 26, 2011**, when notice of the claim was finally provided to the insurer. Though this delay precedes the action having been commenced, it was a critical time for SLS to get a sense of what the claim was about and to get the file ready for early negotiations at the adjuster level. There is no evidence to explain this gap.

[102] The Statement of Claim was issued on **March 2, 2011** and the defendant was served on **March 30, 2011,** so things were off to a good start, yet Wilkins did not write any letters of request for relevant documents until **April 4, 2011.** Although Wilkins lists those he wrote to, he does not explain who some of these individuals were or their relationship to the plaintiff. He also fails to state that Dr. Shalini (actually Dr. Manuchin) and the Brar Centre are the only places where his client was seen post-accident for his injuries.

[103] On **April 12, 2011,** Wilkins spoke with Schnider, and agreed to review the file with an eye to an early settlement. Wilkins, however, was in no position to engage in negotiations at that point, as he had none of the necessary documents on hand and had only just sent off initial requests letters. There is no indication in the

evidence that he so advised Schnider or that he asked Schnider to agree to extend the Rule 48.15 deadline at that time.

[104] Schnider wrote to confirm their discussion, making it clear that if negotiations broke down, he would file a statement of defence within 30 days of being asked to do so. He was never asked to make those arrangements, however.

[105] There is no evidence that Wilkins diarized 6 months from issuance of the claim to ensure compliance with Rule 48.15. There is no evidence to indicate that he actually thought about what Schnider had said, and diarized the file for 30 days before that deadline, to ensure that he asked for a defence in time. As matters stood, the Rule 48.15 deadline was due to expire on **September 2, 2011** and by mid-April, Wilkins had nothing in the file to allow him to even begin a meaningful settlement discussion with the insurer, yet Wilkins took no steps to protect his client. He did not move to extend the deadline, nor does it appear that he even diarized it.

[106] There is no evidence to the effect that Wilkins or his office followed up with any of the entities to whom they had initially written. Wilkins simply states in his affidavit that he recalls that it *took some time for the requested productions to arrive or for the addressees to respond and/or provide the documents. Therefore settlement discussions did not occur immediately.* At a later point in the evidence, it is revealed that some of these documents were only obtained by LawPro counsel, after they came on board to respond to this motion in **2014.**

[107] Wilkins is a personal injury lawyer, employed at that time, by a personal injury firm. It therefor ought to have been wholly foreseeable to him that creating a damage brief for the purpose of settlement discussions would take time. It should also have been foreseeable that the insurance adjuster might ask for a waiver of defence while settlement was explored, before the insurer retained counsel. Finally, it should have been foreseeable to Wilkins that he would run up against the Rule 48.15 deadline before he was ready to initiate settlement discussions as he had none of the necessary documents on hand. Yet there is no evidence that he

turned his mind to any of this at any time or considered seeking an extension of the Rule 48.15 deadline.

[108] At the heart of this delay is Wilkins' failure to even request the documents he needed to settle the claim until days before he agreed to consider an early settlement. Having failed to do that, he also failed to demand an immediate defence or to seek an extension of the timeline to allow him to get the documents he needed and to give him time to then negotiate. None of this has anything to do with AS and likely took place before AS began his articles.

[109] There is no evidence at all from Wilkins explaining any of this, aside from him saying that SLS's system for dealing with dismissal notices was to give them to students to deal with. It seems there was no system in place to try to avoid receiving these notices in the first place, by keeping track of the dates themselves; monitoring the approaching deadlines and either seeking extension orders or demanding a defence as was appropriate in each case.

[110] In short, it appears Wilkins did very little to advance this matter either towards settlement or further litigation. He didn't chase the documents he needed to settle the case; he took no steps to buy himself more time to do so and he failed to ask EG to deliver a statement of defence at any time. The action does not appear to have been on his radar. I am therefore unable to say that the plaintiff has provided an adequate explanation for this delay as it really had not been explained.

2. Inadvertence in Missing the deadline to either move to extend or bring the claim to an end

[111] I am also unable to say that the plaintiff's failure to meet the deadline was caused by inadvertence, as Wilkins does not even claim inadvertence regarding any of the above. Based on his evidence it appears that he does not recognize his lack of action as a problem or as having caused or contributed to this situation.

[112] Wilkins made it clear that neither he nor SLS has a system for tracking deadlines. Instead, when dismissal notices or dismissals orders came in, they were given to an articling student. According to Wilkins, that WAS the firm's system. They did nothing on a proactive basis to avoid receiving these notices by keeping track of these timelines. Instead, they waited until the situation was somewhat dire (dismissal notice) or seriously problematic (dismissal order) before dealing with it.

[113] Wilkins' failure to diarize cannot be classified as inadvertent in the context of his not having had any form of tickler system. There is no place for inadvertence in this equation. For inadvertence to apply, there had to have been a system in place to track dates, such that the failure to enter a deadline in it can be said have been inadvertent. Inadvertence is a one-off error, not a failure to create a necessary date-tracking system. There was no tracking system here at all. SLS waited for dismissal notices to come in before addressing the issue of timelines. At that point, they left everything to students, who were largely unsupervised. This cannot be viewed as "a system".

[114] What is clear is that there was a deliberate decision by SLS not to track or worry about Rule 48.15 timelines but instead, to wait until dismissal notices and orders were received from the court and then to address those. This is nothing short of a reckless way to practice law.

[115] While I am aware there are certainly other firms that adopt a similar approach, most seem to have a better system, at least, for dealing with dismissal notices once they do come in.

[116] There also appears to have been deliberate decision to offload these notices and orders to students and to provide them with minimal supervision.

[117] It is clear from Wilkins' evidence that there were *a number of notices and dismissal orders that had been received and accumulated as a result of AS's leave of absence and his departure.* Even after AS left for treatment, the firm did not

adjust their approach. They were aware of but allowed these time-sensitive notices and orders to accumulate, again a deliberate act.

[118] Finally, Wilkins claims he did not receive a copy of the dismissal notice, though it is not clear that he would have done so, if these notices were simply handed off to students. It is therefore not material that Wilkins did not receive or see the notice, as his evidence suggests that these were given to students without a lawyer necessarily seeing them at all. It is not even clear if SLS had a system to record which student had which notices or orders, when they came in, by when they had to be addressed.

[119] Considering the importance of these documents, SLS appears to have taken a somewhat cavalier approach to their handling. Leaving dismissal notices and orders with articling students, who come and often stay for less than a year and then may move on, is certainly not best practice for a host of reasons. Further, most counsel know to consult LawPro as soon as they receive a dismissal order. Based on my exchange with Wilkins, this appeared to be something he was extremely reluctant to do.

[120] What is palpably clear is that AS cannot be blamed for the plaintiff's inability to meet either factors 1 or 2 of the *Reid* test as there is no evidence that he had even come into contact with the file until after the action was dismissed. In large part, the dismissal occurred as a result of a series of decisions made by counsel and SLS regarding how to address Rule 48.15. Rather than tracking deadlines, they waited for the court to issue dismissal notices, which were simply handed off to students, who were left to ensure they did not turn into dismissal orders. In view of the number of dismissal orders that appear to have accumulated, the system, such as it was, was apparently not a successful one.

3. <u>The motion to set aside the order must be brought at the first available opportunity</u>

[121] Wilkins concedes that he became aware of the dismissal order during the week of **October 25, 2011,** though he does not say how. Bearing in mind Rule 37, in

conjunction with the state of our motions list, one would have expected the motion to be hard by **March 2012**.

[122] Wilkins states that he gave the order to AS with instructions to book a motion to set it aside and to prepare the requisite materials. No memo to AS is appended and there is no evidence as to when these instructions were conveyed.

[123] It is Wilkin's evidence that during **the fall of 2011**, *AS's primary assignment* was dealing with incoming notices of dismissal and dismissal orders, and he was *largely unsupervised* in this assignment. "Orders" is referred to in the plural

[124] There are three aspects of Wilkin's evidence in this regard that are of concern. First, the firm have must have had a large number of dismissal notices and dismissal orders such that dealing with them amounted to a student's primary assignment. It should be the rare case where the firm has not been proactive and sought an extension of the deadline before getting the notice, and the exceptional case where a dismissal order has to be dealt with. Why, then, would dealing with these after the fact problems take up most of the time of an articling student?

[125] Secondly, if there were enough of these notices and orders to constitute AS's **primary assignment,** this was a firm problem that began before AS joined the firm and had little if anything to do with him, yet he has been set up repeatedly in the evidence on this motion as the scapegoat for this outcome.

[126] My third concern is the admission that the students were largely unsupervised in this work. The basis for taking such a "hands off" approach when dealing with the life of a client's action is not explained nor would it have been easy to justify.

[127] AS was not well. By **November 2011**, SLS becomes aware of his problems. This was only days after AS was given the dismissal order in this action, on top of the other Rule 48.15 matters he was handling as his primary assignment. Yet, there is no indication that any lawyers from the firm stepped in at any time to review his work, to ensure he was booking the motions, preparing the materials, taking the necessary steps to keep these matters moving forward. Wilkins did not

take this matter back nor was LawPro brought in at that time to deal with this or other dismissal orders.

[128] According to Wilkins, he was too busy to deal with it, already *tasked* in the face of *limited resources.* In fact, Wilkins speaks of having been overwhelmed by AS's departure and counting on his return in **January 2012** to take the work over.

[129] From Wilkins' evidence, it is clear that there was no recognition on his part that setting aside a dismissal order was time sensitive. He also appears to have had no concerns as to the nature and quality of the work that may have been performed by a student who was abusing alcohol to the point of having to seek rehabilitation therapy. There is no evidence that Wilkins or anyone else reviewed AS's files even after they became aware of nature of his problems, to ensure that their files had been attended to before his first departure in November.

[130] Yet again, a deliberate decision was made, this time, to let things sit until AS returned in January. There appears to have been no awareness that substance abuse is not something that just goes away after a month of therapy. There is no evidence that AS was given any accommodation when he returned, that his workload was reduced or his work supervised. There is no evidence that his work was audited during his absence.

[131] AS left the firm for good in **March 2012**, taking his life shortly thereafter. Between the time he returned to the firm and his final departure, Wilkins never followed up with him about this matter. Without any audit of the work done, or not done, by AS, his assignments were simply shifted over to an SLS associate, Harit Dubb.

[132] The evidence does not disclose how many matters were transferred to Dubb, when they were transferred and subject to what instructions. Wilkins was not even able to say with certainty that this file was among those transferred. What is clear is that there were other files involving dismissal orders that had also been left to simmer. As Wilkins put it, *there were previous dismissals in the line of importance*…and the firm was *more concerned about dealing with the dismissals*

that had a longer time period. In other words, there were worst cases that had to be dealt with first.

[133] Wilkins never followed up with Dubb, though the latter was handling files of his where actions had been dismissed. Nor did he follow up for medical and loss of income records initially sought in April 2011 with respect to this matter. He sent a follow-up letter to RIM, but not until May 2012 – more than a year after his first request and after the action had been dismissed. Wilkins says nothing about the other documents.

[134] Somewhere in this time frame, Wilkins formed the intention of leaving SLS and setting up his own firm in partnership. His plan was to leave in **September 2012**, and he notified the firm in June or July. As he put it he was *preoccupied ....with the transfer of his practice* through July and August 2012. He concedes that he failed to ensure this matter was properly prioritised and assigned. He does not claim this was the result of inadvertence on his part.

[135] Once again, this lapse appears to have been caused by Wilkins' deliberate decision to give priority to his new firm, with little regard for the cases in which he had dropped the ball. He was moving on – he was looking ahead.

[136] AS had left the firm in March 2012, yet by **September 2012**, there was still no motion booked. The motion date booked for **April 2012** had been lost as no materials were drafted or served. Nor did the motion proceed on **January 29, 2013**, as the date was not mutually agreed to; only 15 minutes as booked for an opposed motion and the motion materials were short-served on the responding party.

[137] The **May 16, 2013** date booked was also lost, as the plaintiff had, once again, not booked enough time. The **October 17, 2013** date was adjourned as Wilkins was effectively seeking to argue on the basis of his own evidence, submitted through the affidavit of another.

[138] I finally thought we would get this matter heard **May 22, 2014**, but at that point, the plaintiff asked to adjourn to allow their insurer to get involved – more than 2.5 years after the action had been dismissed. The matter was not heard until **December 2014**. None of this is addressed by Wilkins.

[139] In my view, a party cannot simply choose a date for the return of a motion without running it by their adversary to ensure mutual availability; prepare and serve no materials for that hearing; and claim that they have complied with Rule 37.14 as they have booked the first available date.

[140] Further, if every date thereafter that has been booked has been lost because of what the plaintiff has failed to do – serve and file their materials in proper form according to the timelines provided by the Rules – the first date booked does not stop the clock, particularly in the context of a Rule dealing with timeliness. Finally, further delays encountered by counsel's very late in the day decision to involved his insurer is also a delay that must be counted against the plaintiff.

[141] There is no basis on which it can be said that the plaintiff brought this motion promptly, when each and every delay was caused by his own counsel.

4. Prejudice

[142] The presumption of prejudice applies here as the limitation period expired shortly after the claim was issued. I am not satisfied that the plaintiff has rebutted that presumption. Though they note what is available, it is premature to know if the plaintiff had pre-existing injuries or other medical issues that would need to be explored before the court can be satisfied that the damages he seeks are strictly from injuries sustained in this accident. There is also no evidence indicating this is the sum total of documents that will need to be gathered – there is no indication that anyone other than Dr. Manuchin and the Brar Centre were at any time involved with the plaintiff's post-accident assessment or treatment.

[143] There is also no discussion about liability issues, such as the continuing availability of witnesses or documents. The plaintiff had the onus of displacing this presumption and they have failed to do so.

[144] At the same time, EG points to the fact that this event took place almost 6 years ago and the pleadings have not yet closed. If the matter proceeds, it must go through documentary and oral discoveries and mediation before it can even be placed on a trial list. I expect it will be 2017 before it proceeds to trial. I have concerns about fading memories over that time span, exacerbated by the stage of this action. Where an action has been dismissed for delay at this juncture, they may have already gone through examinations for discovery, so memories have been jogged, committed to writing under oath and preserved. Not so in this case.

Other factors

[145] The plaintiff maintains that AS's role in all of this was causal to this outcome. I disagree. AS did not get involved with the file until after the action had already been dismissed, so the litigation delay and missing the deadline to avoid being off-side Rule 48.15 are two issues that have nothing at all to do with him.

[146] AS's involvement was limited to a date in the last week of October 2011 until some time in November 2011 before he went for treatment, and from a date in January 2012 until some time in March 2012. These timelines are imprecise as that is the nature of the evidence filed by the plaintiff. Taken all together, AS's involvement with the file was over a span of about only 3 months, broken up by his leave for therapy. During that time, though Wilkins and SLS knew AS was not well, they did nothing about reviewing the files assigned to him; mentoring him; accommodating him; or taking work back from him.

[147] When all of the relevant factors are taken together, the picture that emerges is one ongoing, persistent and chronic neglect of this file. The firm has no system in place to ensure that they were alerted to the Rule 48.15 deadlines – instead they waited for Notices of Dismissal.

[148] They system for dealing with those notices was to give them to students, without, apparently, tracking who got what when or what the deadline was for some action; and without supervision, aside from what the student thought to ask. There was no follow-up once these notices got into a student's hands.

[149] Once the notices became dismissal orders, the same "system" applied. They had enough of these notices and orders such that dealing with me constituted a primary assignment for one articling student. Even then, no supervision was provided or dates tracked.

[150] In this case, the student tasked with this file was not well. The firm learned of this but left the file with him, even after he was away for treatment, and even then, did not audit his files in his absence. They welcomed him back a month later and expected him to be pick up where he left off, again providing no supervision, no mentoring. Two months later, he had left the firm, and 4 months after that he took his own life. Still, no one audited his files and it is not even clear if this file was ever reassigned until November 2012 – more than a year after the action was dismissed and 8 months after AS had left the firm.

[151] I am not able to say that AS's short sojourn through the firm and his limited dealing with this matter is in any significant way responsible for this situation. It is disturbing that Wilkins has chosen to cast it differently.

[152] In view of all of the foregoing, this motion is dismissed.

[153] I can be spoken to regarding costs within 30 days, if the parties are unable to agree.

Master Joan M. Haberman

Release: February 10, 2015