

**CITATION:** OKAFOR v. MARKEL INSURANCE & KROPKA, 2010 ONSC 2093  
**COURT FILE NO.:** C42087/97  
**DATE:** 2010-06-01

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

<b>B E T W E E N:</b>	)	
	)	
JUNE OKAFOR AND ANTHONY OKAFOR	)	Richard Parker, Q.C. for the Plaintiffs
	)	
	)	
	)	
Plaintiffs	)	
	)	
<b>- and -</b>	)	
	)	
	)	
MARKEL INSURANCE COMPANY OF CANADA and JAN KRODKA	)	Jane Cvijan, for the Defendant Markel Insurance Company
	)	
	)	Joseph J. Masterson, for the Defendant Jan Kropka
	)	
Defendants	)	
	)	
	)	<b>HEARD:</b> July 21, 2009, at Brampton, Ontario

2010 ONSC 2093 (CanLII)

**Price J.**

**Reasons For Costs Order**

**Nature of Proceeding**

[1] This is an order concerning the costs of a motion and of an action dismissed on the ground of delay and breaches of the Rules and of court orders.

**Background Facts**

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[2] The action arose from a motor vehicle accident on October 9, 1996. The plaintiff Anthony Okafor claimed two million dollars and the plaintiff June Okafor claimed half a million dollars in damages against Jan Kropka. Mr. Okafor also claimed against his insurer Markel Insurance (“Markel”) for statutory accident benefits.

[3] I allowed the motion and dismissed the action, having regard to the plaintiffs’ failure to set the action down for trial almost thirteen years after the date of the accident, their failure to comply with their undertakings and to produce documents necessary for the defence, and their breach of orders made in two previous motions by the defendants to have the action dismissed on the ground of delay.

### **Positions of the Parties**

#### **a) Plaintiffs**

[4] There were no costs submissions filed by the plaintiffs.

#### **b) Defendant Markel**

[5] Markel submits that it was successful on the motion to dismiss this action and that costs ought to follow. It requests its costs of the motion and of the proceeding on either a substantial indemnity or a partial indemnity scale. It has filed a bill of costs with detailed docket entries of the time spent and a description of the tasks.

[6] Markel submits that the plaintiffs’ lengthy delay in setting the action down for trial, their failure to comply with orders and undertakings, and their refusal to produce documents unnecessarily lengthened and ran up costs of this litigation.

It submits that this improper behaviour should attract an award of costs on a substantial indemnity basis<sup>1</sup>.

[7] The hourly rates of the lawyers who worked on the file are outlined in the Bill of Costs and counsel has stated that the amounts claimed were billed to Markel. It requests these costs on a substantial indemnity scale, fixed at \$49,499.83, or on a partial indemnity scale, fixed at \$33,733.57.

**c) Defendant Jan Kropka**

[8] The defendant Kropka seeks the costs of the motion on a partial indemnity scale, fixed at \$8,051.09 and the costs of the action on a partial indemnity scale, fixed at \$46,774.57, for a total of \$54,825.66.

[9] The costs were incurred over a period of approximately ten years. Apart from investigating the matter, drafting pleadings, preparing and examining documents, and attending two and a half days of examinations for discovery, three motions were required to dismiss the action for delay. Snowie J. reserved the costs of the motion before her to the trial judge. Marshall J. ordered that the costs of the motion be paid in the cause.

**Analysis**

[10] As a general principle, costs are in the absolute discretion of the court.<sup>2</sup> The fixing of costs is not simply a mechanical exercise. The overall objective is “to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs

<sup>1</sup> *Standard Life Assurance Co. v. Elliott et. al.* (2007), 86 O.R. (3d) 221; *Likar v. Dufferin Rogers Medical Centre*, [2008] O.J. No. 187, 16 A.C.W.S. (3d) 351.

<sup>2</sup> *Courts of Justice Act*, Act, R.S.O. 1990, c. C.43, s. 131.

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incurred by the successful litigant.”<sup>3</sup> This is a “fundamental concept in fixing or assessing costs.”<sup>4</sup>

[11] I have considered the factors set out in Rule 57.01(1). That Rule provides, in part:

57.01(1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the Court may consider...

- (0.a) **the principle of indemnity**, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
- (0.b) **the amount of costs that an unsuccessful party could reasonably expect to pay** in relation to the step in the proceeding for which costs are being fixed; and  
...
- (c) **the complexity of the proceeding;**
- (d) **the importance of the issue;**
- (e) **the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;** [Emphasis added]

[12] I found in my reasons on the motion that the plaintiffs’ conduct amounted to an abandonment of any serious attempt to progress the litigation. I also found grossly undue delay on the part of the plaintiffs which had caused both actual and presumed prejudice to the defendants.

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<sup>3</sup> *Boucher v. Public Accountants Council for the Province of Ontario*, [2004] O.J. No. 2634 (C.A.), paragraphs 24 and 26.

<sup>4</sup> *Gratton-Masuy Environmental Technologies Inc. v. Building Materials Evaluation Commission*, [2003] O.J. No. 1658 (Ont. S.C.J. Div. Ct.) at para. 16. See also *Boucher v. Public Accountants Council*

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[13] The issues in the case were not complex. The action was a straightforward one arising from a motor vehicle collision. Pleadings and affidavits of documents were exchanged, examinations for discovery completed by counsel whose hourly rate, on a partial indemnity scale, ranged from \$145 to \$220, and the defendants brought three motions to dismiss the action for delay, and eventually prevailed. Jan Kropka's disbursements amounted to \$958.34 on the motion and \$7,481.47 in the action, including taxes. Markel's costs were \$2,214.75.

[14] While the conduct of the plaintiffs unnecessarily prolonged the proceeding, there is no basis, from the material before me, to conclude that the action was frivolous or that the plaintiffs, beyond failing to prosecute their action diligently, engaged in conduct that was vexatious or added to the costs. In fixing the defendants' costs, I have had regard to the amount of costs which the plaintiffs could reasonably have expected to pay at this stage of the proceeding.

### **Order**

[15] The defendants were successful in their motions and in their defence of the action, and costs should follow the event. Costs of the action, including the motions, will be on a partial indemnity scale, fixed at \$25,000.00 for Markel Insurance and \$35,000.00 for Jan Kropka, and payable forthwith by June Okafor and Anthony Okafor.

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D.G. Price J.

**Released:** June 1, 2010

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Plaintiffs

- and -

MARKEL INSURANCE COMPANY OF  
CANADA and JAN KRODKA

Defendants

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**REASONS FOR COSTS ORDER**

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D.G. Price J.

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