Date: 20240206
Docket: CI 19-01-22565
(Winnipeg Centre)
Indexed as: Pathak v. Sinha
Cited as: 2024 MBKB 28

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

KUMAR ALOK PATHAK,	)	Dana Kochan
	)	Olivia Jureidini
plaintiff,	)	for the plaintiff
- and -	)	
	)	Trevor Yakimchuk
SUNIL SINHA,	)	for the defendant
defendant.	)	
	)	
	)	Judgment Delivered:
	)	February 6, 2024

TOEWS J.

[1] This is a motion brought by the defendant, Sunil Sinha, to set aside a default judgment (the Manitoba default judgment) ordered against him on or about January 25, 2023. The defendant acknowledges that the allegations upon which the Manitoba default judgment is based are serious, but that he has a meritorious defence and that he defended this action adamantly until he was debilitated by severe mental health struggles. The defendant submits that in the circumstances of this case, it is fair and just that the Manitoba default judgment be set aside and that he be allowed to properly and fully defend the allegations against him in court.

[2] In response, the plaintiff, Kumar Alok Pathak, takes the position the court deny the defendant's motion, as he has persistently delayed this matter, has continually provided false or misleading evidence, has failed to file his motion to set aside the Manitoba default judgment in a timely manner, and lacks a meritorious defence. The plaintiff submits that due to the nature of the underlying action and the egregious defamatory statements made by the defendant, the plaintiff will be prejudiced if the defendant's motion is granted.

[3] Many of the relevant facts in respect of the court proceedings leading to the Manitoba default judgment are not in dispute. The dispute between the parties is focused on whether the defendant has a meritorious defence and whether he was in fact debilitated by severe mental health struggles to the extent that these struggles prevented him from defending the action. The plaintiff states that the evidence here demonstrates that the defendant does not have a meritorious defence nor did he move in a timely fashion to set aside the Manitoba default judgment.

[4] In this case, it is instructive to reproduce the rather detailed facts advanced by each party as contained in their briefs, followed by the arguments advanced by each party. My analysis and decision will follow the presentation of the arguments. I conclude that the law does not support the setting aside of the Manitoba default judgment.

THE FACTS RELIED UPON BY THE DEFENDANT AS SET OUT IN THE DEFENDANT'S BRIEF.

[5] The defendant is an individual who resides in British Columbia. Mr. Sinha is a family friend of Promila Pathak ("Promila"), the ex-wife of the plaintiff.

[6] The plaintiff is a doctor employed at Cancer Care Manitoba.

[7] In July of 2017, Dr. Pathak and Promila separated. Dr. Pathak and Promila have a son ("Pranjal") and a daughter ("Aparajita" or "Apara").

[8] After the separation, Mr. Sinha was contacted by Promila and informed of abuse allegations. Promila indicated to Mr. Sinha that the plaintiff had been abusive throughout their marriage, notably towards Apara. Promila also informed Mr. Sinha that she had told two of the plaintiff's co-workers about the abuse, Dr. Rashmi Koul and Dr. Sri Davartnam (collectively, "the Co-Workers").

[9] Mr. Sinha had no reason to doubt these allegations and what was told to him by Promila.

[10] Mr. Sinha was left deeply concerned and shocked when he was informed about these instances of abuse. He wanted to help Promila and Apara, and he was particularly disappointed in the fact that others had been told of these allegations but did nothing.

[11] On or around July 18, 2018, Mr. Sinha telephoned the Co-Workers to ask them about their knowledge of the allegations, and how they had acted on them. The two Co-Workers were the only individuals that Mr. Sinha contacted regarding the allegations, as he was under the justified belief that the Co-Workers were aware of these allegations.

[12] As a result of Mr. Sinha's communications with the Co-Workers, Dr. Pathak filed this action on August 9, 2019. Additionally, the plaintiff alleges that Mr. Sinha was in

contact with a free-lance journalist named Jared Shapira, who purportedly further disseminated the allegations. Mr. Sinha denies that he had any such involvement with Mr. Shapira.

[13] Mr. Sinha responded to this lawsuit and filed a statement of defence on September 30, 2019. Mr. Sinha advances three main defences to this action:

a) That the abuse allegations are true, and he was informed of their truth by Promila and Apara;

b) The extent of the communications is limited to the two Co-Workers who already knew about the allegations; and

c) That the damages suffered by the plaintiff, if any, were not as extensive as alleged. These defences should be put before the court to fully and fairly be adjudicated.

[14] Unfortunately, in September of 2021, while this action was ongoing, Mr. Sinha's father Madhav Sinha ("Madhav") was diagnosed with oral cancer. After the diagnosis, Mr. Sinha brought his parents to Vancouver, where he resides, to provide care for them while Madhav received cancer treatments. Madhav's cancer progressed quickly, and he was soon required to be fed through a feeding tube. Mr. Sinha spent a considerable amount of time caring for Madhav, which had a compounding impact on his mental and emotional health.

[15] After a long and painful battle, Madhav passed away on April 29, 2022. Madhav's illness, extensive care requirements, and eventual death caused Mr. Sinha to experience severe depression and continuous dissociative episodes. These mental health impacts

were further compounded by the COVID-19 pandemic, and the effects that it had on Mr. Sinha's livelihood in event planning and rental properties. Mr. Sinha was left unable to deal with the plaintiff's action, in addition to many other responsibilities in his life, including property status declarations, vacancy tax notices, bills, and other matters. Simply put, Mr. Sinha's mental health was such that he could not function.

[16] Mr. Sinha received treatment from a grief counsellor at Cancer Care who assessed him as suffering from caregiver's grief. Mr. Sinha has also been taking anti-depressant medication since Madhav's death.

[17] Default judgment was entered in this action against Mr. Sinha on or around January 25, 2023. While Mr. Sinha acknowledges that certain documents were sent to his attention in relation to this matter, he was not able to comprehend or respond to these documents because he was experiencing debilitating mental health struggles. Mr. Sinha only recently became able to take charge of his life again and was unaware of the Manitoba default judgment until June 9, 2023. After learning of the Manitoba default judgment, Mr. Sinha began taking steps to retain counsel and address this matter.

[18] Mr. Sinha maintains that he has a meritorious defence and would have continued pursuing his defence of this action had he not been overwhelmingly debilitated by his mental health struggles. He is now ready to stand trial and defend this claim.

THE FACTS RELIED UPON BY THE PLAINTIFF AS SET OUT IN THE PLAINTIFF'S BRIEF.

(i) The following events occurred prior to the defendant's father being diagnosed with cancer (diagnosis took place in September 2021).

[19] The plaintiff filed a statement of claim against the defendant on August 9, 2019, for among other things, defamation, harassment, intimidation and/or extortion, in which the plaintiff sought an interim and permanent injunction, as well as special, aggravated, punitive and general damages. The claim was filed within 10 weeks from May 25, 2019, when the plaintiff came to know from the defendant that he had contacted his employer with abuse allegations.

[20] A statement of defence was filed on behalf of the defendant by his previous counsel, Mr. Gavin Wood on September 30, 2019, in which the defendant admitted making statements to Dr. Rashmi Koul, in which he asked Dr. Koul if she "was aware that the plaintiff had been accused of abusing a minor, specifically his daughter, as well of abusing the plaintiff's spouse".

[21] The defendant further admits in the statement of defence that he made statements to Dr. Sri Navaratnam "asking if Dr. Navaratnam was aware that the plaintiff had been accused of abusive behaviour".

[22] Shortly after, the plaintiff received multiple threatening messages from a Vancouver number (604) 674-5213 referring to these allegations between 11:41 pm CST on October 5, 2019, and 12:01 am CST on October 6, 2019. These messages regarding being "cruel to family" came a couple of days prior to the plaintiff's divorce proceedings against his ex-wife Promila. Mr. Sinha came to Winnipeg to attend the entire divorce trial between October 8 to 11, 2019, advised Promila, and attempted to speak on her behalf during the trial.

[23] Later, the plaintiff discovered that the "604" number is registered in the name of Neil Van Guy (a pseudonym used by Mr. Sinha) with TextNow, a Voice over Internet Protocol (VoIP) app.

[24] On April 14, 2020, the defendant filed a Notice of Intention to Act in Person.

(ii) Attempts to Schedule the Examination for Discovery of the defendant

[25] Despite having filed a Notice of Intention to Act in Person, Mr. Wood recommenced his representation of the defendant and commencing on or about August 12, 2020, plaintiff's counsel, Ms. Dana R. Kochan ("Ms. Kochan") attempted to schedule Examinations for Discovery for two consecutive days in October and/or November of 2020.

[26] Between August 19, 2020, and November 6, 2020, the defendant sent multiple harassing messages from his TextNow number, (604)674-5213, to the plaintiff mentioning this ongoing litigation, demeaning the plaintiff and his family, and threatening to damage his marriage. He admits that he had contacted the Human Resource Department of CancerCare Manitoba. The intimidation and harassment continued until the plaintiff spoke to TextNow to block this number from contacting him.

[27] Although Ms. Kochan had to follow-up with Mr. Wood on September 23, 2020, Mr. Wood ultimately confirmed his and his client's availability for the Examination for Discovery of the defendant for December 10, 2020. Confirmation of the Exam date of the defendant was sent by Ms. Kochan to Mr. Wood on September 28, 2020, confirming that the Examinations for Discovery of the defendant would take place at her office on December 10, 2020, commencing at 10:00 a.m.

[28] Ms. Kochan sent a further reminder to Mr. Wood on November 30, 2020, at which time she also requested that Mr. Wood and his client respond to her firm's Covid-19 Risk Assessment Questionnaire.

[29] On December 1, 2020, Mr. Wood wrote to Ms. Kochan advising that he had not diarized the examination date, nor confirmed the examination date with his client and advising that he and his client were unable to proceed with the examinations as scheduled on December 10, 2020. Also attached to Mr. Wood's e-mail correspondence was an e-mail from the defendant to Mr. Wood's office dated November 30, 2020, advising that he "will not attend any examination for discovery until the risk assessment to travel has been lowered" and that "he will not travel during the winter to Winnipeg".

[30] The plaintiff reluctantly agreed to reschedule the Examinations for Discovery of the defendant and Ms. Kochan wrote to Mr. Wood on December 1, 2020, proposing Thursday, January 21, 2021, as the rescheduled date (with those examinations to proceed by videoconference rather than requiring the defendant to attend in person from British Columbia).

[31] As Ms. Kochan did not receive any response from Mr. Wood to her December 1, 2020, correspondence, she wrote to him again on December 11, 2020, requesting his and his client's availability for the proposed January 21, 2021, examination dates. Ms. Kochan further advised Mr. Wood that if she did not receive his confirmation by Wednesday, December 16, 2020, then she would simply serve a Notice of Examination for a date unilaterally chosen.

[32] Mr. Wood responded to Ms. Kochan on December 14, 2020, indicating that he had written to his client and would advise further.

[33] Ms. Kochan responded to Mr. Wood on the same date, indicating that she required a substantive response by Wednesday, December 16, 2020, to the January 21, 2021 date proposed in order to avoid a Notice of Examination being served unilaterally.

[34] Despite the deadline of December 16, 2020, being imposed (and despite this request having initially been made on December 1, 2020), Ms. Kochan did not receive any communication from Mr. Wood until December 17, 2020, at which time Mr. Wood indicated that the defendant would prefer the examinations to be scheduled for the middle of April and that he would require air fare and hotel accommodations to be arranged in advance.

[35] Ms. Kochan wrote to Mr. Wood on the same date (that being December 17, 2020) reminding him that it was the plaintiff's intention to proceed with the examinations by videoconference (not in person) and once again requesting confirmation that the defendant was prepared to do so on January 21, 2021.

[36] As Ms. Kochan did not receive any further response from Mr. Wood to her e-mail correspondence dated December 17, 2020, she provided Mr. Wood with a further e-mail dated December 21, 2020, which enclosed a Notice of Examination set for Thursday, January 21, 2021 (to proceed by videoconference).

[37] Ms. Kochan did not receive any further communication from Mr. Wood after her correspondence dated December 21, 2020, with the first correspondence received being

the provision of the defendant's notice of motion and affidavit seeking to adjourn the examination date.

[38] The defendant's motion and affidavit were received by Ms. Kochan's office on January 5, 2021, and was set for January 13, 2021.

[39] Both counsel appeared (by teleconference) on the Master's List on January 13, 2021, at which time the Honourable Master Goldenberg adjourned the defendant's motion so that the motion could be heard on a contested basis the following day, on January 14, 2021.

[40] After the contested hearing on January 14, 2021, the Honourable Master Goldenberg ordered that the defendant's motion (seeking an adjournment of the Examination for Discovery scheduled for January 21, 2021) be dismissed, with costs payable from the defendant to the plaintiff in the sum of $1,500 in any event of the cause. This payment has not been made and remains outstanding. The examination for discovery of the defendant remained scheduled for January 21, 2021, at 10:00 a.m. CST (by videoconference).

[41] On January 19, 2021, Ms. Kochan provided Mr. Wood and the defendant with the link to the Microsoft Teams meeting for the Examination for Discovery scheduled for January 21, 2021. The link was sent again to Mr. Wood and the defendant on January 21, 2021, at 9:09 a.m. CST.

[42] Although the plaintiff, Ms. Kochan, Mr. Wood and the court reporter were all in attendance at Deeley Fabbri Sellen for the examinations for discovery which were to

commence at 10:00 a.m. CST on January 21, 2021, the defendant did not join the meeting by video through Microsoft Teams.

[43] Between 10:00 a.m. and 10:30 a.m. CST on January 21, 2021, Mr. Wood made several phone calls to his office and to the defendant directly, trying to locate him.

[44] Mr. Wood further confirmed that he had spoken to the defendant the previous afternoon and confirmed that the defendant was fully aware of his obligation to attend the examination for discovery, was in receipt of the log in information to attend by video through Microsoft Teams, and as well, was aware of the two-hour time difference between Vancouver and Winnipeg.

[45] Despite repeated attempts on the part of Mr. Wood to get a hold of his client, the defendant did not attend the examinations for discovery as scheduled, nor did he contact Mr. Wood or Mr. Wood's office during this time.

[46] At 10:30 a.m. CST, the court reporter issued a certificate of non-attendance of the defendant.

[47] After Mr. Wood, the court reporter and the plaintiff had left, Ms. Kochan received a log in attempt from the defendant at 10:59 a.m. CST and an e-mail from the defendant at 11:03 a.m. CST advising Ms. Kochan that he was unable to connect and asking if everyone was still there.

[48] Ms. Kochan provided the defendant with a return e-mail advising that everyone had left and to contact Mr. Wood.

[49] On January 22, 2021, Ms. Kochan was contacted by Mr. Wood who advised that the defendant fell ill the morning of January 21, 2021, and had to attend the hospital.

[50] In support of this position, Mr. Wood provided Ms. Kochan with copies of medical documentation which indicated a medical examination date of January 21, 2021, at 11:25 a.m. Vancouver time, (1:25 p.m. Winnipeg time).

[51] On January 28, 2021, Ms. Kochan sent correspondence to Mr. Wood requesting that his client provide triage notes for the time of the defendant's attendance at the hospital on January 21, 2021, as the time of the defendant's attendance at the hospital did not appear to correspond with the time that he was to be in attendance at the examinations for discovery, nor the time that he attempted to log in for the discovery.

[52] On February 1, 2021, Mr. Wood e-mailed Ms. Kochan advising her that the defendant was unable to obtain the triage notes from his attendance at the hospital.

[53] On February 11, 2021, Mr. Wood e-mailed Ms. Kochan enclosing emergency department documentation that showed the defendant's attendance at the hospital on January 21, 2021, at 10:06 a.m. Vancouver time, (12:06 p.m. Winnipeg time) and which further showed a completely normal neurological examination.

[54] A notice of motion was filed by the plaintiff on February 24, 2021, seeking an order that the defendant's statement of defence be struck, or in the alternative, requiring the defendant to attend at the offices of Deeley Fabbri Sellen by videoconference at a fixed date and time for the examination. This motion was heard by the Honourable Senior Master Clearwater on March 16, 2021, at which time she ordered the defendant to attend at the offices of Deeley Fabbri Sellen (by videoconference) on Thursday, May 27, 2021, to be examined for discovery. Costs of that motion were ordered as payable by the defendant to the plaintiff in the sum of $2,000 in any event of the cause (with $500

payable forthwith). The $500 payment was made by Mr. Wood's office, on April 13, 2021, however the $1,500 has not been paid and remains outstanding.

[55] The examinations for discovery of the defendant proceeded by videoconference on May 27, 2021, at which time the defendant provided 12 undertakings.

(iii) Events Following the Examination for Discovery

[56] On June 3, 2021, Mr. Wood advised Ms. Kochan that "due to circumstances" the defendant had again determined to represent himself going forward.

[57] On June 17, 2021, Ms. Kochan filed a pre-trial brief on behalf of the plaintiff so that steps could be taken to schedule the first pre-trial conference.

[58] On June 23, 2021, a notice of change of lawyer was filed by Matthew Duffy on behalf of the defendant.

(iv) The following events occurred after the defendant's father's cancer diagnosis in September 2021.

[59] With the cooperation of Mr. Duffy, the first pre-trial conference was scheduled for November 5, 2021, at 9:00 a.m. The Honourable Justice Toews ordered the defendant to provide his answers to undertakings to the plaintiff within 45 days of receiving a written request from the plaintiff.

[60] On December 21, 2021, Ms. Kochan sent Mr. Duffy a list of the Undertakings that had been given by the defendant on May 27, 2021. Following the order/direction of the Honourable Justice Toews, the defendant's answers to undertakings were due by February 4, 2022.

[61] The defendant's answers to undertakings were not provided by February 4, 2022, (and for that matter, have still not been provided) and therefore Ms. Kochan wrote to Mr. Duffy on February 9, 2022, advising that the deadline had passed and asking that the defendant's answers be provided immediately.

[62] On February 11, 2022, Mr. Trevor Yakimchuk, co-counsel for the defendant, advised Ms. Kochan that he was in receipt of Ms. Kochan's correspondence and was working with the defendant to provide the answers to undertakings.

[63] As no further response was received from counsel for the defendant, Ms. Kochan wrote again to Mr. Duffy/Mr. Yakimchuk on March 9, 2022, advising that the deadline imposed by the Honourable Mr. Justice Toews had expired on February 4, 2022, that it had now been three months since the list of undertakings had been provided to their office, that it had been nearly one year since Mr. Sinha had been examined for discovery, and requesting that the answers be provided by no later than March 31, 2022, failing which the plaintiff would be filing a notice of motion compelling the defendant's answers to undertakings and requesting a further pre-trial conference in front of Justice Toews to discuss the defendant's breach.

(v) The defendant's father passed away on April 29, 2022, and the following events are after his death.

[64] The plaintiff's motion seeking to either strike the defendant's statement of defence and/or in the alternative, requiring the defendant to provide his answers to Undertakings by a set date, was set down for the pre-trial conference scheduled for June 9, 2022.

[65] The pre-trial conference took place via teleconference before the Honourable Mr. Justice Toews on June 9, 2022, at which time defendant's counsel, Mr. Duffy, was

allowed to withdraw as lawyer of record for the defendant, with the defendant to continue as a self-represented litigant once again. The defendant was to file a notice of intention to act in person. At this second pre-trial conference, the defendant reported having been pre-occupied with caring for his ill father, advancing that as an explanation for his prior breaches and inability to comply with deadlines.

[66] During the pre-trial conference on June 9, 2022 (at which the defendant was present) the Honourable Justice Toews discussed the plaintiff's motion seeking to strike out the defendant's statement of defence or alternatively compelling the defendant to provide his answers to Undertakings by a fixed date. During the pre-trial conference, the following orders and directions were made by the Honourable Justice Toews which were communicated to the defendant:

a) Ms. Kochan was to provide the defendant with a copy of the undertakings on June 9, 2022, by e-mail, to the defendant's e-mail address at sunil@asconsulting.ca

b) The defendant was to confirm receipt of the e-mail attaching or setting out the undertakings by the end of the business day on June 10, 2022;

c) The defendant was to provide his answers to the undertakings by the end of the business day on July 10, 2022 by e-mailing those answers to Ms. Kochan at dkochan@dfslaw.ca;

d) The defendant was ordered to pay costs in the sum of $2,000 payable in any event of the cause ($1,000 of which was payable forthwith).

[67] There was also discussion during the pre-trial conference with respect to the plaintiff's anticipated motion to compel the defendant's telephone and text records. As part of these discussions, the Honourable Justice Toews made the following further direction that the defendant provide (which was communicated to the defendant):

> copies of all of his telephone and text records in respect of any personal or corporate telephone numbers that he was using, whether they are in his name as noted in the statement of claim or otherwise.

[68] In furtherance of the orders/directions made by the Honourable Mr. Toews, at the pre-trial conference, Ms. Kochan provided the defendant with a copy of the undertakings on June 9, 2022, to his e-mail address at sunil@asconsulting.ca. In breach of the order of Justice Toews, the defendant did not confirm receipt of the e-mail by the end of the business day on June 10, 2022 or otherwise.

[69] As a result, on June 15, 2022, Ms. Kochan sent further correspondence to the defendant by regular mail again setting out the list of undertakings.

[70] Despite the e-mail sent to the defendant on June 9, 2022, the written correspondence sent by Ms. Kochan to the defendant on June 15, 2022, and the directions made by the Honourable Mr. Justice Toews on June 9, 2022, the defendant failed to do the following:

a) The defendant did not file a notice of intention to act in person;

b) The defendant did not confirm receipt of the e-mail setting out the undertakings by the end of the business day on June 10, 2022, or at all;

c) The defendant did not provide any answers to the undertakings by the end of the business day on July 10, 2022 or at all;

d) The defendant has not paid the $1,000 costs ordered as payable forthwith;

e) The defendant has not provided copies of all of his telephone and text records in respect of any personal or corporate telephone numbers that he was using, whether they were in his name as noted in the statement of claim or otherwise.

[71] As the defendant continued to violate orders/directions made by the court and failed to provide the plaintiff with his answers to undertakings, the plaintiff proceeded with the motion to strike the defendant's statement of defence and requested default judgment.

[72] On July 19, 2022, Ms. Kochan sent correspondence to the defendant by e-mail and regular mail, attaching a copy of her correspondence addressed to the Honourable Justice Toews dated July 19, 2022. In that correspondence Ms. Kochan requested an immediate appearance before the Honourable Justice Toews for the purpose of seeking an order striking out the defendant's statement of defence for failure to comply with the directions given at the pre-trial conference on June 9, 2022, and further seeking leave to proceed to default judgment against the defendant.

[73] On July 19, 2022, Ms. Hildebrand, assistant for the Honourable Justice Toew,s sent e-mail correspondence to Ms. Kochan, Mr. Duffy and the defendant in which she advised that a fresh motion would not be required, and that the matter could be set down for a pre-trial at which time the relief requested in the previous motion would be considered.

[74] On July 21, 2022, Ms. Kochan's office sent e-mail correspondence to Ms. Hildebrand and the defendant in which it was confirmed that as there was already a

pre-trial scheduled for September 19, 2022, the plaintiff's motion filed May 26, 2022, would be heard on that date.

[75] On September 6, 2022, Ms. Kochan sent correspondence to the defendant, both by e-mail and regular mail, attaching her correspondence, the supplemental affidavit of Kumar Alok Pathak, affirmed August 10, 2022, and the plaintiff's motion's brief. This correspondence confirmed that the matter would be heard on Monday, September 19, 2022, at 9:00 a.m.

[76] On October 3, 2022, after the September 19, 2022 hearing, the Honourable Mr. Justice Toews ordered that the statement of defence of the defendant be struck without leave to file another, and the plaintiff was given leave to note the defendant in default and proceed to obtain default judgment. The court further ordered the issue of damages and costs to be adjourned to a hearing on January 25, 2023. The defendant was allowed to file and serve any responding evidence and materials by December 15, 2022. Service of the order was made on the defendant by mail and e-mail to: Suite 404-1102 Hornby Street, Vancouver, British Columbia, V6Z 1V8, sunil@asconsulting.ca.

[77] On October 12, 2022, Ms. Kochan's office sent correspondence to the defendant by e-mail and regular mail enclosing a copy of the order of the Honourable Justice Toews dated October 3, 2022.

[78] On January 19, 2023, Ms. Hildebrand, on behalf of Justice Toews, sent e-mail correspondence to Ms. Kochan and the defendant confirming that the matter would proceed on January 25, 2023, with the defendant being entitled to appear by teleconference and the teleconference details were included.

[79] On January 25, 2023, a motion hearing occurred in which the defendant did not appear. Judgment was issued against the defendant in the following sums:

a) Pecuniary damages in the amount of $107,562.60;

b) General damages in the amount of $200,000;

c) Aggravated damages in the amount of $150,000;

d) Punitive damage in the amount of $100,000; and

e) A permanent injunction prohibiting the defendant from having any contact with the plaintiff, plaintiff's patients, employees or co-workers at Cancer Care Manitoba, Health Sciences Centre, the University of Manitoba, St. Boniface Hospital and/or the College of Physicians and Surgeons;

f) $2,000 in costs for the pre-trial motion.

[80] On March 17, 2023, Ms. Kochan served the defendant with a copy of the Manitoba default judgment by both regular mail to Suite 404-1102 Hornby Street, Vancouver, British Columbia, V6Z 1V8, as well as by e-mail to sunil@asconsulting.ca in accordance with the instructions of the Honourable Justice Toews. This was now nearly a year since the defendant's father had passed away.

[81] On March 24, 2023, the plaintiff registered the Manitoba default judgment and the unpaid cost orders with The Supreme Court of British Columbia (BCSC action No. L230117, BCSC action No. L230118, BCSC action No. L230119). Court file numbers L230117, L230118 and L230119 were consolidated on May 18, 2023 under L230117 by order of The Supreme Court of British Columbia.

[82] On March 28, 2023, the Certificates of Judgment were registered at the New Westminster Land Title Office against the Lands owned by the defendant as registration numbers CB539306, CB539294, and CB539300.

[83] Ms. Nguinambaye, the plaintiff's counsel in British Columbia, sent an e-mail to the defendant at sunil@asconsulting.ca on March 30, 2023, enclosing a formal demand letter, copies of the registered judgments and the certificates of judgment for BCSC action nos. L230117, L230118 and L230119 and thereafter on March 30, 2023, she also sent the same documentation to the defendant by registered mail to Suite 404-1102 Hornby Street, Vancouver, British Columbia, V6Z 1V8.

[84] As she did not receive a response from the defendant by April 13, 2023, she followed up with him again by e-mail requesting that he confirm service. Further, Ms. Nguinambaye spoke to the defendant by telephone on May 2, 2023, at which time he confirmed receipt of the documents that had been sent to him by e-mail and personal service and during which he advised that he intended to retain counsel.

[85] On April 26, 2023, the defendant was served with the demand letter, the Manitoba default judgment, the Manitoba cost orders, and the three Certificates of Judgment that issued from the BC courts by way of personal service.

[86] On November 1, 2023, over nine months after judgment was entered in the matter, and over four years after the statement of claim was filed, the defendant filed a notice of motion to set aside the Manitoba default judgment.

[87] The defendant alleges that he was not aware of the proceeding to enforce the Manitoba default judgment until May 28, 2023, and was not aware of the Manitoba default

judgment until June 9, 2023, however Ms. Kochan e-mailed and mailed the defendant a copy of the Manitoba default judgment on March 17, 2023, and Ms. Nguinambaye spoke to the defendant by telephone on May 2, 2023, at which time he confirmed receipt of the documents.

[88] Further, the defendant alleges that his father's illness and eventual death is the reason he has been unresponsive in this action. Such excuse has previously been used by the defendant at the pre-trial conference on June 9, 2022, to justify his prior delinquent conduct and breaches. To the contrary, the defendant's father was diagnosed with cancer in September 2021 and passed away on April 29, 2022 (a period of seven months), while the defendant's conduct and non-compliance in this action has existed since close to the beginning of this action.

THE ARGUMENT OF THE DEFENDANT IN FAVOUR OF SETTING ASIDE THE MANITOBA DEFAULT JUDGMENT

[89] King's Bench Rule 19.08 provides the legal authority for the court to set aside a default judgment. The rule provides:

> **Under rule 19.04**
> **19.08(1)** A judgment against a defendant who has been noted in default that is signed by the registrar or granted by the court on motion under rule 19.04 may be set aside or varied by the court on such terms as are just.
>
> **Under rule 19.05**
> **19.08(2)** A judgment against a defendant who has been noted in default that is obtained on a motion for judgment on the statement of claim under rule 19.05 or that is obtained after trial, may be set aside or varied by a judge on such terms as are just.

> **Noting of default**
> **19.08(3)** On setting aside a judgment under subrule (1) or (2) the court or judge may also set aside the noting of default under rule 19.03.

[90] The defendant acknowledges that he has the burden of proof to show why the default should be aside, quoting the court in ***Wynn Las Vegas, LLC v. Li***, 2012 MBQB 191, 281 Man.R. (2d) 95 (QL), where the Master set out the procedure and several requirements that a defendant must meet in bringing forward a motion to set a default judgment aside. The court noted at para. 23:

> **23** The Manitoba Court of Appeal in ***De Rzonca v. Kummerfield and Kummerfield***, [1956] M.J. No. 5 set out at para 10 the requirements of a litigant applying under this rule:
>
> > **10** In order to succeed on a motion to set aside a judgment regularly entered the applicant must proceed as soon as possible after the judgment comes to his knowledge. Mere delay will not be a bar to the application unless an irreparable injury will be done to the plaintiff or the delay has been wilful. The application should be supported by an affidavit setting out the circumstances under which the default arose. It is not sufficient to merely state that the applicant has a good defence on the merits: the affidavit must show the nature of the defence and set forth facts which will enable the Court or a Judge to decide whether or not there is matter which affords a defence to the action…
> >
> > [underlining in the original]

(i) A Meritorious Defence

[91] As stipulated by the case law, the defendant submits he has a meritorious defence to this action. He asserts that his defamatory comments, made to individuals that the plaintiff works with, were true and therefore justified, namely that the plaintiff was abusive to his daughter. He states the allegations of abuse included physical and sexual abuse against the daughter and that the plaintiff's ex-wife and daughter will corroborate these allegations.

[92] The defendant also states that the Winnipeg Police Sex Crimes Unit investigated the allegations and although no criminal charges were ultimately laid, the police referred the file to the Crown, recommending charges against the plaintiff.

[93] Furthermore, the defendant asserts that the dissemination of any defamatory remarks was "minimal in nature" and only provided to two co-workers. (See defendant's brief at paras. 22-26). He argues that the abuse allegations were true and would therefore constitute a meritorious defence to this action.

[94] The defendant also states that he had an honest belief that these allegations were true, having been informed about them by the victims themselves and that the allegations were made without malice. He states that he informed the co-workers of the allegations after being informed of them by the victims and does not stand to gain anything else out of making these remarks. This defence of qualified privilege was outlined by the court in ***Melnyk v. Daly***, 2015 MBQB 169, 322 Man.R. (2d) 111 (QL), at paras. 113-14 as follows:

> **113** I turn now to the defence of qualified privilege. The onus is on the defendant to establish that the communication occurred on an occasion of qualified privilege. If a communication was made in good faith, and with an honest belief in its truth, qualified privilege may be successful in defence of defamation. Furthermore, there is a presumption of good faith and honest belief.
>
> **114** But proof of malice will rebut that presumption. …

(ii) Delay and Potential Prejudice

[95] The defendant submits that there was no delay in bringing this motion to disentitle him from having the court set aside the Manitoba default judgment and that the plaintiff would not be prejudiced by the Manitoba default judgment being set aside.

[96] The defendant states that he only became aware of the Manitoba default judgment on or around June 9, 2023, and that during this time he was still in the process of

recovering from his debilitating mental health struggles. He states that shortly thereafter he began making efforts to review the Manitoba default judgment materials and to re-establish contact with his legal counsel in Manitoba. He says that he began addressing all the matters and responsibilities that he had inadvertently neglected due to his depressive and dissociative episodes, and this took some time to do.

[97] The defendant takes the position that any delay here is attributable to his gradual recovery from his mental health struggles. The defendant states that he is an individual who is getting back on his feet, but he could experience days or weeks of relapse, and this is normal. He argues that what is important is that he is seeking help from appropriate resources and is now adamant about defending this claim. The defendant says he is prepared to conduct all steps necessary expedite this matter to trial as soon as possible.

[98] The defendant further submits that there would be no irreparable harm to the plaintiff if the Manitoba default judgment were set aside. He states the plaintiff's ability to prosecute the claim has not been adversely impacted and that there is no evidence to suggest that he will attempt to evade any future judgment that the plaintiff might obtain against him.

[99] The defendant submits in the alternative, that if the court is unwilling to grant an order setting aside the Manitoba default judgment, the award of damages should be reduced.

[100] The defendant relies on two recent Manitoba Court of Appeal decisions, one of which was delivered after the Manitoba default judgment being entered against the

defendant. These decisions are ***Chartier v. Bibeau***, 2022 MBCA 5, 465 D.L.R. (4th) 527, and ***Muzik v. Canadian Broadcasting Corporation et. al.***, 2023 MBCA 95, [2023] M.J. No. 304.

[101] The defendant submits that considering the principles held to be applicable in respect of the determination of quantum for special, general, aggravated and punitive damages in defamation cases, these two decisions indicate that a significant reduction in the overall award of damages is necessary in this case.

THE ARGUMENT OF THE PLAINTIFF IN FAVOUR OF DISMISSING THE DEFENDANT'S MOTION TO SET ASIDE THE MANITOBA DEFAULT JUDGMENT

[102] The plaintiff requests the court dismiss the defendant's motion, as he has persistently delayed this matter, has continually provided false or misleading evidence, has failed to file his motion to set aside the Manitoba default judgment in a timely manner, and lacks a meritorious defence. Due to the nature of the underlying action, and particularly the egregious defamatory statements made by the defendant, the plaintiff says he will be prejudiced if the defendant's motion is granted.

[103] The plaintiff's argument addresses the following issues:

(i) Whether the defendant has a reasonable explanation as to why the matter proceeded by default;

(ii) Whether the defendant was timely in bringing his motion to set aside default judgment upon learning of the judgment; and

(iii) Whether the defendant has a meritorious defence to the underlying action.

[104] There is no issue between the parties as to the applicability of the King's Bench Rules or in general terms, the law setting out the factors relevant in deciding whether to set aside a default judgment. These factors include:

a. Whether the defendant had an ongoing intention to defend;

b. Whether the defendant adequately explained why there was delay in filing a defence;

c. Whether the delay in filing a defence was willful:

d. Whether the motion to set aside the noting of default was brought with dispatch, and

e. Whether the delay in filing a defence caused prejudice to the plaintiff.

(See ***Neepawa-Gladstone Cooperative Ltd. v. Ehr***, 2019 MBQB 65, [2019] M.J. No. 112, at para. 24)

[105] The plaintiff states that the facts demonstrate that throughout the litigation the defendant has delayed defending the matter, ignored his obligations in the litigation, and ignored the court's orders. The plaintiff argues that failure on the part of the defendant to meet his obligations commenced at the time of the scheduling of the examinations for discovery in August 2020 and in the result, it took 22 months from the issuance of the statement of claim to the conduct of the examination for discovery. This conduct preceded any illness suffered by the plaintiff's father.

[106] The plaintiff points out that the undertakings arising out of the examination for discovery were not provided within the time frame imposed by court order. A second pre-trial occurred on June 9, 2022, where a further schedule was set out by the court in

respect of answering the undertakings. The defendant again failed to comply with the schedule imposed by the court. The defendant's answer to undertakings have still not been complied with.

[107] In addition, the plaintiff points out that the defendant has failed to pay all but one of the three cost awards, paying only $500 out of a total of $5,500 in costs. Together with the failure to comply with the orders made in respect of the undertakings, the failure to pay the outstanding costs as required demonstrates a lack of any intention to defend the action.

[108] The plaintiff points out that the defendant was warned on numerous occasions that his defence could be struck if he failed to comply with the court's directions. The first indication that his defence might be struck was from correspondence from his own counsel in February 2021.

[109] Furthermore, after the defendant's defence was struck by the court on September 19, 2022, the defendant was sent a copy of the court's order and he was advised that a hearing was set for January 25, 2023, for the determination of damages and costs. He was told that he could have an opportunity to file responding materials by December 15, 2022, and attend the hearing to make submissions. The defendant failed to provide any responding evidence and failed to appear by videoconference or in person at the hearing that took place on January 25, 2023.

[110] The plaintiff argues that there is no evidence that would support the defendant's claim that he was mentally unwell which resulted in an inability to open his mail, respond to the e-mails sent to his address in respect of this matter, or otherwise attend to his

basic needs of life. The plaintiff has filed extensive evidence from the defendant's social media posts dated between March 17, 2021, and November 2, 2023, setting out his extensive social interaction, including travels abroad, partying, and visits with friends and family.

[111] The plaintiff points out that there is no evidence of a medical diagnosis or prescriptions that would prevent the defendant from attending to the requirements of this litigation. The plaintiff notes that during the litigation, neither the defendant nor any of his successive lawyers ever mentioned that he was suffering from any mental health issues that precluded his active involvement in the litigation. On June 9, 2022, six weeks after his father's death, the defendant was present by telephone at the pre-trial conference and there was no indication of any inability to cope.

[112] The plaintiff argues that the defendant failed to bring his motion to set aside the noting of the default and default judgment in a timely manner. The plaintiff notes that the defendant was notified that the plaintiff would be filing a motion to strike his statement of defence as early as February 2021, when the plaintiff initially filed his motion to strike. Further, the plaintiff states, on September 1, 2022, a copy of the plaintiff's motion brief to strike the defendant's pleadings and supplemental affidavit were emailed and mailed by regular mail to the defendant's addresses.

[113] Further, on April 26, 2023, the defendant was personally served in British Columbia with the two cost awards in the plaintiff's favour and the Manitoba default judgment. The defendant was also notified on April 26, 2023, that the Manitoba default judgment was registered in the British Columbia Supreme court and against the defendant's properties.

Additionally, on or about May 2, 2023, the plaintiff's counsel in British Columbia spoke with the defendant by telephone regarding the judgments. The defendant confirmed that he was in receipt of the documents and was aware that the Manitoba default judgment had been obtained. Accordingly, the defendant's allegation that he was not made aware of the Manitoba default judgment until June 9, 2023, is inaccurate.

[114] In the same vein, the plaintiff argues that the defendant's suggestion in his affidavit that he was unaware of his lawyer's withdrawal from representing him and that resulted in the plaintiff obtaining a default judgment, is incorrect. The plaintiff points out that the defendant was present at the pre-trial conference on June 9, 2022, and was aware of counsel having withdrawn.

[115] During counsel's submissions on behalf the plaintiff, she summarizes the significant and ongoing social activities that the defendant was involved in during the time he states he was unable to cope. Counsel points out that there is no indication in the documentation produced by the defendant that he suffered from clinical depression nor does the documentation suggest that his mood was so severe and debilitating that it prevented him from responding to this action. On the contrary, the social media posts set out in detail in the plaintiff's brief at para. 43 (a) through (ff) inclusive, dated December 2021 to July 16, 2023, document the extensive activities the defendant was engaged in, in locations across the country from Nova Scotia to British Columbia, as well as internationally.

[116] It is the plaintiff's position that the evidence establishes that the defendant had "illnesses of convenience" that manifested themselves only on days of examinations, deadlines or court required attendances.

[117] The plaintiff argues that the defendant does not have a meritorious defence to this action. The plaintiff states that all the elements of the tort of defamation are supported by the evidence. Counsel argues that the defendant has made defamatory statements against the plaintiff and continued a course of harassment against the plaintiff with no justifiable defence.

[118] The evidence establishes the defendant contacted two of the plaintiff's co-workers, who during conversations recorded by the defendant, denied that they knew about the allegations of abuse referenced by the defendant in those conversations. Not only were the two individuals the plaintiff's co-workers, but they were also the plaintiff's superiors, one being the President and CEO of the organization the plaintiff worked for and the other being the head of Radiation Oncology at the same organization. These calls were placed three months after Child and Family Services had investigated and closed the file in respect of the alleged abuse.

[119] As a result of the allegations made, the plaintiff's ethics and character were questioned, and he was investigated by the College of Physicians and Surgeons and his employer.

[120] The plaintiff points out that the defendant justifies his actions in bringing this matter to the attention of the plaintiff's employer based on a police report filed on August 15, 2019. However, the police report was filed a year after the defendant approached

the plaintiff's employer and six days after the statement of claim was commenced, just before the statement of defence was filed. Ultimately, no criminal charges were laid by the authorities and Child and Family Services took no action after investigating the matter.

[121] The plaintiff points out that the defendant's language and conduct exhibited malice and therefore extinguishes qualified privilege as a defence.

[122] Finally, the plaintiff argues that he will be prejudiced if the court grants the defendant's requested relief. He points out that the defendant's defamatory statements date back to July 18, 2018, and since that time the plaintiff has attempted to advance his claim against the defendant. During that time, the defendant continued to stall the proceedings and resist access to information pertinent to this case.

[123] The plaintiff points out that the defendant is responsible for seven separate breaches of the court's orders and directions, strongly suggesting that if the Manitoba default judgment is set aside, the defendant will continue his attempt to evade any future judgment the plaintiff might obtain.

[124] The plaintiff submits that this is a case of delay where the plaintiff's ability to prosecute the action has been impacted with the lapse of time. The plaintiff states that the history of the defendant's reluctance to provide any answers over the last five and half years gives rise to a real concern that relevant evidence might have been destroyed by deleting e-mails and text messages and by disposing of electronic devices. Initiatives to obtain this information were put on hold based on assurances that answers to the undertakings would be provided. It would now be extremely difficult to retrieve e-mail messages and chats after such a long time. Further, the intimidating messages from the

defendant have ceased since the Manitoba default judgment was entered. Setting this judgment aside will again expose the plaintiff to the risk of similar conduct.

[125] The plaintiff states that because of the defendant's behaviour, the plaintiff has spent a significant amount of time over the last five years in a lawyer's office in attempts to repair his good character and reputation. The plaintiff has had to endure investigations relative to the defendant's defamatory statements. The plaintiff has experienced mental anguish, inability to sleep, and missed time at work that could have been better served attending to cancer patients. The plaintiff has taken many years to rebuild trust with patients based on the plaintiff's reputation. Setting aside the default judgment will expose the plaintiff again to years of mental stress and pain.

[126] The plaintiff states that he has spent over $100,000 in legal fees attempting to obtain and collect on the Manitoba default judgment. Most of these amounts would be amounts thrown away, if the default judgment is set aside.

[127] Finally, the plaintiff has serious concern that if the Manitoba default judgment is set aside, the registrations that have been placed against the defendant's properties in British Columbia would by necessity be lost. This would allow the defendant to dispose of his properties, leaving the plaintiff with little to no ability to ever collect on this judgment.

ANALYSIS AND DECISION

[128] The factors which are to be considered when determining whether a default judgment should be set aside are set out in ***Manitoba Public Insurance Corp. v. Landry***, 2005 MBQB 141, 196 Man.R. (2d) 136 (QL). In that decision, Greenberg J.

enumerates five specific factors to be considered, but also makes it clear that the determination to set aside a default judgment is not limited to a consideration of those factors. Furthermore, a factor which may in certain cases be dominant may lose its dominance when considered in conjunction with another. The factors which the court should consider will vary from case to case. She states:

> **11** Queen's Bench Rule 19.03(1) provides that the noting of default may be set aside by the court on such terms as are just. There are no criteria set out in the rule to guide the court's discretion. A review of the cases under this rule indicates that courts in Manitoba have looked at a variety of factors in determining whether or not to set aside default, including:
>
> 1) whether the defendant had an ongoing intention to defend;
>
> 2) whether the defendant adequately explained why there was delay in filing a defence;
>
> 3) whether the delay in filing a defence was willful;
>
> 4) whether the motion to set aside the noting of default was brought with dispatch; and
>
> 5) whether the delay in filing a defence caused prejudice to the plaintiff.
>
> **12** Counsel for the defendant argued that there is no requirement for the court to find that the defendant has a meritorious defence in order to set aside the noting of default. In fact, that was the clear statement of the Court of Appeal in ***Beardy v. Sass*** (1997), 118 Man.R. (2d) 99 (C.A.). However, in the more recent decision of the Court of Appeal in ***Protect-A-Home Services Inc. v. Heber***, [2001] MBCA 171, Twaddle J.A., writing for the Court, referred to ***Beardy v. Sass***, but held that, although proof of a meritorious defence was not a pre-condition to the exercise of discretion to set aside default, it is a relevant factor for the court to consider. And it was one of the factors upon which Twaddle J.A. relied in upholding the noting of default in that case.
>
> **13** Twaddle J.A. held that the factors which the court should consider will vary from case to case. He stated further:
>
>> [18] The factors to be taken into consideration in the exercise of the court's discretion to set aside a noting of default are not to be considered each in isolation from the others. As the *Sinclair* decision shows, a factor which may otherwise be dominant may lose its dominance when considered in conjunction with another. It is equally true that several factors which

> individually might not warrant a refusal to set aside a default may in combination do so.
>
> **14** In my view, where the delay in moving to set aside default is excessive (as I believe the four and one-half years is in this case), the court cannot help but consider whether there is merit to the defence. A court may be more inclined to excuse the delay in filing a defence where the defence has clear merit.

[129] In concluding that the Manitoba default judgment should not be set aside, I have carefully considered the conduct and evidence of the parties to this action. Specifically, I have considered the following factors:

a) Whether the defendant has failed to establish an ongoing intention to defend;

b) Whether the defendant has a reasonable explanation as to why the action proceeded to default;

c) Whether the defendant failed to bring his motion to set aside the noting of default and default judgment in a timely manner;

d) Whether the defendant's health, and specifically his mental health, was such that he could not take steps to defend the action;

e) Whether the defendant has a meritorious defence to this action; and

f) Whether the plaintiff will be prejudiced if the court grants the defendant's requested relief.

[130] Furthermore, I have come to the conclusion that even if it were inclined to do so, this court does not have the authority to reduce the amount of damages awarded after the default judgment hearing has taken place, the quantum of damages has been determined by the court and the default judgment has been entered by the court.

[131] In considering the evidence before the court, I have also concluded that the evidence of the defendant as set out in his material is not reliable. For the reasons set out in this decision, I accept the evidence of the plaintiff where the evidence of the plaintiff conflicts with that of the defendant.

a) Has the defendant failed to establish an ongoing intention to defend?

[132] I agree with the plaintiff that the defendant's pattern of conduct does not support the contention that there is an ongoing intention to defend by the defendant. This is not only apparent in the defendant's pre-judgment conduct but that there was also no demonstrable efforts or intention to defend after the Manitoba default judgment was obtained.

[133] The defendant consistently took steps to avoid the litigation proceedings leading up to the default Manitoba judgment being entered. These steps include his attempts to avoid the discovery process even when he was represented by counsel. I note that the plaintiff agreed to accommodate him by having the discoveries proceed by way of video rather than insisting on his personal attendance in Manitoba. His own counsel at the time confirmed that the defendant was aware of the time of the proceedings. Furthermore, when asked to support his assertion that a medical issue had arisen which rendered him unable to attend the scheduled discovery, he was unable to do so. While the defendant asserts that this medical issue required his attendance at a hospital in Vancouver, British Columbia, the evidence he produced did not support the assertion that his attendance created a conflict as to time nor did he produce any documentary evidence of a medical condition from the hospital or otherwise that would support his inability to attend.

[134] When the defendant was ordered by the court on several occasions to produce answers to undertakings provided at the discovery, those undertakings were left unanswered and remain unanswered despite several demands to produce them within a certain time frame. At the same time, the defendant has taken no steps to examine the plaintiff to produce admissions or uncover evidence that would advance his case.

[135] When the defendant was ordered at a pre-trial on June 9, 2022, to answer the undertakings by a specific date (several months after the death of his father), contrary to the order made, the defendant failed to confirm the receipt of the e-mail attaching the undertakings at the end of business day on June 10, 2022. He subsequently failed to comply with every other order made on June 9, 2022.

[136] The defendant was served with the correspondence relating to the motion to strike his defence on September 6, 2022. However, he did not arrange to appear in person or otherwise at the hearing following which the court gave the plaintiff leave to note the defendant in default. Furthermore, after the Manitoba default judgment was obtained, pursuant to the order of the court, the defendant was served with notice to attend the hearing on January 25, 2023, to determine the issue of damages and costs. Again, he failed to attend.

[137] The plaintiff states, and I accept his evidence, that the defendant was aware of the Manitoba default judgment having been issued by the court and that it was mailed to him on March 17, 2023. The plaintiff's counsel in British Columbia confirmed the defendant's receipt of the documents in a telephone conversation with the defendant on May 2, 2023.

[138] The defendant has consistently demonstrated a pattern of conduct, both before and after the Manitoba default judgment was entered, that does not support an intention to defend the action, but rather demonstrates a continuing intention to avoid the legal proceedings.

b) Does the defendant have a reasonable explanation as to why the action proceeded to default?

[139] The evidence establishes that the defendant was warned on numerous occasions that if he did not comply with the court's directions his defence could be struck, and a default judgment could be entered. The first indication that his defence might be struck came from his own lawyer on February 11, 2021, after the defendant failed to attend an examination for discovery. Counsel advised the defendant:

> Sunil,
> I am anticipating being served shortly with a Motion to strike the Statement of Defence.
> Would you please call me as I do require your instructions now.

(See Exhibit "N" of the Affidavit of Coral Matthes affirmed February 17, 2021)

[140] On March 8, 2021, the defendant was again put on notice by way of the plaintiff's motion to strike the statement of defence. Contrary to the defendant's explanation that it was his father's illness that explains his inaction, it is clear that the defendant's history of non-compliance, including his failure to provide the undertakings which he gave at the discovery in May 2021, began well before his father was diagnosed with a very serious illness in September, 2021.

[141] His suggestion that he was so incapacitated by his own illness is clearly without any merit. His Facebook postings contain approximately 144 pages of content detailing his travels, partying, eating out, visits with friends and family and trips across Canada

and abroad. There is no evidence of a debilitating medical diagnosis such as is being advanced by the defendant in his brief. The only reasonable explanation supported by the evidence is that the defendant simply attempted to avoid the implications of the statement of claim until the reality of the Manitoba default judgment forced him to take the steps now being advanced by his counsel at this hearing.

c) Did the defendant fail to bring his motion to set aside the noting of default and default judgment in a timely manner?

[142] The defendant's position that he was not made aware of the Manitoba default judgment until June 9, 2023 is not supported by the evidence. I find that the defendant was made aware of the very real possibility of being noted in default and default judgment being ordered on the basis of the order of the court dated October 3, 2022 arising out of the September 19, 2022 hearing.

[143] It is also reasonable to infer that he knew his statement of defence had been struck when he was provided with the materials including the material that stated damages flowing from the default would be determined by the court on January 25, 2023, and that he had until December 15, 2022 to file responding evidence and materials.

[144] The evidence establishes that he was well aware of default being noted and that default judgment had been entered against him well in advance of June, 2023, but that he chose not to take steps to set aside the Manitoba default judgment in a timely manner.

d) Was the defendant's health, and specifically his mental health, such that he could not take steps to defend the action?

[145] I agree with the position of the plaintiff that the defendant has failed to provide any substantiating evidence of his alleged medical diagnosis. To the contrary, the

defendant's social media presence demonstrates that over the past two years he has been active in promoting his business and continued to be active in his personal life, all during the time in which he alleges his severe depression impeded his ability to not only respond to this matter, but even open his e-mails or regular mail.

[146] While it may be the case that many people active on social media may overstate to some degree their personal, social and business accomplishments, wherever the defendant may fall on that spectrum, his social media posts demonstrate that he was able to function at a highly active level during the relevant time period. Since his self-professed level of depression is not borne out by any objective or independent medical evidence, it is my conclusion that he is not and was not so incapacitated that he would have been unable to attend to the demands of this litigation. The evidence establishes a selective inability to address court and legal communications related to this matter while at the same time demonstrates a concurrent ability to communicate and manage his business, travel and social activities.

e) Does the defendant have a meritorious defence to this action?

[147] In my opinion, the evidence establishes that the defendant has made serious defamatory statements as well as conducted a course of harassment against the plaintiff for no clear discernable reason, and more importantly, with no justifiable defence.

[148] The defendant has stated that the defamatory statements about the plaintiff were only made to two of the plaintiff's "co-workers". The evidence however paints a substantively different picture. The two "co-workers" were in fact the plaintiff's superiors and the dissemination of that type of defamation understandably had a significant impact

on the plaintiff's employment as a medical doctor. This defamation ultimately resulted in his inability to carry out his employment responsibilities for a period as well as being subjected to what was undoubtedly the very uncomfortable scrutiny of his profession's governing body carrying out their legal mandate to investigate allegations of improper conduct by the members of that profession.

[149] Furthermore, the recordings that the defendant made of his conversations with the two medical "co-workers" establish that defamatory comments were made. In addition, contrary to the submissions of the defendant that these two doctors already knew about the abuse allegations, the recorded conversations demonstrate that neither of them knew anything about the allegations of child abuse and sexual abuse being made by the defendant.

(See Exhibit "C" of the affidavit of Sunil Sinha sworn the 12th day of November, 2023)

[150] Furthermore, my review of the evidence leads me to the conclusion that on May 25, 2019, the defendant sent the plaintiff text messages wherein he admitted to contacting professional colleagues of the plaintiff regarding allegations of abuse and that the defendant admits that he has been talking to "many" of the plaintiff's colleagues and not just two as he has claimed in his submissions.

(See Exhibit "A" of the affidavit of Pat Jorundson affirmed November 15, 2022)

[151] In respect of possible defences to these allegations of abuse, the defendant has not presented material on this motion to justify setting aside the default judgment by demonstrating that he has an arguable defence. This includes failing to advance an arguable defence consisting of any evidence that the abuse allegations are "substantially"

true or that the extent of the abuse communications by the defendant was limited to two professional colleagues who already knew about the allegations. In summary, I am of the opinion that the defendant has neither an arguable defence in respect of justification or truth, or in the form of qualified privilege.

f) Will the plaintiff be prejudiced if the court grants the defendant's requested relief?

[152] I have also arrived at the conclusion that the plaintiff will be prejudiced by the Manitoba default judgment being set aside. The defamatory statements admittedly made by the defendant date back to July 2018. My review of the evidence leads me to the conclusion that the defendant has willfully stalled and delayed these proceedings. He has defied or otherwise failed to comply with almost every order intended to resolve this dispute.

[153] I agree with the plaintiff that the defendant has demonstrated a consistent reluctance to provide any answers or documentation that he is required to provide. The defendant has been unresponsive in respect of multiple legal initiatives designed to obtain this information. This unwillingness to cooperate with the plaintiff's lawful efforts to obtain this information leads me to the reasonable inference that not only has the passage of time itself made it extremely difficult to obtain electronic information, but that the defendant may make or has already deliberately made efforts designed to ensure that this information is not capable of being retrieved.

[154] The plaintiff advises that since the Manitoba default judgment was entered, intimidating, threatening and harassing messages from the defendant have ceased. Not only do the plaintiff's investigations into the source of these messages point to the

defendant as being the responsible party, but the defendant has also specifically ignored the court's request to produce telephone and electronic records which might assist in determining in a more conclusive manner whether the defendant is behind these messages. Together with the other evidence produced by the plaintiff, the defendant's failure to comply with the court's direction in this respect allows the court to properly draw the inference that the defendant is in fact responsible for these messages.

[155] The defendant's conduct in sending these intimidating, threatening and harassing messages has understandably had adverse impacts on the plaintiff's ability to function in his personal and professional capacity. Setting the Manitoba default judgment aside carries with it the real likelihood that the defendant's past conduct in this regard will resume.

[156] The plaintiff has produced documentation that his "throw away" legal costs amount to approximately $110,000. Based on the failure of the defendant to pay a much smaller total of costs ordered to be paid forthwith, it is reasonable to assume that it is unlikely that the plaintiff would be able to collect on any future judgment without further protracted legal proceedings, if at all. The registrations that have been placed against the defendant's properties in British Columbia because of the Manitoba default judgment, would be vacated if the Manitoba default judgment were set aside. Other creditors of the defendant presently in litigation with him would be placed in a better position to ensure that their financial demands would be met. This would come at a cost to the plaintiff's ability to recover any award even if a future judgment were entered against the defendant in respect of this action.

The power to vary a default judgment "on such terms as are just"

[157] Finally, I wish to address one further submission. The defendant argues in the alternative that if the court does not set aside the Manitoba default judgment, the court has the power to vary a default judgment "on such terms as are just" as set out in King's Bench Rule 19.08. The defendant argues that this provides the court with the authority to vary the quantum of damages ordered pursuant on the basis of the Manitoba default judgment being entered.

[158] It is my opinion that this rule or any other rule in the King's Bench Rules does not allow me to reconsider the order that I have made and vary the quantum of damages at this stage in the proceedings. In my opinion, this type of remedy is not available to this court unless the Manitoba default judgment itself is set aside and a contested trial is ordered. The defendant here is essentially asking this court to carry out an appellate function in respect of the quantum ordered by this court after it has concluded a hearing and issued a judgment. The law generally, and the King's Bench Rules specifically, governing default judgments do not provide this court with that type of power.

[159] Although the case law in Manitoba does not appear to provide me with a precedent directly on point, in my opinion the decision of the court in ***Farmers Edge Inc. v. Precision Weather Solutions Inc.***, 2022 MBQB 142, [2022] M.J. No. 482 (QL), is instructive. In that decision, Martin J. considered a motion pursuant to Rule 59.06(2)(a) to set aside an order on the ground of fraud or of facts arising or discovered after it was made. Rule 59.06 provides:

> **59.06(1)** An order that,
> (a) contains an error arising from an accidental slip or omission; or

(b) requires amendment in any particular on which the court did not adjudicate; may be amended on a motion in the proceeding.

Setting aside or varying
59.06(2) A party who seeks to,
(a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;
(b) suspend the operation of an order;
(c) carry an order into operation; or
(d) obtain relief other than that originally awarded;
may make a motion in the proceeding for the relief claimed.

[160] In interpreting the scope of the power grant by this rule, Martin J. holds:

17 The law respecting Rule 59.06(02) is not complicated and is generally agreed.

18 Without going into a fulsome explanation of all of the policy rationale respecting setting aside orders, suffice it to say that finality is an important and animating legal concept. At some point, parties to an action must be able to rely upon a judgment or order as the end of a procedural dispute, or the substantive action itself. Once an order is formalized, memorializing that decision, it is usually only subject to appeal and even then within prescribed limits, such as time frames. The judge who issued the decision becomes *functus officio*. Looked at from the flipside, revisiting a decision to attempt to have the judge change their mind, sometimes referred to as litigation by installment, is discouraged. Revisiting a decision is counterintuitive to an effective, efficient and proportionate legal system, and effects the integrity of the appeal system.

19 However, occasionally, in narrow and circumscribed situations, an application to set aside an order by the judge who made the order may promote the interests of justice. Queen's Bench Rule 59.06(02)(a) is an example of flexibility in the rules of civil procedure to achieve that end. The Rule is the second part of what is commonly referred to as the "slip rule". The Rule states:

> 59.06(2) A party who seeks to,
> (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;
> …
> may make a motion in the proceeding for the relief claimed.

20 In ***Wong v. Grant Mitchell Law Corp. et al***. 2016 MBCA 65 (***Wong***), the Manitoba Court of Appeal noted that:

> [4] Generally speaking, in our system of civil justice, a judgment or order that has been formalized in accordance with the rules of court cannot be re-opened because the law gives the responsibility for error correction exclusively to the

> Court of Appeal …. Rule 59.06 sets out the narrow set of circumstances when a trial judge or motion judge has discretion to potentially re-open a formalized judgment or order. …
>
> [5] Rule 59.06 is not intended as a backdoor appeal of the merits of an unfavourable decision. …
> (citations omitted)

21 The Ontario equivalent to QBR 59.06(02)(a) is based on the same policy rationale. In ***Clatney v. Quinn Thiele Mineault Grodzki LLP***, [2016] ONCA 377 (***Clatney***), the Ontario Court of Appeal noted the potential scope of the rule:

> [58] However, as this court remarked in *Tsaoussis (Litigation Guardian of) v. Baetz* … , at p. 272, there are ways, two in fact, by which an individual who would otherwise be bound by a previous order can seek to have that order set aside. First, the party can move in the original proceedings under r. 59.06(2)(a) in cases of "fraud or facts arising or discovered after [the order] was made". Or, the party can bring a separate action to set aside the order.
>
> [59] The role of r. 59.06 is to provide an expeditious procedure for setting aside court orders. However, it does not prescribe or delineate a particular test: ... Ultimately, under r. 59.06 or within a separate action, an individual seeking to set aside an order is required to show "circumstances which warrant deviation from the fundamental principle that a final [order], unless appealed, marks the end of the litigation line": … .
>
> [60] Thus, a court is not limited to setting aside an order in instances of fraud or facts arising or discovered after the order has been made. This is reflected in a review of this court's decisions, which demonstrates a willingness to depart from finality and set aside court orders where it is necessary in the interests of justice to do so: .. .
> (citations omitted)

22 Manitoba decisions about the Rule are relatively scarce. Aside from ***Wong***, there are also Queen's Bench decisions in ***Apotex Fermentation Inc. v. Novopharm Ltd.***, 2000 CanLII 20744 (MB QB), and ***585430 Alberta Ltd. et al v. Trans Canada Leasing Inc. et al***, 2005 MBQB 220, both of which are referred to in a recent decision I wrote in ***Long v. Philipp and MacDougall***, 2021 MBQB 254 (***Long***). These cases take guidance from the Ontario lineage of cases on point, culminating with ***Clatney***.

23 In ***Long***, I concluded at para. 24 that QBR 59.06(02)(a) "is to be relied on in unusual, tightly prescribed circumstances. It is not a springboard for redo of an earlier hearing. … The policy underpinnings include principles of *functus officio* and finality."

24 Also notable is the Ontario Court of Appeal's decision in ***Royal Bank of Canada v. Futurecom Inc.***, [2010] O.J. No, 291, 2010 ONCA 63. At para. 20, the Court stated: "[R]ead in the context of the rule as a whole, it is clear that the

> reference to fraud is a fraud perpetrated in the way the judgment or order was obtained."
>
> **25** Clearly, Rule 59.06(02)(a) is not designed for redo of cases where the underlying claim is fraud, or where one party is alleged to have committed fraud upon another party. The reference to fraud in this Rule means a fraud upon the court in obtaining the order that is the subject of the set aside motion.

[161] In my view, while Rule 19.08 is not identical to the rule under consideration in ***Farmers Edge Inc.*****,** the general policy underlying Rule 59.06(2) identified, considered, and applied by Martin J. there, is equally applicable here. Like Rule 59.06, Rule 19.08 is to be relied on in unusual, tightly prescribed circumstances. It is not intended as a backdoor appeal of the merits of an unfavourable decision or as the basis for redo of an earlier hearing. The policy underpinnings include principles of *functus officio* and finality.

[162] In the circumstances of this case, it is my opinion Rule 19.08 does not provide me with the authority to reconsider the order that I have made and vary the quantum of damages at this stage in the proceedings. If I have made an error in assessing the quantum of damages here, that is a matter that lies within the jurisdiction of the Court of Appeal to correct.

CONCLUSION

[163] Based on the forgoing reasons, the motion brought by the defendant to set aside the Manitoba default judgment ordered against him on or about January 25, 2023, is dismissed. Similarly, the defendant's argument to have the court reconsider the quantum of damages ordered pursuant to the Manitoba default judgment is also dismissed. The plaintiff is awarded his costs on the motion on the basis of the applicable tariff.

_____ J.