

Date: 20250414
Docket: CI 23-01-43832
(Winnipeg Centre)
Indexed as: Burton v. James et al.
Cited as: 2025 MBKB 50

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

NEIL BURTON,	)	<u>Natalie Gerry</u>
	)	for the plaintiff
plaintiff,)	
)	
- and -)	
)	
GRAHAM MICHAEL JAMES and	)	<u>Stephan J. Thliveris</u>
ST. JAMES ASSINIBOIA SCHOOL	)	<u>Derek J. Novosel</u>
DIVISION,	)	for the defendant Graham Michael James
defendants.)	
)	
	)	<u>Bernice R. Bowley</u>
	)	<u>Kelsey M. Yakimoski</u>
	)	for the defendant St. James Assiniboia
	)	School Division (on a watching brief)
)	
)	
	)	<u>Judgment Delivered:</u>
	)	April 14, 2025

DECISION AND REASONS ON THE MOTION FOR SECURITY FOR COSTS

INNESS J.

INTRODUCTION

[1] This is my decision on the motion for security for costs filed by the defendant Graham Michael James ("James").¹ For the reasons that follow, I am declining to grant the order sought as it would be unjust to do so.

BACKGROUND

[2] The plaintiff, Neil Burton ("Burton") is a resident of Ontario but lived in Manitoba during the relevant timeframe. Burton claims he was sexually assaulted by James in the fall of 1983 while attending school where James was his substitute teacher. Burton alleges the incidents of abuse occurred in the classroom at the school, with one incident taking place at the home of a relative where Burton and his sister were staying. Burton further claims that the St. James-Assiniboia School Division (the "Division") knew or ought to have known about concerns regarding James' sexual offending and is therefore directly liable for breach of fiduciary duty and negligence as well as being vicariously liable for James' actions.

[3] James admits to being employed as a substitute teacher for the Division in the early 1980s but denies substitute teaching at the elementary school where Burton first enrolled as a student in September 1983. In any event, James contends he ceased all work as a substitute teacher at the end of the 1982-1983 school year when he was hired

¹ The defendant St. James-Assiniboia School Division is not seeking security for costs at this stage of the proceedings.

as the assistant coach and director of player personnel (head scout) for the Winnipeg Warriors hockey team.

[4] The defendants deny all liability. They collectively rely on documents including James' income tax records, school division records and reports generated from a Winnipeg Police Service's investigation as evidence that James was no longer working as a substitute teacher when Burton was a student.

[5] A summary judgment hearing date is set for May 2, 2025. Trial dates are set for October 19 to November 6, 2026.

ISSUES

[6] The issues on James' motion for security for costs are:

- 1) Should an order for security for costs be made; and, if so
- 2) What is the appropriate amount and form of security required?

LAW ON SECURITY FOR COSTS

[7] On motion, the court may make an order for security for costs where it is just to do so, including the enumerated circumstances of a plaintiff being ordinarily resident outside of Manitoba or being a nominal plaintiff (Rules 56.01(a) and 56.01(d) of ***The Court of King's Bench Rules***, M.R. 553/88) (the "***Rules***"). The amount of security as well as the form and timeframe within which it is to be provided is within the discretion of the court (Rule 56.04).

[8] According to Rule 56.01, the fundamental test for determining whether to grant an order for security for costs is whether it would be "*just in the particular circumstances of the case*" (***Gray et al. v. Webster et al.***, 1998 CanLII 6168 (MB CA),

129 Man. R. (2d) 87, at para. 12). As expressed by Scott C.J.M. in **Gray et al.**, at para. 32, "*An order for security for costs should only be granted where it is essential to do so, in the interests of justice, to provide defendants with some protection for their potential costs*".

[9] Generally, where a non-resident plaintiff has no assets in Manitoba the defendant has a *prima facie* entitlement to security for costs. The onus is on the plaintiff to convince the court that an order for security for costs is unnecessary in the interests of justice. (See **MacIver v. MacIver**, 1997 CanLII 22763 (MB QB), 117 Man. R. (2d) 154, at para. 16; **Park Avenue Furniture Corp. v. Gandhi**, 1990 CanLII 11065 (MB QB), 63 Man. R. (2d) 167; **Croizier v. Wellair Concepts Inc. et al.**, 1997 CanLII 23015 (MB QB), 122 Man. R. (2d) 208; **Private Trading Group, LLC v. The Government of Manitoba et al.**, 2025 MBKB 4.)

[10] In exercising its discretion, the court must weigh and balance the relevant factors, including: the apparent merits of the claim; the manner in which the proceedings have been conducted; the costs incurred by the defendant; the likely costs against the plaintiff if unsuccessful; the plaintiff's ability to pay costs including his realizable assets; whether the plaintiff might avoid paying a costs award; and whether a security for costs order would likely frustrate the plaintiff's ability to advance a meritorious claim (**DeBono v. Smith**, 1989 CanLII 7278 (MB QB), 62 Man. R. (2d) 98, at p. 88). These factors, while a handy guide, are not exhaustive. The context and circumstances of each case must be considered (**Gray et al.**, at para. 30; **Winkler v. Winkler**, 1990 CanLII 7968 (MB CA), 66 Man. R. (2d) 285, at para. 21).

[11] A plaintiff's impecuniosity is not an automatic bar to an order for security for costs. Whether an order ought to be granted in such circumstances must be carefully considered. In ***Sargsyan v. Westman Regional Laboratory Services Inc. et al.***, 2006 MBCA 85, 205 Man. R. (2d) 275, Scott C.J.M. stated at para. 5: "*It is clear that a financially disadvantaged litigant should not be barred from access to the courts due to significant financial constraints where there is an arguable case to be made*". Scott C.J.M. described an "*arguable case to be made*" (at para. 5) as being one that "*does not clearly lack merit*" (at para. 6). (See also ***Kalo v. Law Society of Manitoba***, 2010 MBCA 24, at para. 8.) Furthermore, judges should heed the following direction from the Ontario Court of Appeal in ***Yaiguaje v. Chevron Corporation***, 2017 ONCA 827, at para. 23: "*Courts must be vigilant to ensure an order that is designed to be protective in nature is not used as a litigation tactic to prevent a case from being heard on its merits*".

POSITIONS OF THE PARTIES

James' Position

[12] James filed his motion for security for costs on August 20, 2024. He has been timely in his request. James has expended approximately \$50,000 in legal expenses to date. James anticipates that costs will exceed \$100,000 if matters proceed through a 15-day trial. James argues that Burton's case is doomed to fail and it is unlikely that Burton could satisfy a costs award after trial. James further argues that Burton is a nominal plaintiff (Rule 56.01(d)) due to his impecuniosity and a contingency fee arrangement with his counsel. James seeks security in the amount of \$100,000.

Burton's Position

[13] Burton has no property or assets in Manitoba or Ontario. He has significant debt and minimal income over the last decade. In his affidavit, Burton stated that he has been unemployed since June 23, 2024 due to mental health reasons related to the underlying claim. Burton applied for a bank loan in the amount of \$50,000 but it was declined on March 6, 2025. Burton asserts that his claim has sufficient merit that it would be unjust to grant an order that would likely result in the termination of the claim due to his impecuniosity. Burton argues that granting an order in this case would lead to an injustice whereby James would benefit from the harm he created.

ANALYSIS AND CONCLUSION

[14] The evidence filed on the motion demonstrates, and James agrees, that Burton is an impecunious plaintiff. Burton has met his onus of satisfying the court that he is "*genuinely impecunious*" (***The College of Pharmacists of Manitoba v. Jorgenson***, 2020 MBCA 80, at para. 14). I accept that if I were to make a security for costs order in an amount sought by James, Burton would be unable to satisfy the order. I disagree with James, however, that Burton is a "nominal plaintiff". Burton has a significant vested interest in the outcome of the matter, personally and financially. The contingency fee arrangement was necessary for Burton to advance his claims and it does not impact my analysis in the circumstances of this case.

[15] While Burton's impecuniosity alone is not a basis upon which I can exercise my discretion against making a security for costs order, it is a factor that I must consider. If

I were to grant a security for costs order, it is undisputed that Burton would be unable to advance his sexual assault claim.

[16] Burton argues that his ability to earn income has been impacted by mental health issues caused by James' abuse. While the medical letter of Dr. Rana Prabal, dated September 13, 2024, appended to Burton's affidavit, sworn on March 11, 2025, lacks detail, it does state that Burton was away from work due to mental health reasons. Burton also provided evidence in his affidavit as to the psychological impacts of the abuse, including with respect to his employment.

[17] It is well recognized that sexual violence on children can cause serious emotional and psychological harm that is long lasting, continuing into adulthood. The Supreme Court of Canada's landmark decision in ***R. v. Friesen***, 2020 SCC 9, discussed the contemporary understanding of the harms occasioned by sexual offending on children and directed courts to be mindful of lifelong and wide-ranging impacts. The significance of the harm can be so pronounced for children that even a single instance of sexual abuse in childhood can "*permanently alter the course of a child's life*" (at para. 58).

[18] Proof of damages arising from the claim is an issue for trial. For the purposes of this motion, however, I am satisfied that Burton has established a sufficient basis upon which this factor ought to be considered. If Burton's claim succeeds, there is a basis upon which a court may conclude James is responsible for the damages alleged.

[19] Despite James' argument that Burton's initial steps in the litigation resulted in increased costs, I find that Burton's actions appear objectively reasonable. Although Burton made multiple requests for disclosure of documents, in the context of this

historical claim I do not find the requests to be excessive or unreasonable. As stated earlier, the defendants also rely upon historical documents to support their defence. In short, there is no evidence before me that Burton has done anything other than appropriately and vigorously pursue his claim.

[20] I have taken into account the status of the case and the fact that a summary judgment hearing is upcoming. If the defendants are entirely successful at summary judgment, the costs associated with a three-week trial, including expert evidence, will be avoided. I am satisfied that a security for costs order is not necessary to encourage Burton to act reasonably in the litigation at this stage of the proceedings (**Kalo**, at paras. 9-11).

[21] This brings me to the main issue in dispute between the parties, which is an assessment of the merits of Burton's claims. James argues that this factor weighs heavily in favour of a costs order even if it results in the termination of the claim for that reason. Based upon a preliminary assessment of the claims, which is all that is required at this stage, I do not find that Burton's claims are "*entirely devoid of merit*" (**Sokaluk v. St. Paul's College**, 2000 MBQB 20, 149 Man. R. (2d) 98, at para. 23) or that the relative merits of the claims are dubious (**The College of Pharmacists of Manitoba**, at paras. 23 and 43). Despite the triable issues as to the identity of the perpetrator and the reliability of Burton's evidence, I agree with Burton that the time to thoroughly assess the merits of the claim in detail is at the upcoming summary judgment motion.

[22] The decision in *C.A. et al. v. N.S.C. (formerly G.M.C.) et al.*, 2024 MBKB 179, where \$50,000 in security for costs was ordered, is distinguishable. The plaintiffs in that case had significant assets in the form of real property and agreed to pay any costs award made against them. Furthermore, the plaintiffs had ample time and resources to prepare for the possibility of a costs order. No amount of time or preparation could have enabled Burton to access the necessary resources to post security, certainly not anything close to the amount sought by James.

[23] It is worth noting that Burton's claims against the Division will proceed regardless of the outcome of this motion. It would seem incongruous to grant an order that would have the effect of removing James from proceedings where his alleged wrongdoing forms the basis of the claims against both defendants. Also, a decision that results in the removal of James as a defendant could potentially prejudice the Division's position, particularly as it relates to its' crossclaim against James. These considerations, while not essential to the decision on this motion, further support the justness of my decision to deny James' motion.

CONCLUSION

[24] It is within the discretion of the court to determine whether a security for costs order would be "just". In the particular circumstances of this case, after considering and balancing all of the applicable relevant factors, I conclude that it would not be just to grant James an order for security for costs. In coming to this conclusion, I put significant weight on the fact that any costs order would result in Burton's meritorious claims against James terminating due to his impecuniosity. Furthermore, the proposition that Burton's

impecuniosity was caused by James' actions militates against a security for costs order (***The College of Pharmacists of Manitoba***, at para. 16).

[25] The motion is denied.

COSTS

[26] Counsel agreed to defer the issue of costs until the ruling on the motion was received. Subject to counsel arranging a one hour teleconference to argue costs within 14 days of the receipt of this decision, I decline to make an order for costs on this motion.

_____. J.