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Docket: CI 23-02-04190
(Brandon Centre)
Indexed as: Schaworski v. Unrau
Cited as: 2025 MBKB 74

COURT OF KING'S BENCH OF MANITOBA
(GENERAL DIVISION)

B E T W E E N:

STANLEY JAMES SCHAWORSKI	)	Rhea P. Majewski
	)	for the plaintiff
plaintiff,	)	
- and -	)	
	)	
RICK UNRAU	)	Jennifer A. Sokal
defendant.	)	for the defendant
	)	
	)	
	)	Judgment delivered:
	)	June 02, 2025

LEVEN J.

SUMMARY

[1] This was an appeal for the decision of an Associate Judge (AJ) on costs. For reasons explained below, the appeal must fail.

[2] The plaintiff (who had a lawyer) filed a Statement of Claim (the "Claim") on or about May 15, 2023. (All dates are in 2023 unless otherwise specified.) The Claim was served (by actual service if not proper service) on June 22. The defendant spoke to a lawyer but

didn't retain him. The defendant allegedly spoke to the plaintiff's lawyer in a hostile manner. On July 18, the plaintiff noted default. The defendant hired a lawyer. The two lawyers spoke on August 2. On August 22, the defendant offered the plaintiff $200 to agree to set aside default. The plaintiff didn't accept the offer, and didn't make a counteroffer at that time.

[3] Over the next few months, both parties filed many affidavits and cross-examined on some affidavits, running up thousands of dollars of legal bills. The various affidavits were signed by both parties, by legal assistants from both law firms, by the plaintiff's partner, by the defendant's friend (who was golfing with him on June 22) and by the defendant's common law spouse. During cross-examination, the defendant realized that default was probably noted in error. After these costs were incurred, the plaintiff eventually made a settlement offer (that default would be set aside but that each party would bear its own costs), which was rejected.

[4] On June 3, 2024 the parties signed a consent order setting aside default, but didn't agree on costs. Instead, on June 3, 2024, they had a costs hearing before the AJ. On October 10, 2024, the AJ awarded the defendant slightly elevated costs ($6,500 grand total).

[5] The plaintiff appealed. The appeal hearing was held on April 28, 2025. The plaintiff filed her large appeal brief the morning of the hearing (although it had been served much earlier).

FACTS

[6] This is not a comprehensive recitation of all evidence and argument; it is a concise summary.

[7] The Claim was filed on or about May 15. It was a "Rule 20A" claim, alleging breach of contract and negligence. It claimed $67,885.37 in general damages (or, in the alternative, general damages to be determined at trial), plus interest and costs. The alleged negligence was in relation to alleged deficiencies in a home renovation project.

[8] The Claim was allegedly served on the defendant on June 22 by a process server (although this is a matter of disagreement). The defendant allegedly wasn't home when the process-server arrived. If not served on the defendant, the Claim was at least served on the defendant's spouse, who quickly texted the defendant. At the very least, he saw the hard copy when he got home later that day. There can be no serious dispute that, at the very least, actual service occurred on June 22.

[9] Given the 20-day deadline for filing a Statement of Defence [***Rule*** 18.01(a)], the deadline would have been July 12.

[10] The defendant approached a lawyer ("the First Lawyer"). They discussed the Claim, but the lawyer was not ultimately retained. The First Lawyer phoned the plaintiff's lawyer. Although not yet retained, he asked the plaintiff's lawyer if she would agree not to note default without reasonable notice. She did not agree. She asked the First Lawyer to confirm his retainer. He never did.

[11] For a brief period, the defendant was self-represented. The First Lawyer gave the plaintiff's lawyer the defendant's email address. The plaintiff's lawyer did not try to contact the defendant. There may have been a misunderstanding. The defendant might have believed that the plaintiff's lawyer was going to contact him.

[12] Default was noted and judgment issued on July 18 (a mere six days beyond the deadline for filing a Defence).

[13] The defendant retained a lawyer ("the defendant's lawyer"). The lawyer phoned the plaintiff's lawyer on August 2 and told her that she had been retained. She also told her she would file a motion to set aside default.

[14] The Motion (served on the plaintiff's lawyer on or about August 4) raised several grounds. It mentioned the dispute about whether the defendant was properly served with the Claim. It mentioned the defendant's misunderstanding. It mentioned how the defendant took prompt steps after finding out that default was noted.

It argued that the defendant always had a *bona fide* intention to defend the action. It argued that the plaintiff would suffer no prejudice if the default were set aside.

[15] Steps were taken to put the Motion to set aside default onto the Master's list (now the AJ's list). There was correspondence between counsel and at least one misunderstanding about when the Master would receive the Motion. As it turned out, the first appearance for the Motion was on August 21.

[16] On August 7, the plaintiff's lawyer sent a letter to the Master (now the AJ). Among other things, she alleged that, during her recent phone conversation with the defendant, the defendant was "possibly intoxicated" ("the intoxicated letter"). The letter was copied to the defendant's lawyer.

[17] On August 22, the defendant offered the plaintiff $200 to agree to set aside default. The plaintiff refused and did not make any counteroffer until many months later (*see below*).

[18] Both parties filed multiple affidavits.

[19] The lawyers discussed the logistics of cross-examining on the affidavits. The plaintiff's lawyer works in Brandon. Both parties live closer to Brandon than to Winnipeg. The defendant's lawyer works in Winnipeg. The defendant's lawyer asked the plaintiff's lawyer if she would agree to allow the cross-examinations to be done by video.

The plaintiff's lawyer agreed that the defendant's lawyer could be on video, but she insisted that the defendant must be present in Brandon.

[20] Everyone came to Brandon, and cross-examinations on some affidavits took place on January 19, 2024.

[21] During cross-examination, both parties realized that default was probably noted in error because not all damages were liquidated. In a February 1, 2024 letter to the plaintiff's lawyer, the defendant's lawyer wrote that "the requisition for default judgment should not have indicated that the claimed damages were liquidated and default judgment should not have been obtained from the registry".

[22] The lawyers corresponded on February 1, 2024 about potential settlement, without success.

[23] The plaintiff's lawyer wrote to the defendant's lawyer on February 21, 2024. She did not actually argue that damages were liquidated. Rather, she pointed out that the defendant's Motion to set aside default didn't raise this point, and that the defendant first raised this point on February 1, 2024. In the end, she offered to set aside default by consent if each party would bear its own costs.

[24] Default judgment was set aside by consent on June 3, 2024. The issue of costs was not consented to. Rather it was referred to the AJ for a hearing.

[25] A Statement of Defence was filed on June 7, 2024.

[26] On October 9, 2024, the learned AJ made his decision (now reported as ***Schaworski v. Unrau***, 2024 MBKB 150). He awarded slightly elevated costs ($6,500 including disbursements and tax) to the defendant. (Tariff costs, disbursements and taxes would have been $5,610.06).

[27] At paragraph 31, after analyzing the case law, the learned AJ pointed out that "the onus or threshold to satisfy is considered to be low when it comes to setting aside default".

[28] In reaching his decision, the learned AJ carefully and accurately reviewed the essential facts and the relevant case law. He declined to award solicitor-and-client costs. However, he chose to award slightly elevated costs to the defendant. He focused on the intoxicated letter; the fact that the plaintiff's lawyer refused to allow cross-examination by video; and the fact that the plaintiff refused the defendant's August 22 offer to set aside default for $200.

[29] On January 28, 2025, the plaintiff filed a Notice of Appeal of the AJ's decision.

[30] Although nothing turns on this, the Claim was eventually consolidated with another claim by consent.

LAW

[31] ***Hradowy v. Magellan Aerospace Limited,*** 2025 MBCA 9 ("***Hradowy***"), dealt with an appeal from an AJ's decision. At paragraph 11, the court observed that, while "a judge hearing an appeal from an associate judge does not apply an appellate standard of review, the exercise of their independent discretion requires careful consideration of the decision of an associate judge".

[32] ***Hamilton v. Open Window Bakery Ltd.***, 2004 SCC 9, dealt with solicitor-and-client costs. At paragraph 26, quoting from its decision in ***Young v. Young***, 1993 CanLII 34 (SCC), the court pointed out that solicitor-and-client costs "are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties".

[33] ***Tregobov v. Paradis***, 2017 MBCA 60 ("***Tregobov***"), dealt with elevated costs (a higher "class" on the costs tariff). The plaintiff ignored the sage advice of the case conference judge to narrow the issues in dispute, and the result was an eight-day trial. The court concluded that the principle of proportionality could be the basis for awarding elevated costs (see paragraph 24).

[34] ***Mayer v. Osborne Contracting Ltd,*** 2011 BCSC 914 ("***Mayer***"), dealt with "special costs" (a different term for solicitor-and-client costs). At paragraph 11, the court concluded that special

costs may be ordered in various circumstances, including "where a party made the resolution of an issue far more difficult than it should have been".

[35] In ***Vassilaki v. Vassilakakis***, 2024 BCCA 15, ("***Vassilaki***"), at paragraph 48, the court pointed out that simply pursuing a claim that turns out to be without merit, is not the sort of reprehensible conduct that attracts "special costs". (Note that ***Vassilaki*** is more recent than ***Mayer*** and is an appellate decision.)

[36] In ***Century Customs Brokers v. P.C.B. Freight Services***, 1985 CarswellOnt 486 (ONSC), a Master ordered solicitor and client costs against a party that opposed a motion for no good reason, but eventually consented to it. At paragraph 8, the Master commented: "When asked on what grounds [the party] had opposed the motion, counsel for [the party] had no answer."

[37] ***MPIC v. Landry***, 2005 MBQB 141 ("***Landry***"), was an appeal from the decision of an AJ (then called a "Master"), on a motion to set aside the noting of default. At paragraph 11, the court summarized some relevant factors to consider regarding setting aside default:

> 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.
>
> …

[38] ***Ultracuts v. Magicuts***, 2024 MBCA 45 was about solicitor-and-client costs and elevated costs. At paragraphs 12 and 14, the court pointed out that solicitor-and-client costs are rare and exceptional. At paragraph 17, the court observed that "where unproven claims do not rise to the level of reprehensible, scandalous or outrageous conduct, they can still lead to an award of elevated costs".

King's Bench Rules

[39] Relevant ***Rules*** from the ***Court of King's Bench Rules***, Man. Reg. 553/88 (the "***Rules***") include:

> **General principle**
>
> 1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> **Proportionality**
>
> 1.04(1.1) In applying these rules in a proceeding, the court is to make orders and give directions that are proportionate to the following:
>
> (a) the nature of the proceeding;
>
> (b) the amount that is probably at issue in the proceeding;
>
> (c) the complexity of the issues involved in the proceeding;
>
> (d) the likely expense of the proceeding to the parties.

ORDERS ON TERMS

1.05 When making an order under these rules the court may impose such terms and give such directions as are just.

...

VALIDATING SERVICE

16.08(1) Where a document has been served in an unauthorized or irregular manner, the court may make an order validating the service where the court is satisfied that,

(a) the document came to the notice of the person to be served…

FILING AND SERVING STATEMENT OF DEFENCE

18.01 Subject to subrule 19.01.1(1) (filing of defence stayed if motion to strike filed), a statement of defence (Form 18A) shall be filed and served,

(a) within 20 days after service of the statement of claim, where the Defendant is served in Manitoba…

Where no defence filed

19.01(1) Subject to subrule (4), rule 19.01.1 and subrule 19.04(1.1), where a defendant fails to file a statement of defence within the prescribed time, the plaintiff may, on filing proof of service of the statement of claim, require the registrar to note the defendant in default….

Terms

19.03(1) The noting of default may be set aside by the court on such terms as are just.

…

SETTING ASIDE DEFAULT JUDGMENT

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….

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.

...

Factors in discretion

57.01(1) In exercising its discretion under section 96 of The Court of King's Bench Act, to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle made in writing,

(a) the amount claimed and the amount recovered in the proceeding;

(b) the complexity of the proceeding;

(c) the importance of the issues;

(d) the conduct of any party which tended to shorten or lengthen unnecessarily the duration of the proceeding;

(d.1) the conduct of any party which unnecessarily complicated the proceeding;

(d.2) the failure of a party to meet a filing deadline;

(e) whether any step in the proceeding was improper, vexatious or unnecessary;

(f) a party's denial or refusal to admit anything which should have been admitted;

(f.1) the relative success of a party on one or more issues in a proceeding in relation to all matters put in issue by that party;

(g) whether it is appropriate to award any costs or more than one set of costs where there are several parties with identical interests who are unnecessarily represented by more than one counsel; and

(h) any other matter relevant to the question of costs. [underlining added]

DECISION

[40] I have given careful consideration to the decision of the learned AJ (as per ***Hradowy***).

[41] In light of the fact that the parties eventually agreed to set aside default by consent, it is not necessary to do a full analysis about whether a set-aside motion would have succeeded if contested. That being said, the factors from ***Landry*** suggest that default would have been set aside.

[42] On a balance of probabilities, the defendant likely had an ongoing intention to defend, although he probably misunderstood what had to happen next after the First Lawyer gave the plaintiff's lawyer his email address. The explanation for the trivial delay was within the range of reasonable explanations. The trivial delay was likely sloppy rather than willful. The set-aside motion was brought with admirable dispatch. There is no evidence at all that the trivial delay prejudiced the plaintiff in any way.

[43] Rules of court and practice directions set out a procedural framework for our justice system. Professional codes of conduct set out minimal ethical obligations for lawyers. That being said, the smooth operation of any justice system requires more than strict adherence to rules and codes. It requires common sense and simple courtesy.

[44] The "intoxicated letter" was extremely childish and unprofessional. I do not wish to usurp the role of the Law Society, so I will say no more about it.

[45] All parties agree that, during the COVID crisis, the courts became much more flexible about using video-conferences and teleconferences for various purposes. This flexibility was a positive development, and should continue. The affidavits filed were in relation to a procedural motion, not the merits of the claim itself. Upon being asked by another lawyer to permit cross-examination on affidavits (on a procedural motion) by video, many lawyers would have willingly agreed, as a professional courtesy. Lawyers who show this courtesy should be commended. That being said, the unwillingness of the plaintiff's lawyer to permit the use of video, in and of itself, would not have justified elevated costs.

[46] The plaintiff's lawyer argued that, when it came to setting aside default, she had no choice. She called her conduct "the only procedure available by the rules". The ***Rules*** say statements of defence must be filed within 20 days. After that, defendants have a legal right to note default. If plaintiffs then ask them to agree to set-aside default, the ***Rules*** don't say that plaintiffs must agree. Many lawyers do agree as a professional courtesy, especially if there is some evidence of a misunderstanding, and if the request comes within a

few days of default. Lawyers who show this courtesy should be commended.

[47] The ***Rules*** don't say a lot about settlement. Rule 49 does set out formal procedures for making settlement offers, and for costs implications based on those offers. ***Rules*** 50.01(2) and 50.03(2) discuss settlement talks at pretrial conferences.

[48] Parties are <u>always</u> free to make without-prejudice settlement offers and counteroffers. Making a without-prejudice offer or counteroffer is <u>always</u> a procedure available under the ***Rules***. In reality, in civil litigation, parties almost always make settlement offers, to the benefit of all parties. Most civil disputes are settled, rather than being litigated to the bitter end. Courts are not usually aware of without-prejudice settlement offers. In this case, we are aware. The parties agree that, on August 22, the defendant offered the plaintiff $200 to agree to set aside default. We also know that the plaintiff refused, and refused to make any counteroffers at the time.

[49] After multiple affidavits and cross-examinations, and after the parties realized that default was probably noted in error, the plaintiff offered to set aside default with each party bearing its own costs.

[50] The plaintiff <u>did</u> have a choice. He might have accepted the $200 settlement offer. He might at least have made a prompt counteroffer. By failing to do so, he unnecessarily lengthened the

duration of the litigation. He created the need for unnecessary steps in the litigation. This is a factor relevant to costs.

[51] The simple reality is this: before all the affidavits and the cross-examinations, the plaintiff refused to set aside default for $200. Months later, after the cross-examinations were finished, the plaintiff proposed to set aside the default with each party bearing its own costs (on February 1, 2024).

[52] The tragedy of this whole affair is that the Claim was filed over two years ago, and the parties have not yet had their first pretrial conference. There is almost no evidence about the merits of the dispute (one affidavit mentioned deficiencies in the renovation project and included multiple photos, with no details about the significance of each photo.) This sorry state of affairs cannot possibly be reconciled with the spirit of ***Rule*** 1.04 (proportionality).

[53] The decision of the learned AJ to award slightly elevated costs ($6,500) to the defendant was absolutely correct. The multiple affidavits and the cross-examinations consumed many months and many dollars, but did absolutely nothing to bring this litigation closer to an end (either by settlement or by trial). I uphold the learned AJ's decision without reservation.

[54] The above reasoning about the learned AJ's decision applies equally to this appeal decision. (I also note that the plaintiff filed her

large brief the morning of the hearing.) For the same reasons that informed the AJ's decision, slightly elevated costs are fair and reasonable on appeal. The defendant was successful on this appeal, and is entitled to regular (tariff) costs plus $250, in respect of this appeal.

_____J.