

*Case Name:*  
**Bilic v. Toste**

**Between**  
**Marija Bilic, Plaintiff, and**  
**Nicholas Toste, Alda Toste, Dufferin**  
**Construction Company and the City of**  
**Hamilton, Defendants**

[2015] O.J. No. 1088

2015 ONSC 1473

Court File No.: 10-20636

Ontario Superior Court of Justice

**H.S. Arrell J.**

June 3, 2015.

(18 paras.)

**Counsel:**

Allen Wynperle, for the Plaintiff.

Thomas M. Muir, for the Defendants, Nicholas Toste and Alda Toste.

Martin Forget, for the Defendants, Dufferin Construction Company and The City of Hamilton.

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**JUDGMENT ON COSTS**

H.S. ARRELL J.:--

**Introduction:**

**1** The plaintiff was a passenger injured in a single car accident on June 25, 2008. The defendants Toste were respectively owner and driver of the vehicle.

2 The plaintiff commenced action for her injuries on June 11, 2010. She included the City and Dufferin as a result of the police report indicating heavy construction on the road where the accident occurred and which may have had something to do with the defendant's vehicle losing control.

**Facts:**

3 The defendants filed their defences and cross claims in the usual course. The plaintiff was examined for discovery on one day and the defendants on another.

4 The matter settled for \$177,000 inclusive of costs, after mediation.

5 The defendants Dufferin and the City did not attend the mediation nor did they contribute to the settlement. Indeed, throughout the action they denied any liability and demanded their costs.

6 The matter came before me on a motion by the plaintiff for a discontinuance and a cross motion by the defendants Dufferin and the City for costs. On consent I dismissed the action and requested that counsel provide written submissions on the issue of costs, which they have done.

7 I am advised that there is an agreement of some sort between the plaintiff and the defendants Toste on the issue of any costs that might be payable to the defendants Dufferin and the City.

**Analysis:**

8 The parties advise that there are no offers that would impact costs under the rules. Certainly there would appear to be no type of conduct by any party that would suggest any type of cost sanction be imposed by the court.

9 The defendants Dufferin and the City seek costs as successful defendants on a partial indemnity basis.

10 The position of the defendants Toste is that Dufferin and the City were proper parties to this action based on the police report and should get no costs. In the alternative they suggest that if costs are awarded it should only be from April 18, 2013 when these defendants unsuccessfully offered to let Dufferin and the City out of the action without costs.

11 I agree it was not unreasonable to include Dufferin and the City in this action based on the police investigation. I do not know what further investigation unfolded or what was said on discoveries on the issue of their liability.

12 The fact remains, however, that Dufferin and the City have been successful throughout and have demanded their costs throughout. The plaintiff and the defendants Toste knew the risks of suing them and keeping them in the lawsuit if unsuccessful. There is no plausible argument to deny them partial indemnity costs as successful defendants. The plaintiff elected to sue these defendants and was not successful against them. *Marupov v. Metron Construction Inc.*, 2013 ONSC 609.

13 Dufferin and the City seek \$28,189.97 inclusive of H.S.T. and disbursements on a partial indemnity basis. I see no reason to limit these defendants to their costs from the date of the defendants Toste offer to allow them out without costs. Dufferin and the City have been successful throughout and have demanded their costs throughout. No compelling reason has been given as to why I should limit their costs to a certain date.

14 The defendants Toste also submit that the amount claimed is excessive. It is submitted, and I accept, that by far, most of the defence of this matter was conducted by counsel for Toste. Indeed counsel for Dufferin did not even attend the mediation.

**15** Counsel for the defendants Toste billed his client on a solicitor/client basis \$17,241.04 up to September 11, 2013. The mediation took place thereafter.

**16** Section 131 of the *Courts of Justice Act* provides that "costs of and incidental to a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid." Rule 57.01 of the *Rules of Civil Procedure* enunciates the general factors to be considered by the court in exercising its discretion in relation to costs. I have considered those factors.

**17** As noted by Armstrong J.A. in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3rd) 291 the fixing of costs involves more than merely a calculation using the hours docketed and the cost grid. He further stated in para. 24, "In our view, the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant."

**18** I am of the view that this was a very simple case with less than 2 days of discoveries and no motions. The defendants Dufferin and the City were not targets and did none of the active work of defending. It is also clear in reviewing the dockets that there appears to be some duplication and somewhat excessive time spent on a relatively simple piece of litigation. I fix their costs, inclusive of disbursements and taxes at \$20,000.00.

H.S. ARRELL J.