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Family Law Newsletters
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— Franks & Zalev - This Week in Family Law

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Breaking News - *Assoc. de médiation familiale du Québec c. Bisaillon, et al.*

In *Bombardier inc. c. Union Carbide Canada inc.*, 2014 CarswellQue 3600 (S.C.C.) ("*Union Carbide*"), a unanimous Supreme Court of Canada determined that a confidentiality clause in a commercial mediation agreement will generally not displace the common law exception to the rule that settlement discussions are inadmissible, and found that evidence about what had happened during a mediation in this case was admissible to prove that a settlement had been reached:

> [3] . . . For the reasons that follow, I find that **parties are at liberty to sign mediation contracts under which the protection** of confidentiality is different from the common law protection. This enables parties to secure the safeguards they deem important and fosters the free and frank negotiation of settlements, thereby serving the same purpose as settlement privilege: the promotion of settlements. **However, I reject the presumption that a confidentiality clause in a mediation agreement automatically displaces settlement privilege, and more specifically the exceptions to that privilege that exist at common law**. The exceptions to settlement privilege have been developed for public policy reasons, and they exist to further the overall purpose of the privilege. **A mediation contract will not deprive parties of the ability to prove the terms of a settlement by producing evidence of communications made in the mediation context unless a court finds, applying the appropriate rules of contractual interpretation, that that is the intended effect of the agreement**. [emphasis added]

In *Bisaillon c. Bouvier*, the parties attended five mediation sessions to try and resolve the issues arising out of the breakdown of their relationship. At the end of the process, the mediator prepared a summary of what the parties had agreed to (the "Summary"). However, the parties did not sign the Summary or prepare a written agreement.

Litigation ensued when Mr. Bouvier decided that he did not want to abide by the settlement. During the litigation, an issue arose about whether the Summary was admissible, or whether it was protected by the confidentiality provisions of the mediation agreement and/or settlement privilege.

The majority of the Quebec Court of Appeal determined that, in accordance with the Supreme Court's decision in *Union Carbide*, the Summary was admissible to prove that the parties had reached a settlement during the mediation. The majority also upheld Justice Moore's decision in the court below that the parties had, in fact, reached a binding settlement.

In dissent, Justice Doyon distinguished *Union Carbide* on the basis that it had involved a commercial dispute, and concluded that in the family law context, the common law exception to settlement privilege does not apply unless the evidence shows that

the parties intended otherwise. As a result, he determined that the Summary should be inadmissible. However, he reached the same result as the majority because the evidence about what happened after the mediation ended was sufficient to show that an agreement had been reached.

The Association de médiation familiale du Québec, which intervened in the Court of Appeal, sought leave to appeal the Quebec Court of Appeal's decision to the Supreme Court of Canada. Its application for leave was granted on July 6, 2020, (hence the new style of cause of *Assoc. de médiation familiale du Québec c. Bisaillon* instead of *Bisaillon c. Bouvier*).

It will likely be some time until the appeal is heard and a decision is released. But whatever the Supreme Court ultimately decides, you can avoid this type of dispute entirely by ensuring that when engaging in settlement discussions (whether by correspondence, mediation, or direct negotiations), you make it clear at the outset that a written agreement signed by both parties is a true condition precedent to a binding settlement.

"It's a 'claim'!" . . . "No! it's a 'declaration'!" . . . "No! it's a 'prelude'!" . . . "No! it's a 'gateway'!" . . . I don't know what it is - but it ain't a Limitation Period

Kyle v. Atwill, 2020 CarswellOnt 10337 (C.A.) - Feldman, Zarnett, and Brown, JJ.A.

Disclosure: Epstein Cole LLP argued this appeal on behalf of the Appellant Husband.

Is a "claim" to set aside a marriage contract a "claim" to which the *Limitations Act, 2002*, applies?

Whatever one calls a request to set aside a marriage contract under section 56(4) of the *Family Law Act*, R.S.O. 1990, c. F.3 (the "*Family Law Act*"), the Court of Appeal for Ontario has now unanimously confirmed that a separate limitation period, and specifically the two-year general limitation period in section 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B (the "*Limitations Act*"), does not apply to it.

In this case, the husband and wife signed a "kitchen table" marriage contract one week before their wedding, in July 2005, after living together for a year. The wife found a template on the Internet for a "prenuptial agreement" and presented it to the husband for signing. The agreement purported to waive "alimony or support obligations" and provided that the parties would be separate as to property in the event of a breakdown of their marriage. Neither party consulted with a lawyer before signing the agreement or exchanged financial disclosure, even though the agreement says that they did.

The parties separated in August 2012, and began negotiations that were later abandoned by the husband due to issues with his mental health. In the spring of 2015, the husband's lawyer contacted the wife's lawyer to advise that the husband was going to commence an Application. However, no proceeding was commenced until August 25, 2017, when the husband brought an Application for, among other things, spousal support and equalization of net family properties.

In his Application, the husband did not specifically request an Order setting aside the marriage contract under section 56(4) of the *Family Law Act*, but referred to the contract and pled that it was signed with no legal advice, no financial disclosure and under duress.

In her Answer, the wife relied on the marriage contract as a defence to the husband's claim for equalization of net family properties and spousal support.

Four weeks before the scheduled trial date, the wife brought a summary judgment motion to dismiss what she argued was the husband's "claim" to set aside the marriage contract, because it was brought after the expiry of the basic two-year limitation period.

The motion judge agreed with the wife. He concluded that a request to set aside a marriage contract is a claim "to remedy an injury, loss or damage caused by an act or omission" within the meaning of s. 1 of the *Limitations Act* and was, therefore, subject to a two-year limitation period, unless the *Limitations Act* provided otherwise. While the husband did not raise this argument at the motion, the motion judge considered whether the husband's claim was a "proceeding for a declaration if no consequential

relief was sought" under s. 16(1)(a) of the *Limitations Act* to which no limitation period would apply. However, the motion judge concluded it was not because the husband *was* seeking consequential relief - equalization and spousal support.

Since the motion judge found that the husband had "discovered" his claim by October 17, 2012, more than two years before he commenced his application, the husband was, therefore, statute-barred from asking to set aside the marriage contract, and, effectively from claiming equalization and/or spousal support (notwithstanding that there is actually no limitation period governing a claim for spousal support under the *Divorce Act* or the *Family Law Act*).

The husband appealed. The issue for the Court of Appeal was what, if any, limitation period applied to a request to set aside a marriage contract (or to claim relief contrary to a marriage contract)? Was it the two-year limitation period in the *Limitations Act*? Was it the two- or six-year limitation period in the *Family Law Act* that applied? Was there no limitation period that applied? It was a novel issue and primarily one of first instance.

The Court of Appeal unanimously agreed with the husband that setting aside the marriage contract was not barred by the two-year limitation period in the *Limitations Act*, and overturned the motion judge's decision. However, the panel was divided in its reasons for so deciding.

Justice Feldman, with Justice Zarnett agreeing, concluded that the husband's "plea" to set aside the marriage contract was, in fact, a request for a "declaration where no consequential relief is sought" and therefore, pursuant to section 16(1)(a) of the *Limitations Act*, no limitation period applied:

> [49] As this is a limitations statute, as a matter of statutory interpretation, the question is: what is the meaning of consequential relief in this section and what is the intent of limiting the circumstances when there will be no limitation period to when the request for a declaration does not also claim consequential relief?
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> [50] To answer this question, one must be careful not to confuse procedure with substance in interpreting and applying s.16(1)(a) of the *Limitations Act*. The *Limitations Act* is not concerned with procedural issues: the purpose and effect of its provisions is to govern the time limits for commencing actions and proceedings. Whether the parties have combined different claims or causes of action into one or more proceedings will not alter the time periods that govern. Put differently, different limitation periods may govern different claims in the same action.
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> [51] The key, therefore, is not whether consequential relief in the form of a claim for a remedy against another party is sought procedurally in the same proceeding or in a subsequent proceeding. The key is whether the request for a declaration coupled with a claim for enforceable relief is, in substance, a claim for a remedy against the other party and not merely a request for a declaratory order.
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> [52] This is because, if it is a claim for a substantive remedy against another party, then the limitation period applicable to the substantive remedy will apply to the claim. Similarly, if a declaration is necessary as a prelude to a claim for a remedy against another person, no limitation period applies to the proceeding for a declaration, but the applicable limitation period for seeking the remedial order may still bar the claim.

When isolated from the husband's claims for equalization and spousal support, his "plea" to set aside the marriage contract was a "significant obstacle" to claiming this relief, and not a claim for the relief in itself. Therefore, it amounted to a proceeding for only declaratory relief, with no consequential relief, and subject to no limitation period.

However, the husband's claim for equalization was still subject to a limitation period under the *Family Law Act* - in this case six years. And the husband's claim for spousal support had no limitation period pursuant to s. 16(1)(c) of the *Limitations Act*.

While Justice Feldman's interpretation of "consequential relief" is quite narrow, it does make sense in light of the apparent purpose of s. 16(1)(c) of the *Limitations Act* - to prevent parties from circumventing the two-year limitation period by cloaking a claim for relief as a declaration. In this case, held Justice Feldman, there was no circumventing of any limitation periods

because the *Family Law Act*'s six-year limitation period still applied to the husband's claim for equalization, and regarding the husband's claim for spousal support, there was no limitation period, as was intended by the legislature.

Therefore, it is unlikely that this narrow interpretation of "consequential relief" will open the floodgates and allow parties to circumvent limitation periods. Parties to a civil proceeding will not be able to use this decision to get around a two-year limitation period by seeking a "declaration", for example, that a contract is invalid or has been breached.

In concurring reasons, Justice Brown disagreed with Justices Feldman and Zarnett. While he acknowledged that a proceeding that sought only to set aside a marriage contract without claiming anything else *might* fall within s. 16(1)(a) of the *Limitations Act*, such a proceeding "would be a rare bird", and, in any event, did not apply to this case:

> [72] A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs - it is restricted to a declaration of the parties' rights and does not order any party to do anything: *Starz (Re)*, 2015 ONCA 318, 125 O.R. (3d) 663, at para 102. However, the present case is not one where the husband's request for an order setting aside the marriage contract is for an "existential judgment that considers rights to be or not to be" or where "the parties are not even called upon to take the next step in accommodating the declaration" so that the "failure of the parties to abide by its guidance will inevitably lead to independent subsequent proceedings claiming consequential relief", all hallmarks of a proceeding for a declaration in which no consequential relief is sought: Lazar, Sarna, *The Law of Declaratory Judgments*, 4th ed. (Toronto: Thomson Reuters, 2016), at pp. 7 and 54.

Since the husband was claiming equalization and spousal support - consequential relief - according to Justice Brown, s. 16(1)(a) of the *Limitations Act, 2002* could not apply.

Instead, Justice Brown, in accepting the husband's argument, took a different approach. He concluded that setting aside a marriage contract was just a "gateway" to claiming (in this case) equalization of net family properties and spousal support, and not a stand-alone "claim" to which a separate limitation period applied. Therefore, the limitation periods that applied to the husband's claims were:

> a. the *Family Law Act*'s six-year limitation period, in the case of the husband's claim for equalization of net family properties; and
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> b. no limitation period, in the case of the husband's claim for spousal support.

Justice Brown also disagreed with Justice Feldman that the *Limitations Act* applied to the issue of setting aside a marriage contract in this case:

> [95] In my view, the statutory language governing claims for equalization payments and spousal support indicate that any related "set aside request" in a proceeding be treated as one falling under the limitation periods that apply to the requests for an equalization payment and spousal support asserted in the proceeding.
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> [96] Dealing first with a proceeding that seeks spousal support, s.16(1)(c) of the *Limitations Act* states that:
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> > There is no limitation period in respect of . . . **a proceeding to obtain support** under the *Family law Act* or to enforce a provision for support or maintenance contained in a contract or agreement that could be filed under section 35 of the *Act*. [emphasis added]
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> [97] The statutory language of a "proceeding to obtain support under the *Family Law Act*" is broad enough to include a proceeding that couples a request to set aside the provisions of a domestic contract that limit or waive spousal support for reasons set out in *FLA* s.56(4) with a request for an order to provide spousal support under *FLA* s.33(1). The bars to relief contained in the domestic contract would have to be set aside in order for the applicant "to obtain" support under the *FLA*.
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> [98] Such an interpretation does not undermine the recognition *given* to domestic contracts by *FLA* s.2(10). It is consistent with the policy of allowing courts to set aside waivers of support in domestic contracts that result in "unconscionable

> circumstances": *FLA*, s. 33(4). It is also in step with the approach under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) that a domestic contract is a factor that a court must consider on an application for spousal support: *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 3030, at paras 68-78.
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> [99] So too, the language of s.7 of the *FLA* is broad enough to include a proceeding that couples a request to set aside the provisions of a domestic contract that limit or waive an equalization payment for reasons set out in *FLA* s.56(4) with a request for an order determining a spouse's entitlement to an equalization payment under *FLA* s.5 . . .
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> . . . . .
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> [100] . . . The husband's request for an equalization payment is "based on subsection 5(1)". The language in *FLA* s.7(1) that authorizes a court to "determine *any matter respecting the spouses' entitlement under section 5*" (emphasis added) is broad enough to include a concurrent request to set aside, for the reasons set out in the *FLA* s.56(4), the provisions of a domestic contract that limit or waive the right to an equalization payment. In other words, determining whether the provisions of a domestic contract validly limit or waive a spouse's entitlement to an equalization payment falls within the language of determining "any matter respecting the spouses' entitlement under section 5".

Although the panel was clearly doctrinally divided in its reasons, the Court acknowledged the "unique" nature of family law and were alive to the impractical consequences that could arise from a two-year limitation period. Justice Feldman commented that the special and often more generous limitation periods in family law, "account for the need to allow spouses more time to try to resolve their property issues without having to go to court, and the fact that a spouse or former spouse's support needs can change over time and may be addressed whenever they do." (para. 32)

Justice Brown was also concerned that applying a two-year limitation period to a request to set aside a marriage contract would overcomplicate family law proceedings, and could even lead to the absurd requirement that a spouse move to set aside a marriage contract before separation and while the parties were happily married.

This is an important and welcome decision for family law litigants and their lawyers because it clarifies a limitation period issue that has been, surprisingly, unresolved to date. Parties and lawyers do not need to worry about a separate two-year limitation period when their application involves a claim contrary to the provisions of a marriage contract or to set aside a marriage contract.

However, to be very, very clear, it is not the case (as reported by some news outlets) that "there are no more limitation periods in family law." That is simply a mis-statement. The limitation periods within the *Family Law Act* that apply to equalization *still govern claims for equalization*. That has not changed.

This decision does leave three interesting question unanswered, however.

First, *Kyle v. Atwill* dealt with a claim made in the face of a marriage contract (or to "set aside" a marriage contract). But what of a claim to set aside a separation agreement? Will the same logic and considerations apply? There is an argument to be made that, as determined by the Supreme Court of Canada in *Miglin* and *Hartshorne*, marriage contracts and separation agreements are different contracts. Once parties reach the terms of a separation agreement dealing with the equalization and/or the division of property, should the general two-year limitation period in the *Limitations Act* then apply to a claim to set aside the separation agreement? Or is a claim to set aside a separation agreement also merely a claim for a declaration without consequential relief - a necessary "prelude" to the "real claim"?

Presupposing that the underlying limitation period of the "real claim" has not expired, it is hard to see why a separation agreement would be treated any differently than a marriage contract. Again, to use Justice Feldman's words:

> [52] If it is a claim for a substantive remedy against another party, then the limitation period applicable to the substantive remedy will apply to the claim. Similarly, if a declaration is necessary as a prelude to a claim for a remedy against another person, no limitation period applies to the proceeding for a declaration, but the applicable limitation period for seeking the remedial order may still bar the claim.

Second, and perhaps more troubling: if a request to set aside a separation agreement is also a "proceeding for a declaration where no consequential relief is sought" such that no limitation period applies, does that mean a party can apply to unwind a deal forever after the agreement was signed? For example, if 10 years after a separation agreement was signed, a spouse decided that he or she overpaid on an equalization payment, can the spouse apply to set aside the contract, rescind the deal, and get his or her money back? Justice Feldman specifically finds that the "husband's plea for *rescission* of the marriage contract is a proceeding for a declaration where no consequential relief is sought . . . no limitation period applies to that pleading." (emphasis added) (para 5). Therefore, one could argue, that a "plea" for rescission of a separation agreement, which, effectively means a plea to be put in the position the party was in before the contract was made, does not attract a limitation period.

It is likely that the plea to unwind a deal and for the return of monies paid under the terms of the deal (arguably restitution or possibly unjust enrichment) is a "claim for a remedy against the other party" that attracts its own, two-year limitation period.

The answers to these questions? We will have to wait and see.

A Helpful Summary on Interim Distributions of Property

Nelson v. Woodward, 2020 CarswellBC 645 (S.C.) - Schultes J.

Six weeks before the parties 10-day family law trial of the financial issues arising out of the breakdown of their 15-year marriage-like relationship, Ms. Nelson moved for an order requiring Mr. Woodward to advance her $200,000 so that she could afford to have a lawyer represent her at trial.

At the time the motion was brought, Ms. Nelson already owed her lawyer $75,000, and estimated that the trial would cost another $125,000. She had no access to funds, and she earned only $30,000/year from her job. Mr. Woodward, on the other hand, had control over the parties' former family residence that Justice Schultes found had a net value of $1,590,000.

Section 89 of the *Family Law Act*, S.B.C. 2011, c. 25 (the "*Family Law Act*"), gives courts in British Columbia authority to order an interim distribution of family property to allow a spouse to pay for legal fees:

> 89 If satisfied that it would not be harmful to the interests of a spouse and is necessary for a purpose listed below, the Supreme Court may make an order for an interim distribution of family property that is at issue under this Part to provide money to fund
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> . . . . .
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> (b) all or part of a proceeding under this Act . . .

In *McKenny v. McKenny*, 2015 CarswellBC 2173 (S.C.), Justice Fitch (as he then was) set out the following two-part test for considering whether to order an interim distribution of family property under s. 89 of the *Family Law Act*:

> [57] . . . 1) The applicant must show an advance is required to mount a challenge to the other spouse's position at trial; and
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> 2) The applicant must show that the advance or payment on an interim distribution basis will not jeopardize the other spouse's position at trial.

This statutory test is *significantly* easier to meet than the common law test for an award of interim costs. As the Supreme Court of Canada noted in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 CarswellBC 3040 (S.C.C.) at paras. 1 and 36, at common law, interim costs will only be granted in "rare and exceptional circumstances", and then only if the party seeking interim costs could establish "the three criteria of impecuniosity, a meritorious case and special circumstances:"

> [36] **There are several conditions that the case law identifies as relevant to the exercise of this power, all of which must be present for an interim costs order to be granted**. The party seeking the order must be **impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case**. The claimant

> must establish a ***prima facie*** **case of sufficient merit to warrant pursuit**. And there must be **special circumstances** sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate. These requirements might be modified if the legislature were to set out the conditions on which interim costs are to be granted, or where courts develop criteria applicable to a particular situation where interim costs are authorized by statute (as is the case in relation to s. 249(4) of the *Ontario Business Corporations Act*; see *Organ*, *supra*, at p. 213). But in the usual case, where the court exercises its equitable jurisdiction to make such costs orders as it concludes are in the interests of justice, the three criteria of impecuniosity, a meritorious case and special circumstances must be established on the evidence before the court.

Justice Schultes then helpfully summarized the principles that courts in British Columbia have considered when applying the two-part test from *McKenny* for ordering an interim distribution of family property, including that:

> • An order for an interim distribution of family property is "extraordinary and must be assessed carefully". [*McKenny v. McKenny*, 2015 CarswellBC 2173 (S.C.) at para. 57]
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> • "The blunt purpose of s. 89 is to assist economically disadvantaged spouses to access justice in matrimonial disputes; it is meant to help level the litigation playing field that is so often skewed when one spouse controls all or the majority of the wealth and assets." [*F. (I.) v. R. (R.J.)*, 2015 CarswellBC 1266 (S.C.) at para. 192]
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> • " . . . the plain meaning of the phrase 'harmful to the interests of the spouse' in s. 89 contemplates actual or potential economic harm, and is likely broad in its scope. Determination of the presence of harm requires the court to reasonably anticipate and then assess the consequences that may flow from the interim order being sought. That approach, in turn, invites a highly individualized component to the inquiry." [*F. (I.) v. R. (R.J.)*, 2015 CarswellBC 1266 (S.C.) at para. 193]
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> • "Application of s. 89 calls for a purposive interpretation, where the need of the applicant spouse to receive an interim distribution and the potential entailing harm to the other spouse are evaluated contextually with an eye on the larger objectives endorsed by the *FLA*." [*F. (I.) v. R. (R.J.)*, 2015 CarswellBC 1266 (S.C.) at para. 192]
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> • " . . . the concept of being harmful to the financial interests of the spouse in terms of the recipient spouse's capacity to repay, must mean harm of an enduring nature. Accordingly, the fact that the recipient spouse may only be able to repay the distribution over a reasonable period of time into the future, as opposed to immediately following an unfavourable outcome at trial, would not, of itself, qualify as being harmful to the other spouse's interests." [*F. (I.) v. R. (R.J.)*, 2015 CarswellBC 1266 (S.C.) at para. 198]
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> • "The fact that it may be commercially inconvenient or awkward for [a spouse] to generate these funds does not mean that it is harmful to his [or her] interests within the meaning of the section." [*Negus v. Yehia* (2015), 65 R.F.L. (7th) 485 (B.C. S.C.) at para. 8]

After considering both parties' arguments, Justice Schultes granted Ms. Nelson's request for a $200,000 interim distribution. He found that Ms. Nelson had an arguable case for an equal division at trial, and that she would be entitled to significantly more than $200,000 if she was ultimately successful. His Honour was also satisfied that Ms. Nelson would not be able to pay for the trial on her own and that forcing her to defend the "factually and legally complex claim" that was "being very vigorously defended by [Mr. Woodward with assistance from] experienced counsel" would "leave her at a very serious disadvantage." He also wholly rejected Mr. Woodward's claim that he could not raise the $200,000 that Ms. Nelson had requested.

This was a sensible result that "levelled the playing field" for Ms. Nelson, who would almost certainly have had to represent herself at trial had Justice Schultes not granted her motion. That being said, $200,000 is a *very* significant amount of money, and there is no indication in the case as to how the sum of $200,000 was calculated. This should be a requirement. And, if Ms. Nelson does not ultimately obtain a judgment against Mr. Woodward for at least that much at trial, he will have been placed in the unenviable position of having had to pay for Ms. Nelson to take him to trial, and then be left to try to collect the shortfall from someone who would likely be judgment proof by that point. Ergo the need to show a *prima facie* case of sufficient merit.

Furthermore, although Justice Schultes indicated in his decision that the trial judge might decide that it would be appropriate for Ms. Nelson to be allowed to repay any shortfall over a reasonable period of time, those payments would presumably be unsecured, and Ms. Nelson would be able to avoid having to make them simply by filing for bankruptcy.

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