

*Case Name:*  
**Iannarella v. Corbett**

**Between**  
**Andrea Iannarella and Giuseppina Iannarella, Plaintiffs, and**  
**Stephen L. Corbett and St. Lawrence Cement Inc., Defendants**

[2017] O.J. No. 469

Court File No. CV-09-372221

Ontario Superior Court of Justice

**K.G. Hood J.**

January 31, 2017.

(10 paras.)

**Counsel:**

D. Zuber for plaintiffs.  
M. Smith for defendants.

**ENDORSEMENT**

**1** K.G. HOOD J.:-- The Appellant argues, among other things, that the Master made a palpable and overriding error in that there was no evidence from the Defendants to support an order for a second defence medical from an orthopedic expert over and above updating the existing defence medical by Dr. Axelrod.

**2** I agree.

**3** Dr. Axelrod's initial report, of his examination of the Plaintiff Andrea, was used at the first trial between the parties in 2012. Dr. Axelrod gave evidence at the first trial. The trial decision was overturned by the Court of Appeal in 2015 and the matter was sent back for a new trial on the issue of damages. The new trial is scheduled for February 27, 2017.

**4** The Master recognized that the Defendants had to justify their request for the Plaintiff to undergo a further defence medical from someone other than Dr. Axelrod. Dr. Axelrod is available so the justification had to be based upon some other reason. The

argument was that he was un-cooperative.

**5** The only evidence provided to justify their request was contained in an Affidavit of Ms. Fisher of March 8, 2016, a clerk, at the Defendant's law firm, which attached a few internal emails between members of the firm in March and April, 2012 and one letter of March 8, 2012 from Dr. Axelrod's office about his toe and one email from Dr. Axelrod from April, 2012.

**6** All of the evidence, to the extent that it even supports the factual finding made by the Master of non-cooperation, is from 2012. There is no evidence about the upcoming trial in 2017. The Master appears to have taken the evidence from 2012 to conclude that Dr. Axelrod is being un-cooperative now, which was the issue before the Master. However, there is simply no evidentiary record to support the factual finding that Dr. Axelrod was being un-cooperative, with respect to the upcoming trial, to such an extent thereof it would be unfair for the Defendants to proceed without another orthopedic expert.

**7** This is not a situation of coming to a different conclusion based upon my own interpretation of the evidence. There just was no evidence to support the conclusion reached. Moreover, whatever the purported concerns of the Defendants may have been in 2012 they did not come to pass. Dr. Axelrod testified and his evidence was favourable to the Defendants.

**8** Without any evidence that Dr. Axelrod was now being un-cooperative the order should not have been made. In my view this was a misapprehension of the evidence, within the meaning of *Zeitoun* such that there was a palpable and overriding error and the appeal must be allowed. Order to go in accordance with the paragraphs 1 and 2 of the Notice of Appeal.

**9** Being successful on the appeal the Plaintiffs are presumptively entitled to costs of the appeal. They also seek costs of the motion before the Master. There was nothing in the material in relation to the Master's cost order.

**10** If the parties are unable to agree on the question of costs the Plaintiffs are to provide written submissions of no more than 3 typed pages, double-spaced, along with any necessary attachments such as offers, case law, a Costs Outline or Bill of Costs and the cost decision below by February 10, 2017. The Defendants' submissions, subject to the same direction, are to be provided by February 20, 2017.

K.G. HOOD J.