

ONTARIO

Court File Number
FC 15-2446-0

Superior Court of Justice Family Court Branch
(Name of Court)

at 161 Elgin Street, Ottawa, Ontario, K2P 2K1
(Court office address)

FACTUM > Moore vs. Kiska

Hearing held August 29, 2017 >> heard by Justice Darlene Summers

As of September 19, 2017, Justice Summers has reserved her judgement

Opening Remarks

1. The diagnosis and treatment of mental illness relies **heavily** on information provided by the patient's family—especially in Psychiatric Emergency situations¹. There is simply no other way for psychiatrists to quickly assess symptoms and provide treatment.
2. During my first-ever psychotic break in 2013, however, my husband (the Applicant, "Kiska") did not describe the unravelling of our relationship to hospital psychiatrists. Instead, he provided a combination of "alternative facts" and pure fiction which engulfed any of the truth that he did reveal. The result was a diagnosis of Bi-Polar Disorder—a mood disorder wherein an individual cycles between manic and depressed states and the "gold standard" treatment is lithium.
3. If Kiska had told the truth, the diagnosis would have better reflected an underlying condition such as defensive dysregulation. This condition is now referred to as Brief Psychotic Disorder with marked stressors—a disorder wherein an individual can experience a psychotic break in response to specific situations and the treatment options, whilst vast, do not include lithium.
4. If the distinction between Bi-Polar Disorder and Brief Psychotic Disorder seems relatively unimportant, then I invite you to consider being brought to the hospital for a heart attack and immediately receiving chemotherapy.

"In the current climate within which psychiatrists must make admission decisions, information from collateral sources takes on increased importance."¹

¹ See Exhibit A: The Influence of Collateral Informants on Psychiatric Emergency Service Disposition and Access to Inpatient Psychiatric Care

5. Now, 4 ½ years later, Kiska has successfully convinced (almost) everyone that I suffer from multiple chronic, severe mental illnesses. He rarely misses an opportunity to declare that I refuse(d) to accept treatment and/or take medication. He bemoans his ongoing struggle to protect our children from me without denying them the love of “a mother”²—**but he has never had to prove anything to anyone. Not once.**
6. Kiska’s 2015 notice of separation was served along with a notice of an (**urgent**) Motion³ for the sole custody of our two children (now aged 9 and 11). In my opinion, my (previous) lawyer responded quickly with an Answer that was drafted as a “knee-jerk” reaction to Kiska’s assertions regarding the fragility of my mental health. She did not fully review, understand and/or have access to my medical records, our CAS files and our police files. I now have these files and reports and I am in a position to refute my husband’s assertions—as well as support my own.
7. My name is Deirdre Moore. I developed a mental illness, Brief Psychotic Disorder, in 2013. I am representing myself during my third and final separation from Kiska. I have brought this motion for an order that I be granted leave to amend my Answer so that it:
- better reflects the events that preceded Kiska’s 2016 notice of separation and
 - identifies orders that a victim of partner assault could be in a position to request.

² Interestingly, we signed an interim shared parenting agreement just two weeks after his 2016 notice of separation.

³ Kiska did not file the motion materials: their service, however, was an effective way to instill fear/panic.

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PART ONE – ISSUES TO BE ARGUED ON MOTION

Permission to amend my Answer with the Courts permission

1. I, Deirdre Moore, on this motion seek leave to amend my Answer (see Exhibit B).
2. Kiska, the Applicant, has stated that he opposes this motion because, in his opinion, making claims such as the awarding of damages for the intentional infliction of emotional distress is not permitted in Family Law.
3. The ruling in *Lo v. Lo*, CarswellOnt 2979 para. 12 supports my motion.
4. However, there are several cases where damages for the intentional infliction of emotional distress has been awarded in Family Law.
5. Furthermore, my amended Answer seeks an order for the recovery of costs due to bad faith exhibited by Kiska throughout these proceedings (See Exhibit C); as well as an order for costs on a full recovery basis—both permitted in Family Law.
6. My amended Answer also includes orders for support on both a compensatory and non-compensatory basis.
7. Finally, my amended Answer seeks damages for torts other than the intentional infliction of emotional distress.
8. Upon receipt of this Factum, I expect that Kiska will attempt to persuade the Court that I should be deemed a vexatious litigant; but, *the contents of my Factum are true*—Kiska's Application was built on a house of cards and the orders that I request in my amended Answer have merit and are fully defensible.
9. I have presented my arguments, to the best of my ability, as concisely as possible.

PART TWO – OUTLINE OF THE FACTS

The history of facts is inadequate

Content is stale-dated

1. **The current history of facts is not reflective of our relationship of the past five years because it was prepared over 18 months ago.**

Answer lacks specific references to Ottawa Police files that were unavailable at that time

2. **The actual Ottawa Police Services ("OPS") records and files were not received by me until July 2017.**

Answer lacks specific references to complete Children's Aid Society files

3. **Complete files from the Children's Aid Society ("CAS") were not received by me until August 2017.**

Answer lacks specific references to important files from The Ottawa Hospital

4. **Certain medical files only became relevant after evidence was discovered in the OPS and CAS files noted above.**

Answer lacks reference to my current (and accurate) diagnosis and treatment plan.

5. **I have been diagnosed with Brief Psychotic Disorder with *marked stressors* and take medication that manages heightened anxiety.**

For someone who is being accused of having multiple, severe mental illnesses, the discovery of a file such as Exhibit D is extraordinarily important.

The current orders do not reflect the history that should have been in the original Answer

The test for Bad Faith has been met⁴

1. ***I submit that Kiska is obliged to pay costs related to bad faith exhibited throughout these proceedings.***

Document Disclosure was delayed unnecessarily for four months

2. My original request on March 6, 2017 for provision of document disclosure required multiple unnecessary steps. I was not in a position to review ***all*** of the documents until August 14, 2017. (see Continuous Record ("C.R.") Volume ("V") 3, Tab 4, Exhibit A)

Amending Answer on consent was encouraged for four months and then unexpectedly refused

3. My original request on March 7, 2017 regarding the amendment of my Answer lead to four months of multiple inferences and confirmations that consent was forthcoming until July 5, 2017 when I was told that consent was denied (see C.R. V3, Tab 4, Exhibit B) and that Answer amendment would be opposed and a full motion would be required.
4. I submit that the delays described in 2. and 3. above were intentional attempts to drive my claims into a time period where it could be argued that my claims were statute-barred under the Statute of Limitations Act (2002).

Persuasively-worded, but false, statements have been and continue to be presented to the Court.

5. Kiska's Settlement Conference Brief stated that he was paying me \$15,000/month in support and that I refused to look for work (see Exhibit C, page 1). Neither of these statements is remotely true; but my request for Interim Financial Relief was overlooked.
6. Legal fees paid to counsel since receipt of Kiska's 2015 Application exceed \$30,000. Unpaid work done by me in order to get this far in these proceedings is ***unimaginable***.

⁴ There are many, many more examples of bad faith available upon request. (e.g. Exhibit C, pages 2-8)

The test for attempted Parental Alienation has been met

- 7. I submit that Kiska is obliged to pay damages to me related to attempted parental alienation. I also submit that Kiska is obliged to pay for counselling for our children and for tutoring for our daughter Cate who is struggling in school. I also submit that Kiska be required to purchase insurance for daughter Cate's right eye as vision impairment in her left eye was only detected in November 2016.**

Kiska sought advice on how to alienate me from my children.

- 8. On December 27, 2015, Kiska e-mailed Sheila Deighton of the Schizophrenic Society of Ontario in order to find someone who would "help [him] to explain to the kids why mummy and daddy have decided not to live together going forward." It was "very" important to him "that [his] kids understand that the primary reason for this is mummy's illness and nothing to do with their dad." (confirmed in Kiska's Form 22 Reply to my statement (C.R. V4 Tab 2, #46)**

Kiska re-initiated his parental alienation one week prior to his 2016 notice of separation.

- 9. Recorded in CAS file #2397132 page 2 (see Exhibit E), Kiska was "not letting [me] be alone with the children" and telling them "that they had to stay with him for their safety".**

I did not see my children for most of the summer of 2014.

- 10. Kiska misled TOH psychiatrists on July 10, 2014 and again on July 30, 2014. I was hospitalized and treated for the wrong mental illness so the medication/therapy didn't work.**

The test for Defamation has been met

11. I submit that Kiska is obliged to pay damages related to defamation that has resulted in the decimation of my familial relationships, my social circle and my career. I also submit that Kiska is obliged to pay damages for the libelous and slanderous statements made to physicians, police officers and CAS workers that continues today. In addition, I submit that I should be awarded damages for the defamation that has occurred during these divorce proceedings.

Misinformation regarding the nature of my mental illness is widespread.

12. Presenting samples of defamatory statements made to physicians, police officers, CAS workers and the Court is both simple and difficult—simple because they are well documented but difficult because of the magnitude.

13. One sample that effectively validates my assertions relates to the statement that I “flat-lined” during December 2013. It is 100% fiction. (see C.R. V2, Tab 4 (B) pg 22, para. 4 vs. Kiska Form 22 Reply #96 vs reality C.R. V1, Tab 13, page 12-21” (re-included here as Exhibit G).

14. Kiska’s admittance of defamatory statements is evidenced by his Form 22 Replies #58-60 and #93.

Misinformation regarding the nature of my mental illness has decimated my career. Examples include:

15. I submitted a proposal to NRC (where Kiska worked for several years) for which I was exceptionally qualified. I did not get a call.

16. As well as hundreds of other job postings, I have applied to many jobs at MD Financial where I performed a multitude of contracts for over 10 years. I have never received a call.

The test for Breach of Fiduciary Responsibility has been met

17. I submit that Kiska is obliged to pay damages related to the breach of fiduciary duty that occurred many times since March 1, 2013.

18. Fiduciary duties arise in many contexts. A fiduciary relationship generally involves one person acting for the benefit of another person or entity. The dependent party places trust and confidence in the fiduciary, who, because of the special relationship, must act in good faith to protect the dependent party's interests.

19. I have experienced the opposite of fiduciary responsibility.

The test for Negligent Infliction of Emotional and/or Psychological Distress has been met

20. *I submit that Kiska is obliged to pay damages related to the negligent infliction of emotional distress that has occurred many times since March 1, 2013.*

21. It is not necessary that an act be *intentionally* offensive. A reckless disregard for the likelihood of causing emotional distress is sufficient.

22. The conduct must be heinous and beyond the standards of civilized decency or utterly intolerable in a civilized society.

23. Kiska's conduct was extreme and outrageous.

24. There was a pattern of conduct, not just an isolated incident.

25. I was vulnerable and Kiska knew it.

26. Kiska was in a position of power.

27. As my husband, Kiska owed me a fiduciary duty—especially when he was the Substitute Decision Maker during my first hospitalization.

28. I would not have had emotional and psychological distress but for Kiska's actions.

29. I now suffer from Brief Psychotic Disorder with *marked stressors*.

The test for Intentional Infliction of Emotional and/or Psychological Distress has been met

30. *I submit that Kiska is obliged to pay damages related to the intentional infliction of emotional distress that has occurred many times since March 1, 2013.*

31. It is not necessary that an act be *intentionally* offensive. A reckless disregard for the likelihood of causing emotional distress is sufficient.

32. The conduct must be heinous and beyond the standards of civilized decency or utterly intolerable in a civilized society.

33. Kiska's conduct was extreme and outrageous.

34. There was a pattern of conduct, not just an isolated incident.

35. I was vulnerable and Kiska knew it.

36. Kiska was in a position of power.

37. As my husband, Kiska owed me a fiduciary duty—especially when he was the Substitute Decision Maker during my first hospitalization.

38. I would not have had emotional and psychological distress but for Kiska's actions.

39. I now suffer from Brief Psychotic Disorder with *marked stressors*.

The test for Defamatory Libel has also been met

**40. I submit that Kiska is obliged to pay pecuniary damages related to the crime of
defamatory libel that I have endured.**

The degree of misinformation that Kiska has produced is reprehensible.

41. See previous discussion re: Defamation on page 9 of this Factum.

The test for Criminal Harassment has been met

43. *I submit that Kiska be obliged to pay pecuniary damages for criminal harassment.*

44. Under the Criminal Code of Canada 264 (1) *No person shall, ... , engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.*

45. The conduct mentioned in subsection (1) consists of

- (a) *repeatedly following from place to place the other person or anyone known to them;*
- (b) *repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;*
- (c) *besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or*
- (d) *engaging in threatening conduct directed at the other person or any member of their family.*

46. I have experienced this within the confines of my own home, as documented in many police, CAS and hospital files.

The application of the criminal act Mischief in this instance is warranted

47. I submit that Kiska be obliged to pay pecuniary damages due to criminal mischief or be sentenced as the Court deems fit.

48. Under the Criminal Code of Canada 430 (1) Every one commits mischief who wilfully

(a) destroys or damages property;

(b) renders property dangerous, useless, inoperative or ineffective;

(c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or

(d) obstructs, interrupts or *interferes with any person in the lawful use, enjoyment or operation of property.*

49. I was kept from my home unnecessarily on two separate occasions due to lengthy

hospitalizations caused by the misinformation provided to physicians by Kiska. I missed my son's 7th and 8th birthday parties because of it. I spent the entire summer of 2014 in the hospital without seeing my children.

Compensatory and non-Compensatory Support under the *Divorce Act* is justified

50. I submit that I am entitled to compensatory support for the years that I focused on being a stay-at-home mum.

51. I submit that I am entitled to non-compensatory support as I now suffer from a mental illness that began after thirteen years of marriage.

52. I submit that I am entitled to receive a percentage of Kiska's future earnings stream from his new corporate entity which is piggybacking off of the company that I began in 2002.

53. I left the workforce in 2002 to establish AdvisorOnTrack (AOT) as a sole proprietorship and incorporated the company in 2004.

54. I submit that Kiska's Form 22 Reply would lead one to believe that the company had just been established.

55. The inclusion of my expertise in AOT submissions for acceptance into many government procurement vehicles has enabled Kiska to win several contracts.

56. The use of my talents for writing have helped Kiska to apply for and win many contracts.

57. I have not only coached Kiska with respect to spreadsheet development but, in one instance, I developed the entire application that he delivered to his client.

Full recovery of costs in these proceedings is warranted

58. I submit that, given all of the aforementioned hardship, I am entitled to recover the full cost of these proceedings.

Contemplation of divorce with grounds (cruelty)

Discontinuance

59. Should the Court decide that permission to amend my Answer should not be granted, I

respectfully request a discontinuance of these proceeding so that I might serve Kiska with a

Form 8(A).

Closing Remarks

How could all of this possibly be true?

Simply because there is a *serious flaw in Psychiatric Emergency Intake* at our hospitals.

When a woman in a state of psychosis arrives and claims that they are a victim of domestic violence, the first thing hospital staff does is ask the husband for “collateral information”.

- As presented in Exhibit A, during my first hospitalization on March 3, 2013, I was “too sedated to be interviewed” by psychiatrists, so all of the information was provided by Kiska.
- Also presented in Exhibit A, on July 10, 2014, Kiska called in before I even had a chance to be assessed. (The two instances are just the tip of the iceberg.)

On the page that follows is an illustration that was included in a package that I delivered to

Patient Advocacy and various psychiatrists at The

Ottawa Hospital in April 2017. However, it is

outdated. Kiska’s provision of fiction and

“alternative facts” extends beyond the realm of

“In the current climate within which psychiatrists must make admission decisions, information from collateral sources takes on increased importance.”

friends, family, professional colleagues, physicians, CAS workers and Ottawa Police Services. It also includes the Superior Court of Justice – Family Branch so the instances of “alternative facts” and fiction continues to increase throughout these proceedings.

As well as The Ottawa Hospital, I have contacted the Mental Health Commission of Canada and expect to move forward with a “Knowledge Transfer” program in order to pursue an advocacy role to raise awareness of the fragility of mental health when in an abusive relationship and to help reduce the stigma associated with having a mental illness.

PART THREE – THE LAW

Re: Cost recovery in cases of bad faith is permitted in Family Law
Family Law Act

Costs

BAD FAITH

Rule 24(8) If a party has acted in bad faith, the court shall decide costs on a full recovery basis and shall order the party to pay them immediately. O. Reg. 114/99, r. 24 (8).

The decision in D.B. v R.S. 2016 ONCJ 11 confirms the cost consequences of bad faith behaviour in family law cases. In this case, Justice Jones held that the Applicant was entitled to full recovery of costs because the of Respondent's behaviour, among other things. [13] Justice Jones also considered the case S(C) v S.(M.) 2007 Carswell Ont 3485 where the Ontario Superior Court reviewed the meaning of bad faith:

"Bad faith" has been explained as "not simply bad judgment or negligence but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity . . . it contemplates a state of mind affirmatively operating with furtive design or ill will." See *Biddle v. Biddle* (2005), 137 A.C.W.S. (3d) 1164, [2005] W.D.F.L. 2089, 2005 CanLII 7660 (ON SC), 2005 CanLII 7660, [2005] O.J. No. 1056, 2005 CarswellOnt 1053 (Ont. Fam. Ct.), at para. [14]. The definition of "bad faith" in *The Concise Oxford Dictionary of Current English* (5th ed., 1964, ed. by H.W. Fowler and F.G. Fowler) is simply "intent to deceive". The essence of bad faith is the representation that one's actions are directed toward a particular goal while one's secret, actual goal is something else, something that is harmful to other persons affected or at least something they would not willingly have supported or tolerated if they had known. However, not all bad faith involves an intent to deceive. It is rare, but not unknown in family law cases,

for bad faith to be overt — an action carried out with an intent to inflict harm on another party or a person affected by the case without an attempt to conceal the intent.

Re: Damage claims under the laws of tort are permitted in Family Law
Courts of Justice Act

Other jurisdiction

Rule 21.9 Where a proceeding referred to in the Schedule to section 21.8 is commenced in the Family Court and is combined with a related matter that is in the judge's jurisdiction but is not referred to in the Schedule, the court *may*, with leave of the judge, hear and determine the combined matters. 1994, c. 12, s. 8.

In *McLean v. Danicic*, 2009 CanLII 28892 (ON SC) para. 112, damages were awarded for "intentional infliction of mental suffering and emotional distress", a tort.

In *MacKay v. Buelow* [1995] O.J. No. 867, para 15-18, damages were awarded for violations of tort law.

Re: Pecuniary damages for criminal behaviour is permitted in Family Law Courts of Justice Act

Other jurisdiction

Rule 21.9 Where a proceeding referred to in the Schedule to section 21.8 is commenced in the Family Court and is combined with a related matter that is in the judge's jurisdiction but is not referred to in the Schedule, the court may, with leave of the judge, hear and determine the combined matters. 1994, c. 12, s. 8.

Furthermore, in its *Report on Exemplary Damages*, Ontario Law Reform Commission recommends that exemplary damages be awarded as punishment. (See Exhibit H, Page 6 #5(1)).

"The fact that there have been or might be criminal or other similar proceedings against the defendant should not operate as a bar to an award of punitive damages."

Re: Recovery of costs of proceedings is permitted in Family Law
Family Law Act

Costs

SUCCESSFUL PARTY PRESUMED ENTITLED TO COSTS

Rule 24(1) There is a presumption that a successful party is entitled to the costs of a motion, enforcement, case or appeal. O. Reg. 114/99, r. 24 (1).

In D.B. v. R.S., 2016 ON CJ 11, para. 13, Justice P.J. Jones stated that determination of costs was not a "mechanical exercise": "In fixing costs, I have considered the bill of costs and have not simply approached this task as a mechanical exercise where I have taken the time expended and multiplied by a set hourly rate. Rather, I have adopted the reasoning laid out in the Court of Appeal decision of Boucher v. Public Accountants Council (Ontario), (2004), 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291 and have set an amount that I feel is fair and reasonable for the unsuccessful party to pay given the circumstances of the case.

SUCCESSFUL PARTY WHO HAS BEHAVED UNREASONABLY

Rule 24(4) Despite subrule (1), a successful party who has behaved unreasonably during a case may be deprived of all or part of the party's own costs or ordered to pay all or part of the unsuccessful party's costs. O. Reg. 114/99, r. 24 (4).

In D.B. v. R.S., 2016 ON CJ 11, para. 8, Justice P.J. Jones awarded costs on a full recovery basis as "... actions ... went well beyond bad judgement and veered into the realm of bad faith".

Justice Craig Perkins reviewed the meaning of bad faith in *S.(C.) v. S.(M.)*, 2007 CanLII 20279 (ON SC) para. 16:

"Bad faith" has been explained as "not simply bad judgment or negligence but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity . . . it contemplates a state of mind affirmatively operating with furtive design or ill will." See *Biddle v. Biddle* (2005), 137 A.C.W.S. (3d) 1164, [2005] W.D.F.L. 2089, 2005 CanLII 7660 (ON SC), 2005 CanLII 7660, [2005] O.J. No. 1056, 2005 CarswellOnt 1053 (Ont. Fam. Ct.), at para. [14]. The definition of "bad faith" in *The Concise Oxford Dictionary of Current English* (5th ed., 1964, ed. by H.W. Fowler and F.G. Fowler) is simply "intent to deceive". The essence of bad faith is the representation that one's actions are directed toward a particular goal while one's secret, actual goal is something else, something that is harmful to other persons affected or at least something they would not willingly have supported or tolerated if they had known. However, not all bad faith involves an intent to deceive. It is rare, but not unknown in family law cases, for bad faith to be overt — an action carried out with an intent to inflict harm on another party or a person affected by the case without an attempt to conceal the intent.

PART FOUR – ORDERS REQUESTED

- 1) An order that I be granted leave to amend my Answer in terms of my draft amended Answer (see Exhibit B) and, in the alternative, an order that I be granted leave to amend my answer to include claims for costs due to bad faith, costs, compensatory and non-compensatory support and/or retroactive support under the *Divorce Act* as well as include claims for damages for torts such as attempted parental alienation, defamation, breach of fiduciary duty, negligent infliction of emotional distress, intentional infliction of emotional distress and/or pecuniary damages for the criminal acts of defamatory libel, criminal harassment and mischief. In the alternative, I request an order that the current proceedings be discontinued so that I can initiate divorce with grounds.
- 2) An order to recover costs of this motion and the procedural motion held on July 13, 2017.⁵
- 3) In the event that an order regarding 2) above is awarded, an order that I be permitted to revise amended Answer in Exhibit B one more time—assuming I will be able to find legal representation in time.

⁵ In *D.B. v. R.S.*, 2016 ON CJ 11, para. 8, Justice P.J. Jones awarded costs on a full recovery basis as "... actions ... went well beyond bad judgement and veered into the realm of bad faith".

Justice Jones further added at para. 13 that the determination of costs was not a "mechanical exercise": "In fixing costs, I have considered the bill of costs and have not simply approached this task as a mechanical exercise where I have taken the time expended and multiplied by a set hourly rate. Rather, I have adopted the reasoning laid out in the Court of Appeal decision of *Boucher v. Public Accountants Council (Ontario)*, (2004), 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291 and have set an amount that I feel is fair and reasonable for the unsuccessful party to pay given the circumstances of the case.

List of Exhibits

- Exhibit A Abstract: [the influence of collateral information on psychiatric diagnosis]
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4. S.(C.) v. S.(M.), 2007 CanLII 20279 (ON SC)
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6. Lo v. Lo, 2009 CarswellOnt 2979 para. 12

Citations

McLean v. Danicic, 2009 CanLII 28892 (ON SC) para. 84, 85, 83, 112
MacKay v. Buelow [1995] O.J. No. 867 para. 15-18, 21
Huismans v. Black, 2000 CanLII 22734 (ON SC) para. 3, 4, 5
S.(C.) v. S.(M.), 2007 CanLII 20279 (ON SC) para. 16
D.B. v. R.S., 2016 ONCJ 11 (CanLII) para. 8, 13
Lo v. Lo, 2009 CarswellOnt 2979 para. 12