



FCA Court File No.: A-108-23
(FC Court File No. T-1308-20)

ID 1

FEDERAL COURT OF APPEAL

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COUR D'APPEL FÉDÉRALE		
F I L E	20-APR-2023	
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TORONTO, ON		1

BINAL PATEL, BALSAM SPA, a.k.a. BALSAM DAY SPA

Appellant
(Defendants)

and

DERMASPARK PRODUCTS INC. and POLLOGEN LTD.

Respondent
(Plaintiffs)

NOTICE OF APPEAL

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at **180 Queen Street West, Suite 200, Toronto, Ontario, M5V 3L6.**

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the Federal Courts Rules and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, **WITHIN 10 DAYS** of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the Federal Courts Rules instead of serving and filing a notice of appearance.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

April 20, 2023

Issued by: "Mavis Griffith"
(Registry Officer)

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TO: The Administrator
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APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the order of the Honourable Madam Justice Kane (the “Trial Judge”) dated March 21, 2023, which was made after hearing a Summary Trial when the Trial Judge allowed the plaintiffs’ action and ordered substantial damages, along with punitive damages, and ordered that the damages be paid by the defendants (including director) to the plaintiffs.

THE APPELLANT ASKS that:

1. The order of the Trial Judge be set aside and an order be granted dismissing the plaintiffs’ action;
2. Alternatively, eliminating or reducing the damages ordered for trademark and copyright infringement, as well as reversing the punitive damages ordered and reversing the damages ordered personally against the defendant Binal Patel;
3. In the further alternative, dismissing the plaintiff’s claim for compounding interest at prime plus 2% order, and ordering simple interest be payable as of the date of the decision (including interest on punitive damages commence on the date of the order); and
4. Such further grounds that may be relied on by the appellants.

THE GROUNDS FOR THE APPEAL are as follows:

1. The respondents have trademark over a machine known as OxyGeneo machine (“Machine”) which was bought by the plaintiff, Balsam Spa (“Balsam”), along with certain products that were used to operate with the Machine, from an online seller.
2. The respondent Dermaspark Products Ltd. (“Dermaspark”) did not inspect the Machine and could not give evidence that it was a counterfeit machine. After a number of emails exchanged with the defendants, the Dermaspark’s officer said that he would “assume” that the Machine was counterfeit, and later on their lawyer demanded that the appellants destroy the Machine which they promptly did.

3. The respondents' did not give any credible evidence that the Machine was counterfeit and after the appellants' destroyed the Machine the respondents' brought this action seeking damages.
4. After having demanded that the appellants destroy the machine, the genuineness or counterfeit nature of the Machine could not be established and any other decision is simply speculative. The onus laid at the feet of the respondents to conclusively prove that the Machine bought and used by the appellants was in fact counterfeit.
5. The Federal Court case of *Tommy Hilfiger Licensing Inc. v. Doe*, 2000 CanLII 15906 (FC) held at para. 24 that, "The plaintiff must also put the goods and the intellectual properties, or their images, before the court so that the court can assess the degree of similarity and **arrive at a conclusion as to infringement** or passing off." [Emphasis added.] In this case after demanding that the Machine be destroyed, the respondents could not prove whether the Machine was in fact counterfeit.
6. The Trial Judge erred in coming to a determination that the Machine was counterfeit on circumstantial evidence which could not justify the conclusion reached by the Trial Judge.
7. The respondents' officers testified that they the Machine is sold to about 40 countries across the world and that many online sellers are selling what they allege are counterfeit Machines but no evidence was led to prove that the online sellers are selling counterfeit Machines.
8. After demanding that the appellants destroy the machine, it is unjust to seek damages from the appellants when Dermaspark's own officer could not *conclusively* state that the Machine was in fact counterfeit. The officer's email sent to the appellants noted that he would "assume" that the Machine was counterfeit reveals his on state of mind as at the relevant period. His evidence changed once he started this action.
9. The Trial Judge erred in finding that the Machine bought by the appellants was in fact counterfeit without any evidence of the Machine actually being counterfeit.
10. The appellants bought products NeoRevive (TMA1037225) and NeoBright (TMA1035066) which are trademarked by the respondents from the online seller. The respondents' witnesses did not also inspect these products and did not give **any** evidence that these products were counterfeit. Having bought these products from the same online seller where the Machine

was bought and is not alleged to be counterfeit, it is far stretch to suggest, let alone prove, that the Machine was counterfeit.

11. The respondents' arguments was that the online seller is selling the Machines at much lower price than what Dermaspark is selling in Canada, and hence it is evidence of counterfeiting. However, no evidence was given to establish what the other 40 countries were selling their Machines for and this factor (low price) could not be reasonably relied on to come to a conclusion that the Machine was in fact counterfeit.
12. The Ontario Court of Justice in [*Marchese v. Marchese*](#), 2017 ONSC 6815 (CanLII) at para 23 held that: "Similarly, failure to present relevant evidence, in support of a position advanced by a party, may result in an adverse inference. This, for example, pertains to **disclosure not made or a necessary witness not called to testify**: see, for example, *Levesque v. Comeau* 1970 CanLII 4 (SCC), [1970] S.C.R. 1010 (S.C.C.). In addition, **the best evidence rule requires the production of documents which are relevant to an issue, not simply a reference to it in oral testimony**". [Emphasis added].
13. The respondents' similarly did not give best evidence and the Trial Judge erred in relying on their self-serving evidence without any corroborating evidence in granting them judgement.
14. The extensive sale of the Machine all over the world by online sellers, if they are selling counterfeit Machines, caused the Machines to lose their distinctiveness. The respondents did not give credible evidence, other than by self-serving evidence, that the online sellers are in fact selling counterfeit Machines and/or if they have taken steps to cease infringing activities by these online sellers.
15. By not taking steps to have the online sale of their Machines, the reasonable inference that can be drawn is that the Machines are not counterfeit, or if they are counterfeit, they have lost their distinctiveness. It is also unjust then to make unsuspecting small business people to become liable for substantial damages when trademark or copyright owners allow blatant infringing activities to continue unabated. The Trial Judge erred in not finding that the respondents' actions are punitive and ought not to be condoned by the courts.
16. The appellants were using products NeoRevive (TMA1037225) and NeoBright (TMA1035066) which are not alleged to be counterfeit. The appellant Pollegen Ltd.

(“Pollegen”)’s officer who testified that the sales materials that the appellants used were created to enable ultimate purchasers to use their (respondents’) marketing materials to promote their goods. Therefore, the use of the copyrighted materials by the appellants could not be held to be violating the respondents’ copyright rights.

17. The Trial Judge erred in finding that the appellants violated the respondents’ copyrights when they could use the marketing products to sell and market their NeoRevive and NeoBright products.
18. The Trial Judge erred in arriving at her conclusions with without credible evidence, and on relying on self serving evidence despite evidence to the contrary given by the appellants.
19. The Trial Judge erred in drawing inferences without necessary credibility facts on the record, and/or on contested facts.
20. If the Court of Appeal finds that the Trial Judge did not err in finding that the appellants’ infringed the rights of the respondents, then the appellants submit that the Trial Judge erred: in the quantum of damages that she ordered; that the director of Balsam personally be liable for the damages; for ordering punitive damages; and for ordering compound interest at 2% above prime.
21. Litigants expect courts to determine damages as per jurisprudence that has been held by previous decisions and courts are expected to order damages consistently across the board and not order damages as per the chancellor’s foot.
22. Copyright or trademark infringement cases are not a means to provide substantial windfall to plaintiffs but are to compensate them for damages suffered.. The Trial Judge erred in granting a windfall to the plaintiff in her assessment of the damages. Many cases of worse infringement have granted much more nuanced damages.
23. The Federal Court in *H-D U.S.A., LLC v. Varzari*, 2021 FC 620 (CanLII) held that the “court does its best **to treat like cases alike to the extent possible on the evidentiary record before it and the factors described in the jurisprudence.**” [Emphasis added.].
24. The appellant relied on numerous cases to highlight damages that were ordered in many other cases. The Trial Judge erred in not complying with jurisprudence that she ought to have

applied when she determined the quantum of damages. She committed an error of law in not doing so.

25. The Federal Court of Appeal held that: “**Damages, as with all aspects of a trademark claim, must be proved by the claimant:** *Patterned Concrete Industries, Inc v Horta*, 2014 FC 359 at para 4; *Biofert Manufacturing Inc v Agrisol Manufacturing Inc*, 2020 FC 379 at para 208. That said, and leaving aside whether the term “nominal” is the right one, **this Court has recognized the appropriateness of awarding general damages for trademark violations where an absent or uncooperative respondent makes proof of actual damage difficult:** Pick at para 51. The Trial Judge erred in law not abiding by the Court of Appeal’s decision: *Teavana* at paras 39–41; *Kwan Lam v Chanel S de RL*, 2016 FCA 111 at para 17. [Emphasis added.]: *H-D U.S.A., LLC*
26. Similarly, the court in [Aquasmart Technologies Inc. v. Klassen, 2011 FC 212 \(CanLII\)](#) held that “**Where defendants’ activities have made accurate assessments of trade-mark infringement damages impractical, the courts’ assessments of plaintiffs’ damages have been guided by the scale of the defendants’ activities.** In particular, past decisions of the court have defined a scale that sets appropriate plaintiffs’ damages, in 1997 dollars, at \$3,000 in the case of street vendors and flea market operators, \$6,000 in the case of sales from fixed retail premises, and \$24,000 in the case of manufacturers and distributors. [Emphasis added.]
27. Numerous Federal Court of Appeal decisions highlighted that **where** a defendant was not cooperating to make proof of damages difficult to determine is when general damages may be ordered.
28. The respondents did not give any evidence about what losses they suffered. Various courts have granted nominal damages “**where**” the defendants did not co-operate and/or gave any evidence to help establish damages.
29. In the case at bar, the appellants cooperated and gave evidence of: their purchase of the Machine; the products bought by them; the income they earned from the machine and provided list of patients, and charges for services.
30. The respondents’ did not give any evidence to the contrary. In other words, the appellants’ evidence on the revenues generated by them was not contradicted. This evidence was given

by the appellants on or about July 28, 2022, or about 7 months before the hearing was held. In their responding evidence they did not challenge the appellants evidence and did not seek to examine (discover) the appellants to verify the revenues despite having ample time to dispute the revenues or to demand more supporting evidence to prove the revenues.

31. The appellant testified, on Reply, that she would allow the respondents to inspect her records to verify the reliability of the revenues earned by Balsam.
32. Without any credible evidence to refute the revenue figures, the Trial Judge erred in ordering general damages. It is an error of law to fail to apply Federal Court of Appeal decisions which are binding on Trial Division judges.
33. With respect to destroying the Machine, the personal appellant testified that as the sales were very low, she did not want to litigate when Dermaspark's officer demanded that she buy new upgraded machine and supplies, or supplies only to the tune of \$5,000.00, and that is why she discarded the Machine. Inferring that she destroyed the Machine because the Machine was counterfeit is unreasonable.
34. The uncontradicted evidence shows that their gross income earned by the appellants was \$4,944.75 and after expenses the net sales was \$2,019.75. The damages ordered of \$45,000.00 is far in excess of what the jurisprudence provides in similar cases, and is an error of law by not abiding with or not applying in letter and in spirit with jurisprudence when the Trial Judge ordered general damages: *Kwan Lam*.
35. With respect to copyright damages, the appellant used the copyright materials as she was using the products that are of the respondents' and Pollegen's (owner of Copyright) evidence was that end users could use their marketing materials to sell their products. In any event, it could be said that such use was innocent and not such as to order substantial damages.
36. The Trial Judge's order for damages is contrary to jurisprudence and is overly punitive and grants substantial windfall to the respondents which is an error in law.
37. The Trial Judge also erred in law in awarding compound interest at 2% above prime.
38. In *Apotex Inc. v. Eli Lilly and Company and Eli Lilly Canada Inc.* 2018 FCA 217 at ¶158, the Federal Court of Appeal held that it was an error of law to order compound interest as a party must prove a loss of interest in the same way as any other form of loss or damage.

39. The appellant states that it was an error of the Trial Judge not to explain why she granted compound interest and at rates above prime when the respondents' did not give any evidence to prove loss of interest as per *Apotex Inc.*
40. Furthermore, the Trial Judge erred in ordering that interest be payable on the full amount ordered: first interest on punitive damages ought to start as of the date of Judgement; second the respondents amended their claim on numerous occasions. Although the Trial Judge ordered that interest start as of the date the amended claim was issued, the Trial Judge failed to appreciate that the respondents sat on their case for months. Pollegen did not serve its affidavit of documents and were dragging their feet. It is then that the appellants sought to bring a summary trial to have the action disposed off quickly. The delays by the respondents' in prosecuting the action in a timely manner ought to have resulted in them forfeiting their rights to interest and interest ought to be denied, or at least start at simple interest as of the date of the judgement.
41. Such other grounds as counsel may advise, or this Honourable Court may permit.

April 20, 2023



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FCA Court File No.:
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FEDERAL COURT OF APPEAL

BETWEEN:

BINAL PATEL, BALSAM SPA, a.k.a. BALSAM DAY
SPA

Appellant
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