

CANADA / JUDGMENT

Anderson v. Kullar

2024 BCSC 474

COURT

Supreme Court of British Columbia

DECIDED

23 February 2024

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2024 BCSC 474 Anderson v. Kullar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Anderson v. Kullar,

2024 BCSC 474

Date: 20240223

Docket: M222891

Registry: New Westminster

Between:

Christine Anderson

Applicant

And

Nasera Kullar and Ramanbir Kullar

Respondents

Before: Associate Judge Nielsen

Oral Reasons for Judgment

In Chambers

Counsel for the Applicant:

B.M. Troy

Counsel for the Respondents:

K.J. Walkinshaw

Place and Date of Hearing:

New Westminster, B.C.

February 23, 2024

Place and Date of Judgment:

New Westminster, B.C.

February 23, 2024

- [1] THE COURT: This is an application for an order under s. 5(6) of the Disbursement and Expert Evidence Regulation. The only disbursements that remains at issue are the costs of a functional capacity evaluation with Linda Waithman that's currently scheduled for March 5, 2024, together with the costs associated with preparation and testifying at trial. The plaintiff is also seeking an order that the costs of an examination for discovery be excluded.
- [2] By way of background, the plaintiff was involved in two motor vehicle accidents: one on February 4, 2018, and the other on November 21, 2020. The issues of liability and quantum are in dispute.
- [3] The plaintiff alleges she suffered a number of injuries. They include psychological injuries, injuries to her neck and back, her right shoulder, hip, vision difficulties, concussion symptoms, noise sensitivity, headaches, poor attention and concentration, and memory problems.
- [4] The examination for discovery of the plaintiff has been completed, but the discovery of the defendants has yet to occur. The 84-day deadline for service of expert reports is March 15, 2024. The plaintiff already has the opinion of a physiatrist and a neuro-ophthalmologist, and the defendants have IMEs scheduled with Dr. Gupta, a neurologist, and Dr. Okorie, a physiatrist.
- [5] The concern the plaintiff has is that she will exceed the 6 percent cap for disbursements. I am satisfied that there is a substantial likelihood that, given the nature of the alleged injuries, her limited time in the workforce, and the cost of proving those losses, the recovery of her disbursements is put at risk.
- [6] The real issues are whether the functional capacity evaluation is necessary within the context of regulation 5(9)(b)(ii) and whether the plaintiff would suffer undue hardship in the context of 5(9)(b)(iii).
- [7] In terms of the necessity of the evaluation, the plaintiff does have the two reports of the neuro-ophthalmologist and a physiatrist. I note the physiatrist's comments, in the prognosis section of his report, where he states:

Given she is expected to continue to experience symptoms on a long-term basis, accommodation that she has been provided at work would be necessary moving forward. If she were to leave her current position, she would be less competitively employable given the symptoms she experiences and the need to ask for accommodation.

- [8] The physiatrist also states that although there may be some potential for a degree of improvement, any ongoing interventions would likely not be curative and would focus on pain and symptom management. Further, this would likely be required on an ongoing basis given that her symptoms are essentially chronic.
- [9] In that context, we have a plaintiff who, although continuing to work, is really stuck in her current position, and if she was to leave, the doctors have opined that she would be competitively less employable, requiring ongoing treatment of her symptoms and pain management.
- [10] This is a case which, in my view, gets across the threshold of necessity in terms of proving her case with the assistance of a functional capacity evaluation. There is an element of future income loss, and the cost of future care.
- [11] Now turning to undue hardship, the plaintiff works as an education assistant, and she works sporadically on a part-time basis as a real estate agent. Taking her two incomes into account, she makes roughly \$50,000 a year. Typically, she would make less than that, but when you factor in the booming real estate market of 2020 and 2021, she did somewhat better than she otherwise typically would have.
- [12] I should backtrack a bit. In terms of the necessity of the examination for discovery costs, I forgot to address that. In my view, they do meet the necessity threshold. Liability is in dispute. This is a case where she needs to establish liability in order to recover damages. Without a favorable liability finding, she would lose some or all of her damages.
- [13] Returning to the issue of undue hardship, plaintiff's counsel submits that when you look at the costs of the disbursements -- and we do have some estimates here and some prior bills -- what she is left having to pay is approximately a third of her annual income towards disbursements.
- [14] The plaintiff is married, and her partner makes \$65,000 annually. There is an argument that when you look at undue hardship, household income is a factor to be considered.
- [15] The plaintiff has two children, and considering the plaintiff's income and her spouse's income, I would place the plaintiff and her family within the middle class. Given the disbursement costs being approximately a third of the plaintiff's income, this is significant, and would result in undue hardship were those disbursements not reimbursed.
- [16] The plaintiff is in the unfortunate situation where she might be forced to incur the costs of the disbursements to prove her case, but not recover them, with the consequence being that they would be paid for using a portion of her award of damages.

[17] In my view, this is a case where the plaintiff would be faced with undue hardship, therefore the disbursements claimed will be excluded.

[SUBMISSIONS ON COSTS]

[18] THE COURT: The plaintiff will have her costs of the application in the cause, and the costs of the application will also be an excluded disbursement.

"Associate Judge Nielsen"

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