

CANADA / JUDGMENT

Aschenbrenner v. Yahemech

2010 BCSC 1541

COURT

Supreme Court of British Columbia

DECIDED

1 November 2010

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2010 BCSC 1541 Aschenbrenner v. Yahemech IN THE SUPREME COURT OF BRITISH COLUMBIA
Citation: Aschenbrenner v. Yahemech, 2010 BCSC 1541 Date: 20101101 Docket: 08-3608 Registry:
Victoria Between: Jillian Stephanie Aschenbrenner and Jeffery Leonard Partridge Plaintiffs And:
James Bradley Yahemech Defendant Before: The Honourable Mr. Justice Metzger Reasons for
Judgment on Costs Counsel for the Plaintiffs: D. R. McLeod Counsel for the Defendant: M. S.
Jakeman Place and Date of Submissions: Victoria, B.C. September 20, 2010 Place and Date of
Judgment: Victoria, B.C. November 1, 2010

BACKGROUND

- [1] The husband and wife plaintiffs brought proceedings against their next door neighbour, Mr. Yahemech, as a result of his inappropriate conduct. They sought damages for: trespass, nuisance, assault, defamation, violations of the Privacy Act, R.S.B.C. 1996, c. 373, and an injunction to prevent Mr. Yahemech from repeating his behaviour.
- [2] Even though the plaintiffs sold their house and moved away months before the trial started, the plaintiffs did not inform the defendant of their intent to abandon their injunction application until the first day of trial.
- [3] The plaintiffs sought the following damages:
- \$7,000 to \$8,000 for each of the plaintiffs for actions common to the torts of nuisance, trespass and breach of privacy;
 - \$5,000 to \$7,000 for each of the plaintiffs for the actions common to the assaults and physical abuse;
 - \$12,000 total for defamation.
- [4] I made the following findings and awarded these damages:
- \$1.00 was awarded for the claim of trespass; and nuisance was proven for an award of \$3,500 to the wife and \$2,000 to the husband. The claim for a breach of privacy was dismissed;
 - the claim for assault and physical abuse was dismissed;

c. the claim for defamation was dismissed.

[5] I found there was mixed success and granted the parties liberty to address the issue of costs.

[6] The plaintiffs seek their costs on the usual scale and the defendant seeks an order that the parties bear their own costs including the costs of this application.

ISSUES

[7] Should the plaintiffs' costs be limited to disbursements since their award was within the jurisdiction of the Small Claims Court?

[8] Were the plaintiffs substantially successful?

[9] If the plaintiffs are entitled to costs, is it fair and equitable to award costs if they exceed the damages the plaintiffs were awarded at trial? SMALL CLAIMS COURT JURISDICTION

[10] Rule 14-1(10) of the Supreme Court Civil Rules reads (formerly Rule 57(10) of the Rules of Court):

(10) A plaintiff who recovers a sum within the jurisdiction of the Provincial Court under the Small Claims Act is not entitled to costs, other than disbursements, unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders.

[11] In this case, there was sufficient reason for the plaintiffs to bring this action in the B.C. Supreme Court as neither an injunction nor damages for defamation were available in the Provincial Court of British Columbia. The plaintiffs' costs will not be limited to disbursements only. [See *Bhanji v. Quezada*, 2003 BCCA 445, [2003] B.C.J. No. 1883; *Reimann v. Aziz*, 2007 BCCA 448, 72 B.C.L.R. (4th) 1 (C.A.); *Icecorp International Cargo Express Corp. v. Nicolaus*, 2007 BCCA 97, 38 C.P.C. (6th) 26 (C.A.); *Kuehne v. Probstl*, 2004 BCSC 865, [2004] B.C.J. No. 1383.] SUBSTANTIAL SUCCESS

[12] Rule 14-1(9) of the Supreme Court Civil Rules states that:

(9) Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.

[13] While the Rule itself does not include the term "substantial success" under the former Rule 57(9), it was held to be a necessary and sufficient condition for an award of costs under Rule 57(9) that success in the outcome of the trial be "substantial": see *Gold v. Gold*, 82 B.C.L.R. (2d) 180, 32 B.C.A.C. 287.

[14] In *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 18, 108 A.C.W.S. (3d) 786, appeal to C.A. refused, 2002 BCCA 454, 172 B.C.A.C. 179, Bouck J. stated that a trial judge has absolute and unfettered discretion with respect to costs, but it ought not to be exercised against a successful party except for some good reason in connection with the case.

- [15] Mr. Justice Bouck canvassed the factors to be considered with respect to Rule 57(9), and at para. 45 stated:
- [45] Gold now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when looked at all the disputed matters globally.
- [16] Mr. Justice Bouck then sets out a four step inquiry to determine whether or not to award costs after a trial at para. 46:
1. First, by focusing on the "matters in dispute" at the trial. These may or may not include "issues" explicitly mentioned in the pleadings.
 2. Second, by assessing the weight or importance of those "matters" to the parties.
 3. Third, by doing a global determination with respect to all the matters in dispute and determining which party "substantially succeeded," overall and therefore won the event.
 4. Fourth, where one party "substantially succeeded," a consideration of whether there are reasons to "otherwise order" that the winning party be deprived of his or her costs and each side then bear their own costs. (See also: *Citta Construction v. Elizabeth Lane Holdings Ltd.*, 2004 BCSC 280, 129 A.C.W.S. (3d) 46 at para. 7.)
- [17] Substantial success is not determined by counting up the number of issues and allocating success on each, or by comparing the dollar amounts, but by assessing success in the major issues of substance (*Cohen v. Cohen*, 1995 Carswell 608, 15 R.F.L. (4th) 84 (B.C.C.A.) at para. 4; *Reilly v. Reilly*, [1996] B.C.J. No. 1244 (S.C.); *Rattenbury v. Rattenbury*, 2001 BCSC 593, [2001] B.C.J. No. 889 at paras. 22-24, 33). Substantial success means success on 75% of the matters globally taking into account the weight of the issues and their importance to the parties. A court should compare the pleadings and the submissions with the actual results obtained by the parties (*Rattenbury* at para. 24.).
- [18] In cases where one party achieves substantial success, the courts may award a portion of the substantially successful party's costs. For example, in *Newstone v. Newstone*, [1994] B.C.J. No. 139, 2 R.F.L. (4th) 129 (C.A.), an award of one-half costs to a party was upheld where "[s]uccess, if it could be called that, lay more with the wife than with the husband ..." One-half costs were also upheld in *Rolls v. Rolls*, [1996] B.C.J. No. 292, 20 R.F.L. (4th) 232 (C.A.), on the ground that such an award would not create an imbalanced judgment as much as would a full award. In *Cohen v. Cohen*, a spouse was awarded 75% of her costs after success on her reapportionment claim, which was the largest and most time-consuming issue.

- [19] The four step test identified by Bouck J. applies not only to matrimonial cases, but also to all types of cases where Rule 14-1(10) has application (Chaster (Guardian ad litem of) v. LeBlanc, 2008 BCSC 47, 164 A.C.W.S. (3d) 43 at para. 34).
- [20] Where success is divided such that there is no substantially successful party, the parties may have to bear their own costs (Mari v. Mari, 2001 BCSC 1848, [2001] B.C.J. No. 2979).
- [21] On a global view of the outcome of this litigation I find that the plaintiffs were substantially successful. COSTS EXCEED THE AWARD
- [22] In Rusche v. ICBC, 1992 CanLII 735 , 31 A.C.W.S. (3d) 380 (B.C.S.C.), the plaintiffs were awarded nominal damages of \$1 for trespass and their claim for breaches of the Privacy Act, R.S.B.C. 1979, c. 336, was dismissed. In deciding the appropriate quantum of costs, Catliff J., as he then was, held that the plaintiffs should not be deprived of all costs: As to the question of costs, although only benefiting to the extent of \$1, the plaintiffs should not be deprived of all costs. They established a trespass which was an issue denied in the pleadings and ventilated at trial. ...
- [23] In Chaster, supra, the plaintiff's claim for breach of contract was allowed, based upon the same findings of breach of duty, but only nominal damages of \$1,000 were awarded as no actual loss was proven. The court in Chaster followed the approach in Rusche and awarded the plaintiff 25% of his costs at Scale B from the defendant. The defendant recovered 75% of his costs at Scale B from the plaintiff. The former were deducted from the latter. DECISION
- [24] I have assessed factors such as hardship, earning capacity, the purpose of the particular award, the conduct of the parties in the litigation, and the importance of not upsetting the balance of fairness achieved by the award itself. (See Gold at para. 20).
- [25] I am satisfied that the balance of fairness will not be disrupted by allowing the plaintiffs their costs on the usual scale including the costs of this hearing, less a 20% reduction of the plaintiffs' total costs and disbursements. The "good reason" for the deduction is the plaintiffs' decision to withhold from the defendant, until the first day of trial, their intent to abandon the injunction application.
- [26] The defendant will bear his own costs. "R. W. Metzger, J." The Honourable Mr. Justice Metzger

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/10/15/2010BCSC1541.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/aschenbrenner-v-yahemech-2010>

Prepared on 27 October 2026 · Esheria