

CANADA / JUDGMENT

Banic-Govc v. Timm

2019 BCCA 413

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 413 Banic-Govc v. Timm COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Banic-Govc v. Timm, 2019 BCCA 413 Date: 20191114 Docket: CA45450 Between: Nada Banic-Govc Respondent (Plaintiff) And Gregory Louis Timm, Pacific Customs Brokers Ltd. (Lessee) and Howard Carter Lease Ltd. (Lessor) Appellants (Defendants) Before: The Honourable Mr. Justice Groberman The Honourable Madam Justice Fenlon The Honourable Madam Justice DeWitt-Van Oosten On appeal from: An order of the Supreme Court of British Columbia, dated June 29, 2018 (Banic-Govc v. Timm, 2018 BCSC 1073, Vancouver Docket M157426). Oral Reasons for Judgment Counsel for the Appellants: G. Ritchey Counsel for the Respondent: G.J. Collette Place and Date of Hearing: Vancouver, British Columbia November 8, 2019 Place and Date of Judgment: Vancouver, British Columbia November 14, 2019 Summary: The appellant challenges the trial judge's determination of the respondent's residual earning capacity after injury in a motor vehicle accident. Held: Appeal dismissed. The trial judge did not forget, ignore or misapprehend the evidence. His reasons, read in context, adequately explain the basis of his assessment.

- [1] FENLON J.A.: This appeal raises one issue: whether the trial judge misconstrued residual earning capacity in determining an award for loss of future income. In these reasons, I will refer to the appellants Gregory Louis Timm, Pacific Customs Brokers Ltd. and Howard Carter Lease Ltd. as the defendants, and to the respondent Ms. Banic-Govc as the plaintiff.
- [2] The plaintiff was injured in a car accident in May 2014 when she was 61 years old. At the time, she worked as a family counsellor with the Boys and Girls Club. She returned to full-time work about a week after the accident but never fully recovered. The plaintiff continues to suffer from migraine headaches, chronic pain in her neck and back, as well as heightened anxiety and mild depression. By 2016 she had cut back to four days per week. At the end of March 2018, about six weeks before trial, she retired from the Boys and Girls Club at age 65. The plaintiff then began working part-time at No Fear Counselling, seeing clients for three to four hours one day a week.
- [3] In assessing the plaintiff's loss of future earning capacity, the judge made a number of findings at para. 61 of his reasons for judgment: · The plaintiff's capacity to earn an income was severely constrained by her injuries; · Her decision to retire from the Boys and Girls Club was based on medical advice; · If the accident had not happened, she would have

continued in her employment to age 70 on a full-time basis, and to age 75 on a part-time basis of four days per week; · From the date of the accident until the age of 70, it is likely that she would have earned an annual salary of \$64,000; and · From the age of 70 to age 75, she likely would have earned an annual salary of \$51,000.

- [4] Turning to her post-accident position, the judge said:
- [64] The plaintiff submits she now has a residual annual earning capacity of \$20,000 though No Fear to the age of 70. I accept that as correct. After age 70, I conclude her residual earning capacity will be reduced to \$10,000 per annum. If the plaintiff had continued her employment with the Boys and Girls Club and her salary was unchanged as I believe would have occurred, she would have earned \$64,000 for each of the five years between ages 65 and 70 for a total of \$320,000. From that sum must be deducted \$100,000 to account for a residual earning capacity over those five years, leaving a total of \$220,000. Reduced to a present value that sum is \$208,000. For the additional six working years between age 70 through age 75, the plaintiff would have earned \$51,000 annually with the Boys and Girls Club. Her residual annual earning capacity with No Fear I assess at \$10,000 for each of those years. Her loss is then about \$240,000 before a reduction to its present value which I have factored into my calculations.
- [5] This calculation led to a loss of more than \$400,000, but the judge reduced the award to \$350,000 to take into account negative contingencies given the plaintiff's advancing age.
- [6] The defendants recognize that a trial judge's assessment of damages is a finding of fact, and as such is entitled to substantial deference. But they point to *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, at para. 71, where the Court stated that:
- [71] an appellate court may "reconsider the evidence" proffered at trial when there is a "reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his [or her] conclusion" and thereby erred in law ([*Van de Perre v. Edwards*, 2001 SCC 60, at para. 15).
- [7] The defendants submit that is exactly what occurred in the present case. They say the trial judge forgot, ignored or misconceived the evidence in a way that affected his award for loss of future earning capacity because he failed to address significant and conflicting expert evidence tendered by the plaintiff herself -- evidence which established she continued to have the capacity to work three or four days per week.
- [8] The defendants point to the report of the plaintiff's family doctor prepared about four months before trial in which she opined that there is a real possibility that the plaintiff will have to cut down her work to three days per week in the future. Next, they point to Dr. Stewart's opinion dated February 2018, less than four months before trial. Dr. Stewart was the plaintiff's expert in physical medicine and rehabilitation. She said: Ms. Banic-Govc will be 65 years old in April 2018 and it is likely she will retire at that time. If she [chooses] to work beyond age 65, it is likely that she will reduce her work hours further to three days a

week and in my opinion this would be appropriate given her ongoing pain symptoms and fatigue, which is likely due to being in pain constantly.

- [9] Finally, the defendants point to the report of an occupational therapist in February 2018 which noted that the recommendations for future care would reduce the frequency and intensity of the plaintiff's pain and "help her maintain her current participation in work" which the therapist understood was four days per week.
- [10] The defendants argue that, faced with this evidence, it was incumbent on the judge to explain why he did not accept it, and why he concluded instead that the plaintiff had a much more limited capacity to work.
- [11] I agree that the judge did not address this evidence directly. I do not agree, however, that the plaintiff's expert evidence taken as a whole so clearly supported a work capacity of three to four days per week that the judge's failure to address it could only mean that he had forgotten, ignored or misconceived the expert evidence and did not appreciate a material conflict in the record.
- [12] First, the medical reports were all prepared several months before trial while the plaintiff was still working four days per week at the Boys and Girls Club. In my view, it is not surprising that the reports reflected that capacity for work.
- [13] Second, the testimony of the experts at trial moved away from that position. Dr. Di Cesare said she relied on the plaintiff's self assessment of her work tolerance and had discussed with the plaintiff the potential for reducing her work to three days per week or a day or two or even a few hours per week. Dr. Stewart opined that the plaintiff would not be able to work past age 65 except on a very part-time basis. She explained that individuals with chronic pain try to keep working with the expectation that they are eventually going to recover, but do so at the expense of other areas of their lives. The result is a very poor work/life balance which is not sustainable over time.
- [14] Third, the plaintiff testified that she had continued working four days per week until March 2018 at great personal expense. She said she was exhausted after work and incapable of doing anything else which led to her mental health and relationships with her family and friends suffering. Further, she stated that her condition had been deteriorating over time and that ultimately she determined three to four clients one day per week was the most manageable schedule for her.
- [15] Despite the radical change in the plaintiff's work hours six weeks before trial, it was in my view open to the judge to accept that the plaintiff's capacity had fallen to seeing three to four clients over one day each week. He had before him the plaintiff's evidence that she could no longer maintain the level of work she had been managing to that point, and the testimony of the experts at trial that supported that view. The judge's finding to that effect is clear and unequivocal. At para. 64 of his reasons, he accepted the plaintiff's evidence that her residual earning capacity was \$20,000 per year based on the amount of work she had been doing at

No Fear in the six weeks prior to trial.

- [16] It is apparent from the record that the defendants' position in closing submissions was that the plaintiff had simply chosen to retire at age 65 as most people do in order to have more time for other things, and that she was clearly capable of working three to four days per week based on her past conduct and the reports she had filed in support of her claim. I accept that it was open to the judge to accept that characterization of the evidence and to make a different finding on residual earning capacity, but he did not do so. He had the task of assessing all of the evidence and making findings based on that evidence and his assessment of the plaintiff's credibility. Ultimately, he made a finding that she could only reasonably work very limited hours.
- [17] The figure of \$20,000 used by the judge in his assessment reflected three to four hours of counselling work per week. Mr. Vaisman, the owner of No Fear, testified that the plaintiff told him she only wanted to work one day per week -- on Fridays -- and that he had referred work to her on that basis. This raises the question of whether the judge intended to base his calculation of residual earning capacity on one day per week (7.5 hours) and failed to appreciate that the invoices supporting \$20,000 per year were based on only three to four hours per week -- an error which, if substantiated, would justify a significant increase in residual earning capacity and a corresponding decrease in the award for loss of future income.
- [18] In my view, it is clear from a review of the plaintiff's evidence that she expressed her capacity to work as "seeing three to four clients per week" for one hour sessions. In closing submissions, plaintiff's counsel also described the plaintiff's residual earning capacity as three to four hours per week. The reasons read in the context of the record do not, therefore, support the inference that the judge intended to use a full days' counselling as the measure of residual earning capacity.
- [19] In summary, I do not see that the judge ignored the medical evidence or misapprehended it. His reasons read in context adequately explain the basis of his assessment. He accepted the plaintiff's evidence as to her ability to work only three to four hours per week as of the date of trial. He also accepted the evidence she tendered to establish her earnings for that level of work. Although the award for loss of earning capacity appears generous for a plaintiff of age 65, it reflects the particular work history, reduced capacity, and long-standing plans of this plaintiff to work until age 75.
- [20] In conclusion, I see no basis upon which this Court could interfere with the judge's award of damages under this head of loss. I would accordingly dismiss the appeal.
- [21] GROBERMAN J.A.: I agree.
- [22] DEWITT-VAN OOSTEN J.A.: I agree.
- [23] GROBERMAN J.A.: The appeal is dismissed. "The Honourable Madam Justice Fenlon"

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