
CANADA / JUDGMENT

Berry v. LaBelle

2010 BCSC 741

COURT

Supreme Court of British Columbia

DECIDED

26 May 2010

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2010 BCSC 741 Berry v. LaBelle

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Berry v. LaBelle,

2010 BCSC 741

Date: 20100526

Docket: M07433

Registry: Courtenay

Between:

Paul Andrew Berry

Plaintiff

And

Stephanie LaBelle

Defendant

Before: The Honourable Madam Justice Baker

Reasons for Judgment

(Re: Costs)

Counsel for the Plaintiff:

James E. Dow

Counsel for the Defendant:

Paul Dreyer

Written Submissions Filed

by the Plaintiff and the Defendant

Place and Date of Judgment:

Vancouver, B.C.

May 26, 2010

- [1] Mr. Berry was injured in a motor vehicle accident caused by the negligence of the defendant, Ms. LaBelle. Following a trial heard on May 12 to 15, 2009, I issued Reasons for Judgment on February 26, 2010. I awarded the sum of \$30,000 in damages to Mr. Berry. In the final paragraph of the February 26, 2010 Reasons I indicated that if there were factors relevant to the issue of costs that had not been brought to my attention, counsel were at liberty to make submissions about costs. I specified that submissions should be delivered on or before March 26, 2010.
- [2] Counsel for the defendant filed written submissions about costs on March 23, 2010. Counsel for the plaintiff sought and was granted two extensions of time and eventually filed a one-page written submission on April 19, 2010.
- [3] In his submissions, counsel for the defendant provided a copy of an Offer to Settle delivered by the defendant to the plaintiff on April 14, 2009. The Offer is specified to be an offer to settle under Rule 37B of the Rules. The proposal was stated as follows:

The defendant offers to pay the plaintiff the amount of \$46,000, ("the amount offered"), after taking into account Part 7 benefits paid or payable, pursuant to Section 25 of the Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231 and any advances paid to date, in satisfaction of these proceedings in their entirety. The amount offered includes court order interest assessed to the date of the delivery of this offer and excludes costs.

- [4] The offer was stated to be open for acceptance until 4:00 p.m. on the last business day prior to the commencement of the first day of trial.
- [5] The face value of the sum offered in settlement - \$46,000 - does exceed the amount recovered at trial, if I am correct in assuming that the offer is "new money". The language of the offer is ambiguous, in that it is difficult to determine if the defendant was offering to pay the sum of \$46,000 in addition to any advances that had already been paid; and without reduction of that sum to take into account payments already made, or that could be made in future, under Part 7; or whether the offered sum would be reduced by taking into account advances already made; and Part 7 benefits. In arriving at my decision about costs, I have assumed the former.

- [6] The defendant seeks an order that the plaintiff has his costs up to and including April 14, 2009 on Scale B; and that the defendant have double costs, on Scale B, thereafter. Defendant's counsel has prepared a draft Bill of Costs and seeks an award of costs of \$17,781.54. The defendant seeks to set off this amount against the award of damages made to the plaintiff.
- [7] In response, counsel for the plaintiff submits this action was governed by Rule 66 and that if the defendant is entitled to costs, the quantum is restricted to the sum of \$6,600 pursuant to Rule 66(29). In his brief written submission, counsel for the Plaintiff asserted that:

The Plaintiff respectfully submits that the costs in this matter are bound by Rule 66, "Fast Track Litigation". The Defendant made a point of putting this notation on every document and Application presented to the Plaintiff in this matter except the draft Bill of Costs which makes no reference to "Subject to Rule 66".

- [8] Plaintiff's counsel also submits that defendant's counsel prolonged the trial by inefficient and irrelevant cross-examination; in particular, the cross-examination of the plaintiff utilizing photographs in a magazine about "dirt-biking".
- [9] The defendant did elect to have this action proceed in accordance with Rule 66 by attaching an endorsement in Form 137 to the Statement of Defence. The Courtenay Trial Registry has advised that an application for a trial date was made within four months after the date on which Rule 66 became applicable to the action. So far as I am aware, no order was ever made that Rule 66 cease to apply to the action.
- [10] Sub-rule 66(2) provides that unless the court orders otherwise or the parties consent, a party is limited to \$6,600, exclusive of disbursements, for costs if the trial is longer than one day.
- [11] Rule 37B(4) provides that the court may consider an offer to settle when exercising the court's discretion in relation to costs. The court may deprive a party of some or all of its costs for steps taken after delivery of an offer or settle; and/or award double costs of all of some of the steps taken after that date to the party who delivered the offer; award costs to a party to which the party would have been entitled had the offer not been made; or award to the defendant her costs in respect of all or some of the steps taken after the date of delivery of the offer.
- [12] In making an order, the court may consider whether the offer ought reasonably to have been accepted; the relationship between the terms of settlement offered and the judgment eventually obtained; the relative financial circumstances of the parties and any other factor the court considers appropriate.
- [13] Counsel for the defendant submits, and I agree, that the plaintiff did set his sights very high at trial. In oral submissions at the end of trial, counsel for the plaintiff argued that the appropriate award for non-pecuniary damages was between \$150,000 to \$200,000; that the plaintiff should receive an award of \$45,000 to \$60,000 for past loss of income; and that the court should award \$400,000 for loss of the capacity to earn income in future. The

submissions about income loss were particularly ambitious given that the plaintiff provided no documentary evidence whatsoever about income earned by the plaintiff before or after the accident.

- [14] As my earlier Reasons indicate, I concluded that the plaintiff had failed to prove a loss of income in the three years prior to trial; and failed to demonstrate a significant possibility of a loss of capacity to earn income post-trial. I decided that an award of the magnitude sought for non-pecuniary damages was unwarranted given my conclusion that the evidence established only that the plaintiff had suffered a soft tissue injury to his neck which did not incapacitate him from working; and that within seven months after the accident he had returned to rigorous recreational activities.
- [15] I consider that the offer made by the defendant was one that ought reasonably to have been accepted, although the plaintiff would, in my view, have reasonably needed some time to consider his position and seek his counsel's advice.
- [16] As stated earlier, the plaintiff ought to have anticipated significant difficulty in maintaining a loss of income claim without the ability, or willingness, to provide documentary evidence about his earnings before or after the accident.
- [17] By the date of the defendant's offer, the plaintiff had available to him the medical opinion evidence on which he relied at trial. Given that the medical evidence ruled out neurological injury; plaintiff's counsel would have had plenty of precedents available to assist in assessing the likely range of quantum of non-pecuniary damages.
- [18] I have been given no information about the financial circumstances of the defendant. Surprisingly, I also have little information about the plaintiff's financial circumstances. I can, however, infer that the plaintiff has limited means. The plaintiff runs his own drywall business and at time of trial, employed one individual who worked with him. The plaintiff is married, with two older children from a previous relationship, and a young son with his present spouse. There was some evidence about difficulty the plaintiff and his spouse had had in the past in obtaining a mortgage loan. There was also evidence about the plaintiff having a large outstanding liability for tax. Evidence was led at trial indicating that the downturn in the economy in the fall of 2008 had had a significant and detrimental effect on the construction industry, and on the amount of work available to the plaintiff.
- [19] Certainly the effect of the costs order the defendant is seeking would be to deprive the plaintiff of the greater part of the compensation to which I concluded he is entitled by reason of the defendant's negligence and the plaintiff's injury.

- [20] The plaintiff sought an award of special costs against the defendant on the grounds that defendant's counsel's conduct in the cross-examination of the plaintiff's family doctor had been reprehensibly aggressive. I rejected this submission at trial. I agree with plaintiff's counsel, however, that some of plaintiff's counsel's cross-examination of the plaintiff was unhelpful - the details of various drywall techniques, for example, and a lengthy cross-examination utilizing photographs in a motorcycle magazine.
- [21] In all of the circumstances, I am satisfied that it would be inequitable to make an award of double costs in favour of the defendant. The defendant having elected to proceed under Rule 66, I am satisfied that the defendant's entitlement to costs should be governed by Rule 66. I award the plaintiff his costs, on Scale B, not to exceed \$6,600, up to and including April 21, 2009, plus disbursements incurred to that date. In respect of proceedings after that date, the defendant shall have her costs, but also limited to \$6,600 pursuant to Rule 66(29); and her disbursements from and after April 22, 2009. There shall be no order for double costs. Each party shall bear his or her own costs in relation to the submissions about costs.
- [22] If the parties are unable to agree on the amount of the disbursements, they may proceed to have the costs assessed by the Registrar, in the usual course.

"W.G. Baker J."

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