
CANADA / JUDGMENT

Bird v. Kohl

2012 BCSC 1424

COURT

Supreme Court of British Columbia

DECIDED

27 September 2012

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2012 BCSC 1424 Bird v. Kohl

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bird v. Kohl,

2012 BCSC 1424

Date: 20120927

Docket: 11945

Registry: Duncan

Between:

Steven Laurie Bird

Claimant

And

Pamela Francise Kohl

Respondent

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

(Re: Costs)

Counsel for the Claimant:

Robert W. Nelford

Counsel for the Respondent:

Jesse Stamm

Written Submissions Received

by the Respondent:

August 3, 2012

Written Submissions Received

by the Claimant:

August 27, 2012

Place and Date of Judgment:

Duncan, B.C.

September 27, 2012

INTRODUCTION

- [1] The claimant Steven Laurie Bird and the respondent Pamela Francise Kohl each claim that they were substantially successful at the trial of this family law proceeding, and should recover their costs pursuant to Rule 16-1(7) of the Supreme Court Family Rules. The respondent also says that she made two offers to settle, dated July 27, 2010 and January 11, 2012 which the claimant did not accept, for amounts significantly less than she was awarded at trial, and that the Court ought to exercise its discretion under Rule 11-1(5)(b) to award her double costs from the date of her first offer to settle.
- [2] For his part, the claimant submits that if the Court finds that the respondent was substantially successful at trial, then the Court may exercise its discretion to make no award of costs. Mr. Bird says that he is impecunious, must pay the damages assessed at trial for his assault on the respondent, and has also "paid" for the assault through his guilty plea in the criminal proceedings, his incarceration and loss of employment. The claimant contends that any award of costs against him would constitute an undue hardship and contravene the interests of justice.

BACKGROUND FACTS

- [3] The claimant, who is 40 years old, and the respondent, who is 42 years old were married in August 2007 and separated in August 2008.
- [4] On October 28, 2008 the claimant assaulted the respondent, striking her repeatedly with a shovel handle on the shoulder and head. The respondent suffered a fractured shoulder, a concussion, multiple lacerations and scarring to her head. She continues to suffer from post traumatic stress disorder, anxiety and insomnia. As a result her injuries, the respondent lost her employment as a labourer at Victoria Shipyards, and remained unemployed at the time of trial.

- [5] The claimant was charged with the attempted murder of the respondent. During his criminal trial, he entered a plea of guilty to aggravated assault. Mr. Bird served 27 months in prison for that offence, and as a consequence, lost his former employment as a mill worker. At the time of trial of the family law proceedings, the claimant, who had only found intermittent, casual employment since his release from prison, was unemployed, living with his parents, and retraining for work as a truck driver.
- [6] The matters for trial were:
- (a) the determination and division of family assets including the former matrimonial home located on West Shawnigan Lake Road, Shawnigan Lake, British Columbia, two properties acquired by the respondent prior to the marriage and held in her name only, and the claimant's pensions;
 - (b) reapportionment of the former matrimonial home;
 - (c) the respondent's claim for spousal support;
 - (d) damages for the claimant's assault on the respondent of October 26, 2008;
 - (e) damages for intentional infliction of mental suffering by the claimant upon the respondent prior to the assault;
 - (f) uncontested divorce; and
 - (g) dissipation of family assets by the respondent following separation.
- [7] The most important issues to the parties at trial were the reapportionment of the former matrimonial home and the assessment of damages for the assault.
- [8] The claimant's position was that the equity in the matrimonial home, valued at \$93,000 should be apportioned 100 percent in his favour. At trial, Mr. Bird did not claim an interest in the two properties held by the respondent in her name only. Those properties are a mobile home at Thetis Lake, British Columbia, and a condominium in Duncan.
- [9] By oral Reasons for Judgment delivered July 20, 2012, the Court reapportioned the matrimonial home 60 percent in favour of the claimant and 40 percent in favour of the respondent. The Court held that the two properties owned by the respondent were not family assets, and that the claimant should retain 100 percent of his pensions.
- [10] Mr. Bird admitted liability for the assault on his wife but contested damages. At trial, the respondent sought \$210,000 in damages for assault. The Court's award of \$155,000, or 74 percent of the amount claimed by the respondent, consisted of:

Damages for pain and suffering - \$75,000

Aggravated damages - \$15,000

Past wage loss - \$40,000

Future loss of earning capacity - \$25,000

- [11] Although the respondent pleaded a claim for punitive damages, she did not pursue that head of damages at trial.
- [12] The Court dismissed the plaintiff's claim for damages for intentional infliction of mental suffering.
- [13] The Court also dismissed the respondent's claim for spousal support.
- [14] The Court granted the divorce.
- [15] The claimant obtained an order that the respondent compensate him for the disposal of family assets in the amount of \$20,000, which represented half the amount sought by the claimant.
- [16] The Court also made an order for the sale of the former matrimonial home, granted Ms. Kohl the conduct of sale, and ordered that sale be subject to Court approval.

ISSUES

- [17] The following issues arise for determination:
 - (a) whether either party achieved substantial success;
 - (b) if so, whether costs should follow the event or the Court should exercise its discretion to order otherwise; and
 - (c) whether the respondent is entitled to double costs for all or some of the steps taken in the family law case after delivery of her offers to settle.

DISCUSSION

- [18] Rule 16-1(1) of the Supreme Court Family Rules provides:
 - (1) If costs are payable to a party under these Supreme Court Family Rules or by order, those costs must be assessed in accordance with Appendix B unless any of the following circumstances exist:
 - (a) the parties consent to the amount of costs and file a certificate of costs setting out that amount;
 - (b) the court orders that
 - (i) the costs of the family law case be assessed as special costs, or
 - (ii) the costs of an application, a step or any other matter in the family law case be assessed as special costs in which event costs in relation to all other applications, steps and matters in the family law case must be determined and assessed under this rule in accordance with this subrule;

- (c) the court awards lump sum costs for the family law case and fixes those costs under subrule (14) in an amount the court considers appropriate;
- (d) the court awards lump sum costs in relation to an application, a step or any other matter in the family law case and fixes those costs under subrule (14), in which event costs in relation to all other applications, steps and matters in the family law case must be determined and assessed under this rule in accordance with this subrule.

[19] Under Rule 16-1(7), costs of a family law case must be awarded to the successful party unless the Court otherwise orders.

[20] Rule 16-1(14) provides:

(14) The court may award costs

- (a) of a family law case,
- (b) that relate to some particular application, step or matter in or related to the family law case, or
- (c) except so far as they relate to some particular application, step or matter in or related to the family law case

and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.

[21] The costs of a family law proceeding usually follow the event unless the Court, acting judicially, exercises its discretion to order otherwise: *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 (C.A.) at para. 19; *C.(S.J.) v. A.(S.J.)*, 2010 BCCA 31 at para. 62.

[22] In order to determine whether costs should follow the event, the Court must make an objective comparison of the relief granted and the results obtained by the parties with the submissions made at trial in order to determine whether one party has been "substantially successful": *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at paras. 28 and 60; *Rattenbury v. Rattenbury*, 2001 BCSC 593 at paras. 20-21.

[23] The factors that a trial judge may take into account in exercising the Court's discretion to depart from the usual rule that costs follow the event were discussed by the Court of Appeal in *Gold* at para. 20:

The question, then, is: when should the Court order otherwise? With respect, when the court should order otherwise is a matter of discretion, to be exercised judicially by the trial judge, as directed by the Rules of Court. To lay down any strict guidelines or even to attempt to give exhaustive examples is not, I think, helpful because the facts and issues in each family law case vary so greatly. 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 achieved by the award itself are all matters which a trial judge, quite properly, may be asked to take into account. Assessing the importance of such factors within the context of a particular

case, however, is a matter best left for determination by the trial judge.

[24] The four-part test for determining whether to award costs to a successful party was stated by Bouck J. in *Fotheringham* 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.

[25] In *Fotheringham* at para. 45, the Court described "substantial success" as 75 percent or better, emphasizing that the trial judge must consider the disputed matters globally and weigh their relative importance to the parties.

[26] Even in a case where one party has achieved substantial success, the Court may award only a portion of the successful party's costs: *Cohen v. Cohen* (1995), 15 R.F.L. (4th) 84 (B.C.C.A.), *Rolls v. Rolls* (1996), 20 R.F.L. (4th) 232 (B.C.C.A.).

(a) Did either party achieve substantial success at trial?

[27] Evidence concerning the events leading to the assault of October 28, 2008, the scope and extent of the physical and psychological injuries suffered by the respondent and submissions on the assessment of damages for the assault consumed at least half of the five days of trial of this action. The claimant resisted any award of damages to the respondent for past wage loss or future loss of earning capacity. The respondent was successful in obtaining a substantial award of damages for pain and suffering, past wage loss, loss of future earning capacity, aggravated damages, as well as some, but not all of the special damages she claimed. Ms. Kohl clearly achieved success on this issue.

[28] On the reapportionment of the former matrimonial home, the claimant's starting position at trial was that by virtue of his disproportionate contributions to the down payment and to the mortgage payments before separation, he was entitled to a 100 percent interest in that property. The respondent claimed at trial that she was entitled to her presumptive one-half interest in this family asset, emphasizing that she had borne all of the costs of preserving and maintaining the former matrimonial home since the parties separated. On this issue, success was divided. While the claimant achieved 60 percent of what he sought, the respondent retains a 40 percent interest in the former matrimonial home. In my estimate, evidence and submissions concerning the respective contributions of the parties to the purchase and preservation of the former matrimonial home, its division and reapportionment occupied a full day of trial time. This was an issue of critical importance to

both parties.

- [29] The claimant was entirely successful in resisting the respondent's claim for spousal support as well as her claim for damages for the intentional infliction of mental harm. Mr. Bird was also successful in retaining 100 percent of his pensions.
- [30] The issue of spousal support was significant for both parties. However, evidence and submissions on that issue only consumed about half a day of trial time.
- [31] The claimant did not press a claim at trial for an interest in the mobile home and the condominium held by the respondent. Nonetheless, Ms. Kohl had to come to trial and prove that neither of those properties were family assets. Finally, the claimant succeeded in obtaining an order for compensation for the respondent's dissipation of assets in the amount of \$20,000, representing half the amount he sought at trial.
- [32] Viewing the result on the disputed matters globally, and bearing in mind that the two issues of most significance to the parties, and which occupied the majority of time at trial were the assault and the reapportionment of the former matrimonial home, I find that the respondent achieved substantial success overall and won the event.
- (b) Should costs follow the event?
- [33] An award of costs will result in some financial hardship to the claimant. The respondent has presented a draft bill of costs and disbursements in the amount of \$22,216.54, consisting of costs under Appendix B of \$16,000.00, taxes on costs of \$1,920, and disbursements of \$4,296.54.
- [34] As a result of the assault, the claimant has lost his position at the Catalyst Mill, which, for the years 2004 through 2007 enabled him to earn an annual income ranging from \$74,000 to \$85,000. In 2011, following his release from prison, the claimant earned a total income of \$35,000 from intermittent part-time employment and employment insurance benefits. At the time of trial, the claimant was unemployed and in receipt of weekly employment insurance benefits of \$485. He hoped to find employment as either a long distance truck driver or a longshoreman. The claimant is in good health and at 40, has the capacity to restore some, if not all of his former earning power, although it will likely take him several years to do so. At present, Mr. Bird has no assets, other than his interest in the former matrimonial home, which will probably be applied to partially satisfy the respondent's judgment for damages.
- [35] With respect to the conduct of the parties in the litigation, the respondent refused to submit to oral discoveries, or an independent medical examination regarding her physical and psychological injuries until ordered to do so by the Court at a trial management conference held on October 20, 2011. By that time, the claimant lacked the means to continue to pay for counsel. In the result, he proceeded to trial without counsel and without conducting a discovery of the respondent or obtaining an independent medical examination.

- [36] In these circumstances, the claimant submits that an award of costs to the respondent would be contrary to the interests of justice.
- [37] However, on the other side of the ledger, the respondent was compelled to pursue her action through trial in order to recover damages for the serious physical and psychological injuries she suffered as a result of a particularly brutal assault by the claimant. His current financial circumstances flow from his own misconduct.
- [38] Weighing all of these factors, I am not persuaded that it would be in the interests of justice to deprive the respondent entirely of her costs. The respondent will have the costs of this family law case in the lump sum amount I fix at the conclusion of these Reasons.
- (c) Is the Respondent entitled to double costs for some or all of the steps taken in this proceeding after delivery of her Offers to Settle?
- [39] Under Rule 11-1(4), the Court may consider an offer to settle when exercising its discretion in relation to costs.
- [40] Rules 11-1(5) and (6) provide:
- (5) In a family law case in which an offer to settle has been made, the court may do one or more of the following:
- (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle;
- (b) award double costs of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle;
- (c) award to a party, in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
- (d) if the offer was made by a respondent and the judgment awarded to the claimant was no greater than the amount of the offer to settle, award to the respondent the respondent's costs in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle.
- (6) In making an order under subrule (5), the court may consider the following:
- (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
- (b) the relationship between the terms of settlement offered and the final judgment of the court;
- (c) the relative financial circumstances of the parties;

(d) any other factor the court considers appropriate.

[41] Rule 11-1 serves the same purpose as Rule 9-1 of the Supreme Court Civil Rules, which is to encourage settlement by penalizing a party who declines an offer to settle that ought reasonably to have been accepted before trial: *Bailey v. Jang*, 2008 BCSC 1512, at paras. 15-17 and 39.

[42] The reasonableness of an offer must be assessed without a "hindsight analysis" based on the amount awarded at trial: *Bailey*, at para. 24.

[43] By her first offer to settle delivered to the claimant on July 27, 2010, the respondent offered that "Mr. Bird transfer legal and equitable title to all family property to Ms. Kohl, and in return Ms. Kohl will relinquish her claims for spousal support and for damages for the assault and battery."

[44] On January 11, 2012, the respondent withdrew that offer and replaced it with the following offer to settle:

1. Mr. Bird to sign over to Ms. Kohl any and all interest in the three properties owned by the parties, respectively located at 46 - 1938 Trans Canada Highway, Victoria, B.C.; 107/2520 Dingwall Street, Duncan B.C. and 1776 West Shawnigan Lake Road, Shawnigan Lake B.C.
2. Mr. Bird to pay spousal support to Ms. Kohl in the amount of \$500 per month commencing February 1, 2012 and terminating January 1, 2017, or alternatively that Mr. Bird pay lump sum spousal support to Ms. Kohl in the amount of \$25,000 on or before May 31, 2012.
3. That all other claims by each party be dismissed.
4. That each party bear their own costs of this proceeding.

Was either offer one that the claimant ought reasonably to have accepted?

[45] The respondent's first offer of July 27, 2010 proposed that Mr. Bird transfer legal and equitable title to "all family property" to Ms. Kohl without specifying the property to be transferred in exchange for release of her claims for spousal support and damages for assault. It was by no means clear whether the offer included the two properties held by Ms. Kohl in her name, or the claimant's pensions, which had largely accrued before the marriage. Further, as a result of the respondent's refusal to submit to oral discovery, or to undergo an independent medical examination, the claimant was not in a position to make an informed assessment of the potential value of the respondent's claim for damages for psychological injuries. Taking these factors into account, and particularly the unclear terms of the offer, I find that the respondent's offer of July 27, 2010 was not one that the claimant ought reasonably to have accepted.

[46] The respondent's second offer to settle of January 11, 2012 specified the three properties to which it applied and the amount to be paid by Mr. Bird as spousal support in exchange for the dismissal of all other claims. By January 11, 2012, the claimant and his counsel had

received a report from the respondent's psychologist respecting the nature and extent of her psychological injuries. The claimant had also obtained an order requiring the respondent to undergo an independent medical examination respecting both her physical and psychological injuries, and to attend for examination for discovery. Although the claimant did not conduct a discovery or obtain the independent medical examination, by the time of delivery of the second offer to settle, he was aware of the physical injuries the respondent had suffered in the assault, and knew that she was advancing a claim for substantial damages for both physical and psychological injuries. By this stage, the claimant, who was still represented by counsel, ought to have known that his claim to an interest in the two properties held by the respondent in her name was, at best, weak. He also ought to have anticipated that damages assessed by the Court for the assault would likely exceed the combined value of the equity in the family home and the \$25,000 payment of spousal support proposed by the respondent. Allowing time for consideration of the respondent's second offer, I find that offer ought reasonably to have been accepted by the claimant by January 18, 2012.

Relationship between terms of settlement offered and the judgment

- [47] The respondent's second offer to settle had a value of \$118,000, consisting of the total equity in the former matrimonial home of \$93,000 and the lump sum payment of spousal support in the amount of \$25,000.
- [48] At trial, the claimant was awarded a 60 percent interest in the equity in the former matrimonial home, which amounts to \$55,800, and \$20,000 as compensation for lost property, for a total of \$75,800.
- [49] The Court awarded the respondent a 40 percent interest in the former matrimonial home. Her share of the value of the equity was \$37,200. In addition, the respondent received an award of damages, which, including special damages, totalled \$162,535. The respondent's recovery at trial substantially exceeded the amount of her offer to settle.

Relative financial circumstances of the parties

- [50] Prior to the assault, the respondent earned an annual income of between \$32,000 and \$35,000 through a combination of her employment at Victoria Shipyards, waitressing, and occasional work as a model. As a result of the assault, she lost her employment at Victoria Shipyards. Ms. Kohl, who has no post-secondary education, had not by the time of trial returned to the workforce. Her sole source of income was rental from her properties. For 2011, she reported a total income of \$15,000 in her T-1 General Income Tax Return.
- [51] I have already discussed the claimant's financial circumstances at paragraph 34 of these Reasons. Although Mr. Bird has the potential to increase his earning capacity, at present he is unemployed, depends upon his parents for shelter, and owns no significant assets, other than his interest in the former matrimonial home. An order requiring the claimant to pay

double costs for steps taken in these proceedings after January 18, 2012, would include double costs for preparation and attendance at the five day trial under item 7 of the tariff in Appendix B. That would impose an additional burden of at least \$10,000 on the claimant, over and above his liability for ordinary costs. In my view, that would result in undue hardship to the claimant.

Other Factors

- [52] Under Rule 1-3, the objects of the Supreme Court Family Rules include minimizing conflict and promoting cooperation between the parties and securing the just, speedy and inexpensive determination of every family law case on its merits. The rules relating to discovery are intended to advance those objects. The respondent's refusal to attend for discovery or to submit to an independent medical examination in a case where the assessment of her psychological injuries was critical to any resolution of the litigation became a further source of conflict between the parties, and created an additional impediment to the pre-trial resolution of this case, which continued until the Trial Management Conference Judge ruled that Ms. Kohl must submit to oral discoveries and an independent medical examination. In my view, the respondent's conduct is a factor which militates against an award of double costs.
- [53] Considering all of these factors and giving the most weight to the claimant's financial circumstances and the respondent's conduct, I exercise my discretion against making any award of double costs to the respondent.

CONCLUSION

- [54] I have found that the respondent achieved substantial success at trial and is entitled to costs. I have also declined to make an order awarding the respondent double costs for steps taken in the action subsequent to the delivery of her second offer to settle.
- [55] In my view, this is an appropriate case for the Court to exercise its discretion under Rule 16-1(14) to fix the amount of costs, rather than to put these parties, with their limited financial means, to the expense of an assessment before the Registrar. Each party, through counsel, has made submissions on costs and had delivered a draft Bill of Costs.
- [56] The respondent has claimed \$16,000 for the costs of this family law case under the tariff set out in Appendix B. For tariff items 1, 2 and 7, which cover respectively, correspondence, instructions and pleadings; discovery and inspection of documents; and preparation for and attendance at trial, the respondent has claimed costs in the prescribed amounts, which total \$15,000. Under tariff item 6 she claims an additional \$1,000 for preparation and attendance for an uncontested application and the Trial Management Conference. I would reduce that amount by \$500. The respondent ought not to recover the cost of the Trial Management Conference of October 11, 2011 where the claimant sought and obtained the ruling requiring Ms. Kohl to submit to oral discoveries and an independent medical examination.

- [57] The claimant claims under tariff item 6 costs in the amount of \$2,500 for uncontested applications and the Trial Management Conference. I accept the submission of counsel for the claimant that those applications were necessary and that his client should have the costs of the Trial Management Conference. The claimant's costs for his uncontested applications and for the Trial Management Conference in the amount of \$2,500 will be set off against the respondent's adjusted costs of \$15,500. Accordingly, the costs payable by the claimant to the respondent, exclusive of tax and disbursements, are \$13,000. The tax payable on that amount is \$1,560. I would also award the respondent her disbursements in the amount claimed of \$4,296.54. Accordingly, I fix the award of costs and disbursements to the respondent for this family law case in the amount of \$18,856.54.
- [58] The claimant will pay costs and disbursements in the amount of \$18,856.54 to the respondent.

"PEARLMAN J."

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