

CANADA / JUDGMENT

Boggs v. Harrison

2009 BCSC 1132

COURT

Supreme Court of British Columbia

DECIDED

19 August 2009

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2009 BCSC 1132 Boggs v. Harrison IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Boggs v. Harrison, 2009 BCSC 1132 Date: 20090819 Docket: S076891 Registry: Vancouver Between: Rod Boggs and Bill Hart Plaintiffs And Patricia Harrison, Alexander Harrison, and Carson Harrison Defendants Before: The Honourable Mr. Justice Halfyard Reasons for Judgment On Costs Counsel for the Plaintiffs: G.F. Gregory Counsel for the Defendants: J.D. Shields Place and Date of Hearing: Vancouver, B.C. July 31, 2009 (With Supplementary Written Submissions) Place and Date of Judgment: Nanaimo, B.C. August 19, 2009

Introduction

- [1] In reasons for judgment filed June 15, 2009, I found Mr. and Mrs. Harrison liable in nuisance, and I awarded \$7,500 in damages to each of the plaintiffs against them. Written submissions have been made on the issue of costs, by reason of the plaintiffs recovering damages in an amount far below the limit of \$25,000 that may be recovered in the Small Claims division of the Provincial Court. Rule 57(10) reads as follows:
- (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.
- [2] The plaintiffs accept that they have the burden of proving that there was sufficient reason for pursuing their claims in the Supreme Court. It has recently been decided that the relevant time for assessing that decision is the time when the action in the Supreme Court was commenced. See *Reimann v. Aziz* 2007 BCCA 448.
- [3] In his covering letter to the trial scheduling manager dated June 29, 2009, counsel for the plaintiffs requested that I not look at the submissions on the issue of costs, until after I had decided the plaintiffs' application to reopen the trial which was then being prepared. I completed written reasons respecting the application to reopen the trial on August 13, 2009 and in accordance with Mr. Gregory's request, I did not look at or consider any of the written submissions on costs before then. The positions of the parties

- [4] On behalf of the plaintiffs, it is submitted that they should not only be awarded costs, but should be granted special costs, or double costs on Scale C, or double costs on Scale B, or costs on Scale B.
- [5] The defendants say that each side should bear their own costs, including disbursements, except that each side should bear responsibility for 50% of the hearing fees. Arguments
- [6] I am grateful for the competent and persuasive arguments presented by both counsel on this troublesome issue. I do not intend to summarize or repeat those arguments but will refer to some of the points argued, as necessary. Discussion
- [7] I accept the submission of Mr. Shields that the claims of the plaintiffs for special costs or double costs on any scale are unfounded. In my opinion, the issue is whether the plaintiffs should be awarded costs on Scale B, and if so, whether those costs should be full or partial. I do not accept the defence submission that the plaintiffs' should be deprived of their disbursements.
- [8] There was no dispute as to the factors which are relevant to the determination of the issue under Rule 57(10). I have reviewed all of the authorities presented by Mr. Gregory on this issue. I found the following cases to be of some assistance: *DaCosta v. 658466 B.C. Ltd.* 2007 BCSC 1523 (C.L. Smith J.) and *Grespan v. Peacock* 2008 BCSC 1551 (Cole J.). I have also considered the case of *Lehtonen v. Marasco* 2008 BCSC 1734 (Grauer J.).
- [9] I have concluded that the plaintiffs had "sufficient reason for bringing the proceeding in the Supreme Court" at the time the action was commenced, for the following reasons:
- a) The plaintiffs sought the remedy of an injunction, which would not have been available in Small Claims Court. Notwithstanding that the plaintiffs were unsuccessful in this claim, in view of my finding that "the plaintiffs were greatly disturbed and upset by the conduct of Mr. and Mrs. Harrison," it was entirely reasonable for them to seek an injunction.
 - b) The legal nature of the claims being made, the numerous defences raised and the factual complexity of the case made it prudent and reasonable to utilize the discovery procedures available in the Supreme Court (but not in the Provincial Court).
 - c) The fact that the credibility of the parties was a central issue made it necessary for the plaintiffs to retain counsel to challenge the credibility of the defendants and to utilize all discovery procedures available in doing so. Counsel would also be required to prepare the plaintiffs for challenges to their credibility by defence counsel. No part of the fees for retaining counsel may be recovered in Small Claims Court.

- [10] The plaintiffs have not demonstrated that they could reasonably expect to recover damages in excess of \$25,000 each at the time when the action was commenced. But I consider that this factor (which is commonly decisive in personal injury cases) is outweighed by the other factors that I have just described. (For an example of a case in which the low amount of damages recovered was the decisive factor, see *Bhanji v. Quezada* 2003 BCCA 445.) Should the plaintiffs be awarded full costs, or only partial costs?
- [11] Mr. Shields has properly pointed out that the plaintiffs failed to prove many of the particulars alleged in the amended statement of claim, and in some cases did not even attempt to lead evidence of them. He submits that, practically speaking, success at the trial was divided. Authorities were presented to show that, in such circumstances, the parties should each be required to pay their own costs.
- [12] The plaintiffs did fail to prove many of the particulars they alleged, and failed to prove the alleged motive for the misconduct of the defendants. Their claim for an injunction was dismissed. However, they did succeed on the contested issue of liability (and survived a vigorous challenge to their credibility) and obtained an award of modest damages. I consider that the plaintiffs achieved a far greater measure of success than the defendants, on the factual and legal issues. In addition, there was some misconduct by the defendants in connection with the litigation, in that the Harrisons failed to produce relevant documents, particularly audio recordings in a timely manner.
- [13] In all of the circumstances, I conclude that the plaintiffs should recover from Mr. and Mrs. Harrison 50% of their costs of the action, on Scale B, together with disbursements, and I so order. "D.A. Halfyard, J." The Honourable Mr. Justice Halfyard

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