

CANADA / JUDGMENT

# Cue v. Breitkreuz

2010 BCSC 1323

## COURT

Supreme Court of British Columbia

## DECIDED

20 September 2010

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2010 BCSC 1323 Cue v. Breitkreuz IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Cue v. Breitkreuz, 2010 BCSC 1323 Date: 20100920 Docket: M064862 Registry: Vancouver Between: Miguel Mendoza Cue Plaintiff And Roy Breitkreuz and Gary's Delivery Service Ltd. Defendants Before: The Honourable Mr. Justice Nathan Smith Reasons for Judgment Counsel for the Plaintiff: T.J. Vondette Counsel for the Defendants: D.N. Robinson Place and Date of Trial/Hearing: Vancouver, B.C. December 18, 2010 and April 9, 2010 Place and Date of Judgment: Vancouver, B.C. September 20, 2010

- [1] On April 30, 2010, I gave reasons for judgment dismissing the plaintiff's claim for injuries arising out of a motor vehicle accident. Counsel have now made submissions on the issue of costs.
- [2] This matter went to trial only on the issue of liability. The plaintiff and defendant gave conflicting evidence about how the accident occurred and I preferred the evidence of the defendant, in large part because it was consistent with the evidence of the only independent witness. Counsel have now advised me of the following facts relevant to costs.
- a) On April 11, 2008, defence counsel made a former offer to settle for \$1.
  - b) On April 22, 2008, defence counsel advised plaintiff's counsel about the evidence of the independent witness. Plaintiff's counsel says that information did not include the witness' name or contact information, which was not provided until August 5, 2008. Even then, counsel says repeated attempts to contact and interview the witness were unsuccessful. Defence counsel also had considerable difficulty serving that witness with a subpoena to attend trial.
  - c) On August 8, 2008, plaintiff's counsel advised that his client would waive his claim in excess of \$25,000 in order to bring the matter within the jurisdiction of the provincial court (small claims division). He proposed that the matter be transferred to that court, but defence counsel did not agree, stating that he thought such a transfer would result in greater delay.

- d) On February 23, 2009, counsel agreed that, although the matter remained in this court, the plaintiff's claim would still be limited to the small claims jurisdiction plus disbursements from the date of the agreement, with costs prior to that date to be determined by the trial judge or by agreement of counsel. It was also at that time counsel agreed to proceed to trial first on liability only.
- [3] The defendant now seeks costs at scale B to February 23, 2009, including double costs for the period following delivery of the offer to settle. The offer to settle was delivered under the former Rule 37(24), which provided that a plaintiff who did not accept an offer and whose claim was later dismissed was required to pay double costs from the date the offer was delivered. That result is no longer automatic because Rule 9-1(5) now gives the court a broad discretion to decide whether, and to what extent, it will give effect to a settlement offer.
- [4] Although counsel's agreement left the issue of costs prior to February 23, 2009 for determination of the trial judge, I must consider the matter within the framework of the Supreme Court Civil Rules, B.C. Reg. 168/2009. Rule 14-1(10) reads:
- (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.
- [5] That Rule is intended to discourage parties whose claims can be decided in Provincial Court, from pursuing them in this court. The rules of the Provincial Court do not provide for an award of costs, other than fees for filing and serving documents and "reasonable charges or expenses" that "directly relate to the conduct of the proceeding." (Small Claims Rules, B.C. Reg. 261/93, Rule 20(2)).
- [6] In this case, the plaintiff clearly recognized that the matter should have been brought in Provincial Court and was prepared to transfer it. Had that been done, neither party would have been entitled to costs.
- [7] The matter remained in this court subject to an agreement to still limit the claim to what could be awarded in Provincial Court. Had my liability decision been different and the matter proceeded to an assessment of damages, Rule 14-1(10) would have been a bar to an award of any costs, other than disbursements, in favour of the plaintiff. In my view, fairness requires that the same limitation apply to the successful defendant, particularly as the defendant did not agree to the proposed transfer to Provincial Court.
- [8] I therefore decline to award any costs to the defendant, other than disbursements. There is therefore no need to consider the offer to settle because there are no costs to double.
- [9] There appear to be some issues as to which disbursements are appropriate. These include expenses incurred by counsel in compelling the attendance of the expert witness at trial and expenses incurred by the defendant for his own attendance. I leave those matters to be determined by the registrar on assessment in the normal way. In that regard, counsel

suggests that there may be some differences between the disbursements usually allowed in this court and what may be allowed as "reasonable expenses" under the rules of the Provincial Court. I emphasize that disbursements are being awarded pursuant to a judgment of this court and must be assessed according to the rules and practice of this court. "Nathan Smith J."

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Prepared on 29 October 2026 · Esheria