
CANADA / JUDGMENT

Cunningham v. Mehl

2019 BCSC 769

COURT

Supreme Court of British Columbia

DECIDED

15 May 2019

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2019 BCSC 769 Cunningham v. Mehl

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cunningham v. Mehl,

2019 BCSC 769

Date: 20190515

Docket: S173387

Registry: Victoria

Between:

Daniel Ryan Cunningham, Frederick Brent Cunningham,

and Harriet Marie Cunningham

Plaintiffs

And:

Kaela Janine Mehl and Leanna Comis

Defendants

Before: Master Bouck

Reasons for Judgment

Counsel for Plaintiffs:

D. McLeod

Counsel for the Attorney General of British Columbia:

N. Barnes

Defendants not appearing although duly served

Place and Date of Hearing:

Victoria, B.C.

April 18, 2019

Place and Date of Judgment:

Victoria, B.C.

May 15, 2019

The Application

[1] In their notice of civil claim (the "NOCC"), the plaintiffs' seek an award of damages premised on three causes of action against one or both of the defendants: wrongful death pursuant to the Family Compensation Act, breaches of privacy and theft/misappropriation of property. The wrongful death claim relates to the tragic death of Charlotte, the 18 month old daughter of the plaintiff Daniel Cunningham and the defendant Mehl. Ms. Mehl was convicted of the first-degree murder of Charlotte and is incarcerated in a federal penitentiary in the Lower Mainland.

[2] The plaintiffs now seek a document production order on the following terms:

Part 1: ORDER(S) SOUGHT

1. An Order pursuant to Supreme Court Civil Rule 7-1(1) and 22-7(2)(e) that the Court Order the Defendant, Kaela Janine Mehl, to
 - (a) Prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in Kaela Janine Mehl's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact, and
 - (ii) all other documents to which Kaela Janine Mehl intends to refer at trial, and
 - (b) Serve that list on the Plaintiffs by serving it on their lawyer, Donald R. McLeod, at 103-832 Fisgard St., Victoria, BC, and
2. An Order pursuant to Supreme Court Civil Rule 7-1(17) that Kaela Janine Mehl produce those documents in her possession for inspection and copying by the Plaintiffs, including but not limited to those documents listed pursuant to the order sought in paragraph (1) above, because they are in the possession of her lawyers, such documents to include but not be limited to:

- (a) All of the Exhibits from Kaela Janine Mehl's murder trial as set out in Exhibit "B" to Affidavit #1 of Brent Cunningham, filed March 27, 2019;
 - (b) The transcript of Kaela Janine Mehl's murder trial;
 - (c) The Crown disclosure file from Kaela Janine Mehl's murder trial
3. For costs as are appropriate in the circumstances.
- [3] Counsel for the defendant Mehl was in the midst of withdrawing from the proceeding when this application came before the court. Neither of the defendants filed a response to the application.
- [4] Although not named as an application respondent, the plaintiffs chose to provide the Attorney General of British Columbia (the "AGBC") with the notice of application. The AGBC objects to the order sought in paragraph 2 above.
- [5] There is no trial date set in the proceeding.

Facts

- [6] This action emanates from both the breakdown of the marriage between Daniel Cunningham and Kaela Mehl, but also, and central to this application, the death of Charlotte.
- [7] The plaintiffs Brent and Harriett Cunningham are Charlotte's paternal grandparents. The defendant Leanna Comis is Charlotte's maternal grandmother.
- [8] Charlotte died on September 15, 2015. The plaintiffs commenced this action on September 11, 2017, subsequent to Ms. Mehl being charged with Charlotte's murder. A jury convicted Ms. Mehl of that crime on October 4, 2017. Only Daniel Cunningham gave evidence at the murder trial.
- [9] The Legal Basis for the wrongful death claim is articulated in the NOCC as follows:

Wrongful Death

23. Pursuant to Section 3(4) Family Compensation Act Daniel, Brent and Harriet bring this claim for damages for wrongful death in their own names and for their own benefit and without limiting the generality of the foregoing, Daniel, Brent, and Harriet say that that each of them is a "parent" within the meaning of Section 1 of the said Family Compensation Act. Specifically, when someone intentionally causes the death of a child or grandchild, then that person is liable in damages to those who have suffered the loss of a child or grandchild, in this case Daniel, Brent and Harriet, for the harm suffered as set out herein.

- [10] With respect to the breach of privacy and theft claims, the NOCC alleges that the one or both defendants "conducted surveillance" on the plaintiffs; stole the cellphones belonging to Daniel and Brent Cunningham and as a result obtained information protected by solicitor-client privilege; and made unauthorized audio recordings of conversations had with the plaintiffs. These actions are said to have occurred between May 27 and September 16, 2015.
- [11] On February 13, 2018, the defendant Mehl filed her response to the NOCC and brought a counterclaim against the Daniel and Brent Cunningham. In addition to making general and specific denials to the plaintiffs' claims, the defendant Mehl pleads that:
- a. The actions of the plaintiffs Daniel and Brent Cunningham caused the wrongful death of Charlotte;
 - b. The defendant Mehl was suffering from a mental disorder and did not intend to kill Charlotte; and,
 - c. The defendant Mehl is herself entitled to damages as against the plaintiffs Daniel and Brent Cunningham with respect to Charlotte's death, pursuant to the Family Compensation Act.
- [12] Ms. Mehl's mental state was in issue at the criminal trial with the defence relying on an opinion of Dr. S. Lohrasbe in that regard.
- [13] Meanwhile, the defendant Mehl has launched an appeal of the murder conviction. The lawyers who are counsel of record in this proceeding are also representing the defendant Mehl on the appeal. Those lawyers practice in Saskatchewan. The appeal is to be heard in late October, 2019.
- [14] Brent Cunningham has sworn the affidavit filed in support of this application. Mr. Cunningham deposes that he was present during parts of criminal trial and:

I know that

- (a) copies of the exhibits from Kaela Janine Mehl's murder trial, set out in Exhibit "B" will be in the possession the lawyers conducting her appeal, because I know that those are provided to an accused prior to trial and are provided to an Appellant,
- (b) the transcript of Kaela Janine Mehl's murder trial will be in the possession of the lawyers conducting her appeal because I have read Section 20(1) of the Court of Appeal Rules, which require the Appellant to obtain and file the transcript, and therefore that Kaela Janine Mehl's appeal counsel must therefore have obtained and filed a copy of the criminal trial transcript,

- (c) the Crown disclosure file will be in the possession of the lawyers conducting her appeal because I know that such disclosure is made to an accused prior to trial, and because her lawyer of record for the criminal appeal, Kevin C. Mellor said that he had it, as set out in paragraph 16 above. I know that the private investigator reports are contained within the Crown disclosure file, and they as well as other material with him not file will assist in proving our claims, particularly our claims of breach of privacy.
- [15] In a letter dated February 12, 2018, the defendant Mehl's counsel addressed these requests for disclosure, noting that:
- a. Ms. Mehl will be "calling" Dr. Lorasbe as an expert witness in this proceeding; and
 - b. The crown disclosure package was provided to Ms. Mehl's counsel under trust condition (sic) and we cannot provide that to you to the best of our knowledge especially since Ms. Mehl's conviction is being appealed; and
 - c. Ms. Mehl was unlikely to have any documents in her possession and control due to her incarceration but instructions would be sought in that regard.
- [16] The exhibit card from the murder trial is in turn exhibited to Mr. Cunningham's affidavit. It appears that voir dires were conducted and some documents tendered in those voir dires were not entered into evidence at the trial proper.
- [17] The plaintiffs initially agreed to delay an application for document production until the appeal was heard in October, 2018. However, those instructions changed when the appeal did not proceed as scheduled.

Discussion

- [18] There is no question that the defendant Mehl is obliged to provide a list of documents to the plaintiffs pursuant to SCCR 7-1(1). I order that such a list be provided to the plaintiffs by June 14, 2019. The remedy sought in item 1(b) of the notice of application appears redundant so long as there has been no recent change to the plaintiffs' address for delivery.
- [19] The more difficult issue to resolve is the relief sought in item 2.
- [20] The AGBC raises three main objections to the disclosure or listing of all the documents sought by the plaintiffs.
- [21] First, the AGBC submits that all of the documents provided by the Crown to Ms. Mehl in the course of the criminal law proceeding are subject to an implied undertaking that such documents may only be used for the purpose of making a full answer and defence to the murder charge. Further, the AGBC suggests that Ms. Mehl or her counsel may have marked up the documents and that their release to third parties might result in a breach of solicitor-client privilege.

- [22] Second, the AGBC submits that the exhibits listed in the exhibit card are the property of the court and only "court processes" should dictate the terms of the release of those documents to any individuals, including third parties.
- [23] Similarly, the AGBC says that transcripts of the murder trial are also in the control of the court and the authorized transcriber and the court should be reluctant to authorize release of the transcript until the prospect of a re-trial is resolved.
- [24] All of the objections rely on the premise that the sought after disclosure could prejudice the defendant Mehl if the conviction is overturned and a new trial ordered.
- [25] Nonetheless, the AGBC says that the plaintiffs are not without a remedy. Much of the information sought by the plaintiffs could well be found in the police investigative file and such a file could be produced in accordance with the decision of *Wong v. Antunes*, 2009 BCCA 278.
- [26] The plaintiffs say that the arguments raised by the AGBC on this application have been considered and rejected by the court in *Huang v. Sadler*, 2006 BCSC 559. I note, however, that *Huang* pre-dates *Wong*. Indeed, all of the authorities relied on by the plaintiffs pre-date the introduction of the SCCR and the now explicit consideration of proportionality. In this case, the information sought by the plaintiffs might indeed be gathered from the police investigation file. As such, and without making a determination on the merits of the application, I find that the plaintiffs should first pursue this disclosure: SCCR 7-1(14).
- [27] In the result, the plaintiffs' application for the order sought in paragraph 2 is adjourned generally. The plaintiffs have liberty to re-set that relief following either the hearing of an application for production of the police investigation file or the determination of the appeal from Ms. Mehl's murder conviction, whichever event occurs first in time. Lest there be any confusion, I am not seized of any further applications in this proceeding.
- [28] If the AGBC and the plaintiffs are unable to reach a consent term with respect to the costs related to this application, written submissions are to be delivered within the next 21 days to Supreme Court Scheduling.

"Master C.P. Bouck"

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