

CANADA / JUDGMENT

Duarte v. McMillan

2020 BCSC 899

COURT

Supreme Court of British Columbia

DECIDED

17 June 2020

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2020 BCSC 899 Duarte v. McMillan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Duarte v. McMillan,

2020 BCSC 899

Date: 20200617

Docket: M42690

Registry: Penticton

Between:

Jaime Jose Martins Duarte

Plaintiff

And

Deborah McMillan and Skeena Rent-a-Car Ltd.

Defendants

Before: The Honourable Madam Justice E. McDonald

Reasons for Judgment Re: Costs

Counsel for Plaintiff:

M.D. Brooke,

J.P. Jacoe

Counsel for Defendants:

J. Poon

Place and Date of Hearing:

Penticton, B.C.

April 3, 2020

Place and Date of Judgment:

Penticton, B.C.

June 17, 2020

Table of Contents

INTRODUCTION 3

BACKGROUND 4

ANALYSIS 5

Whether the offer to settle was one that ought reasonably to have been accepted 6

Relationship between the terms of settlement offered and the final judgment 8

Relative financial circumstances of the parties 9

Other appropriate factors 9

CONCLUSION 10

INTRODUCTION

- [1] On January 30, 2016, the plaintiff, Mr. Duarte, was injured in an accident in West Kelowna, British Columbia (the "Accident"). Mr. Duarte's vehicle was stopped at a red light when he was struck from behind by the defendant's vehicle. The defendants admitted liability for the Accident.
- [2] The issues for determination at trial were causation and the amount of damages. The claim was tried for 10 days before a jury starting on January 27, 2020.
- [3] The defendants made three offers to settle to the plaintiff in the year before the trial. On December 13, 2019, the defendants provided the plaintiff with their final offer to settle for \$88,000, plus costs and disbursements. That offer remained open until the commencement of the trial. On January 27, 2020, the plaintiff provided the defendants with an offer to settle for \$175,000.
- [4] On February 7, 2020, the jury returned a verdict awarding the plaintiff damages of \$7,300 for costs of future care and loss of homemaking capacity and \$14,700 for non-pecuniary damages, for a total damage award of \$22,000.

- [5] Pursuant to Rule 9-1(5)(a) and (d) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, the defendants apply for an order that the plaintiff pay their costs and disbursements after December 13, 2019. The defendants do not seek to rely on the dates of their earlier offers to settle, nor do they seek deductions from the cost of future care award pursuant to the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231.
- [6] The plaintiff opposes the application and seeks an order that the defendants be required not only to pay his reasonable costs and disbursements, but also the cost of two counsel attending the trial. As the successful party, the plaintiff says it would be unjust and unfair to deprive him of an award of costs and disbursements.
- [7] The plaintiff submits that it was reasonable to have rejected the defendants' final settlement offer in light of the particular circumstances of this case. In essence, the plaintiff says there were legitimate reasons to reject the offer and factors that made it very difficult for him to predict the result of the jury verdict.

BACKGROUND

- [8] At the time of the accident, Mr. Duarte was 60 years old. He had recently relocated to Princeton, British Columbia where he had purchased a new home. He was not employed at the time of the Accident. He was collecting retirement and disability benefits. At the time of the Accident, Mr. Duarte said he was planning on starting a small engine and ATV repair business in Princeton to supplement his retirement income.
- [9] Mr. Duarte claimed damages for injuries he suffered in the Accident including, cognitive deficiencies, tinnitus, headache, neck pain, lower back pain, depression, anxiety, sexual dysfunction and sleep problems. In addition to his claim for non-pecuniary losses, Mr. Duarte also claimed for past and future loss of income earning capacity as a result of the injuries sustained in the Accident.
- [10] In support of his claim, Mr. Duarte tendered expert evidence at trial that included reports by a doctor specializing in physical medicine and rehabilitation, a psychiatrist, a neuropsychologist and an occupational therapist.
- [11] The defendants conceded that the Accident caused the plaintiff's neck pain. However, the cause and extent of the plaintiff's other injuries were in dispute at the trial. The defendants tendered expert evidence at trial that included reports by a psychiatrist, a neurologist, a radiologist and an orthopedic surgeon.

LAW

- [12] Normally, under Rule 14-1(9), the successful party is entitled to costs unless the court otherwise orders. Although the jury in the present case awarded damages in an amount less than was sought, that result alone provides an insufficient basis to deprive the plaintiff of costs: 3464920 Canada Inc. v. Strother, 2010 BCCA 328 at para. 43.

- [13] In light of their offer to settle and the amount of the award, the defendants seek an order awarding them costs on the basis of Rule 9-1(5)(a) and (d). The relevant parts of that Rule state:
- (5) In a proceeding 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 a proceeding after the date of delivery or service of the offer to settle;
 - (d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle.
- [14] Rule 9-1(6) sets out some considerations that I may take into account in deciding whether to exercise my discretion regarding costs. Rule 9-1(6) states:
- (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.
- [15] Rule 9-1 is meant to encourage early and reasonable settlements of disputes by potentially imposing penalties and rewards on parties related to the outcome of the proceeding and the details of any settlement offers: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25; *C.P. v. RBC Life Insurance Company*, 2015 BCCA 30 at para. 95.

ANALYSIS

- [16] As stated earlier, on December 13, 2019, the defendants made the plaintiff a final offer to settle for \$88,000 and that offer was open until the commencement of the trial. On January 24, 2020, the plaintiff made a counter-offer to settle for \$175,000. The trial proceeded and the jury's total award to the plaintiff was \$22,000.
- [17] The defendants' settlement offers were made to the plaintiff on dates between October 31, 2019 and December 13, 2019. I would not describe the timing of the defendants' settlement offers, even taking the first offer into account, as having been made early in these proceedings given that the trial commenced on January 27, 2020.

[18] I will now deal with each of the considerations for exercising my discretion in Rule 9-1(6).

Whether the offer to settle was one that ought reasonably to have been accepted

- [19] The reasonableness of the plaintiff's decision not to accept the offer must be assessed without referring to the award, but rather taking into account the circumstances that existed when the offer was open for acceptance: Hartshorne, at para. 27.
- [20] The issue is not whether the defendants' offer is reasonable but rather, whether it was unreasonable for the plaintiff to have refused to accept it: Cottrill v. Utopia Day Spas and Salons Ltd., 2019 BCCA 26 at para. 30, citing Kobetitch v. Belski, 2018 BCSC 2247 at paras. 24-25.
- [21] The defendants say that by December 13, 2019, when they provided their final settlement offer, the plaintiff should have realized the obvious weaknesses and risks arising from his mainly subjective accounts of his injuries. The defendants also say the plaintiff ought to have known that he would be unable to prove a causal link between his most significant injuries, such as an accident-related brain injury and tinnitus, and the Accident.
- [22] With respect to the plaintiff's claim for past and future loss of earning capacity, the defendants say the riskiness of this claim should have been obvious to the plaintiff based on the weak evidence of his earning history and his supposed plans to open a repair business.
- [23] At trial, there was no dispute that the plaintiff's neck pain was caused by the Accident. However, the defendants denied that the Accident caused the other injuries claimed by the plaintiff.
- [24] Turning to some of the considerations mentioned in Hartshorne, at para. 27, such as the timing of the defendants' final offer, I do not think that it can be characterized as an early offer to settle (even taking into account the defendants' other offers dating back to October 31, 2019). Nor do I see that the defendants' letter provided the plaintiff with any rationale or explanation for the final offer.
- [25] At trial, the plaintiff presented a great deal of evidence related to his claim for non-pecuniary loss. The plaintiff submits that this evidence, coupled with case authorities in similar cases, demonstrates that he reasonably believed he could achieve a higher award if he proceeded to trial.
- [26] One significant issue at trial concerned whether the plaintiff suffered a concussion or mild traumatic brain injury in the Accident. The plaintiff's self-reporting of his experience and symptoms, especially during and immediately following the Accident, was clearly important evidence for the experts opining about his injuries and was potentially important for the jury as well. The parties' experts disagreed, amongst other things, that the plaintiff had suffered a concussion or mild traumatic brain injury in the Accident.

- [27] Regarding circumstances where the plaintiff's credibility will be an important issue, Justice Mayer noted as follows in *Mitchell v. Fonseca*, 2020 BCSC 395 at para. 16:
- [16] In considering whether an offer ought reasonably to have been accepted this Court has paid particular attention to whether a plaintiff's case was heavily dependent on their own credibility, particularly with respect to expert medical evidence that depends on the plaintiff's account of their alleged injuries and disabilities: See *Dennis v. Fothergill*, 2014 BCSC 452 at paras. 26 to 29; *Warren*, supra at paras. 36 to 39; *Lockett v. Chahal*, 2017 BCSC 1983 at paras. 21 to 26; *Gill v. McChesney*, 2018 BCSC 1378 at paras. 42 to 47.
- [28] In the present case, expert reports prepared on behalf of the plaintiff contained opinions that generally supported his allegations of injury. It is true that the experts disagreed with each other regarding the diagnosis, prognosis and causation of many of the plaintiff's injuries, but that is not unusual.
- [29] Regarding the plaintiff's credibility, the most significant issue in that regard appeared to involve his self-reporting of the symptoms he experienced during and immediately after the Accident. In my view, the plaintiff's evidence on this issue did not point to a general lack of credibility or untruthfulness on the plaintiff's part.
- [30] The experts provided diverging opinions regarding the implications of the plaintiff's symptoms. For example, some experts suggested that the plaintiff experienced a concussion or loss of consciousness in the Accident. Another expert, Dr. Solomons, strongly disagreed. It is true that there was some inherent risk that a jury might disbelieve the plaintiff's evidence regarding his symptoms. However, I cannot say that the plaintiff was unreasonable in taking that risk.
- [31] After considering the evidence as a whole and the authorities, I am unable to conclude that the plaintiff lacked a basis for reasonable confidence in his claim. Further, I am unable to fault the plaintiff for proceeding to trial in the hope of achieving an award greater than the amount in the offer: *Bains v. Antle*, 2019 BCCA 383 at para. 36.
- [32] In short, I disagree with the defendants that a careful review of the evidence should have alerted the plaintiff that he faced a significant risk of being unable to prove causation for his injuries.

Relationship between the terms of settlement offered and the final judgment

- [33] The \$88,000 that was offered to the plaintiff is obviously more than the \$22,000 he was awarded at trial. That fact favours the defendants; however, the relationship between the terms of the settlement offer and the amount of the final judgment is not determinative: *Smagh v. Bumbrach*, 2009 BCSC 623 at para. 13.
- [34] In my view, the relative size of the final settlement offer is a factor that weighs in favour of the defendants' position, but it is not determinative.

Relative financial circumstances of the parties

- [35] The plaintiff is a pensioner with a modest income who owns his own home. The defendants submit that the plaintiff likely spent more money than the defendants preparing for trial, since the plaintiff brought more experts to the trial.
- [36] However, both of the parties submit that the issue of their relative financial circumstances is a neutral factor. I agree with that submission. I have no evidence that either party's financial resources influenced the litigation one way or another.

Other appropriate factors

- [37] The plaintiff urges me to consider the timing of this trial in relation to ICBC's public statements around the same time regarding the rising cost of insurance premiums and ICBC's finances. The plaintiff's counsel pointed out that on the penultimate day of the trial, the provincial government announced a transition to a no-fault insurance model. In the plaintiff's view, this is likely to have influenced the jury and made it more difficult for the plaintiff to succeed at trial.
- [38] The difficulty I have with the plaintiff's submission on this issue is the suggestion that the public statements, which are not in evidence, ought to be assumed to have influenced the jury negatively against the plaintiff. I am unable to make that leap without some evidence.
- [39] One additional factor to consider is that the defendants filed the jury notice, not the plaintiff. Assessing the decision to settle may be more nuanced in cases involving jury trials: Mitchell, at para. 31. Related to that factor is that the jury award in this case (i.e. \$14,700 for non-pecuniary damages), may be low relative to judge-alone decisions made in other cases involving comparable injuries: Mitchell, at para. 32. In my view, this favours the plaintiff being entitled to his costs.

CONCLUSION

- [40] After considering the factors set out in Rule 9-1(6), I find that it is not appropriate to deny the plaintiff his costs. Therefore, I award the plaintiff costs of the entire proceeding.
- [41] In reaching my conclusion regarding costs, I am aware that the \$22,000 awarded to the plaintiff is a sum within the jurisdiction of the Provincial Court under the Small Claims Act, R.S.B.C. 1996, c. 430. The defendants have not relied upon Rule 14-1(10) as a basis to deny the plaintiff his costs. I infer that the defendants do not dispute that the plaintiff had sufficient reason to bring this proceeding in the Supreme Court.
- [42] However, if I award the plaintiff costs, beyond disbursements, I must find that there was a sufficient reason for the plaintiff bringing the action in the Supreme Court. In light of the evidence that was available to the plaintiff and on the basis of his alleged injuries, I do find that there was sufficient reason for him to bring the action in the Supreme Court.

- [43] The defendants also seek a determination of the costs. They have made submissions regarding the plaintiff's draft bill of costs. The plaintiff submits that the determination of costs is a matter that should be dealt by way of an assessment before the Registrar.
- [44] The plaintiff also submits that if I determine he is entitled to costs, that I consider finding him entitled to claim the cost of two counsel attending seven of the ten days of trial, given the complexities associated with jury trials.
- [45] While a trial judge has the discretion to assess costs under Rule 14-1(15), this discretion should be exercised sparingly as the Registrar is often best placed to conduct the assessment of costs: *Gichuru v. Smith*, 2014 BCCA 414 at para. 154. There are no circumstances in this case that would indicate the Registrar is not in the best position to assess costs. The assessment of costs, including the plaintiff's claim for the cost of two counsel attending trial, is therefore a matter to be assessed by the Registrar.

"E. McDonald J."

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