

CANADA / JUDGMENT

Garcia v. Gill

2024 BCSC 617

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 617 Garcia v. Gill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Garcia v. Gill,

2024 BCSC 617

Date: 20240415

Docket: M207092

Registry: Vancouver

Between:

Amara Garcia

Appellant

And

Jaspreet Singh Gill and Bel-Air Taxi (1982) Limited

Respondents

Before: The Honourable Justice Majawa

On appeal from: An order of the Supreme Court of British Columbia, dated January 24, 2024 (Garcia v. Gill, 2024 BCSC 108, Vancouver Docket No. M207092).

Reasons for Judgment

Counsel for the Appellant:

M. Lui

Counsel for the Respondents:

T. Weinstein

Place and Date of Trial:

Vancouver, B.C.

March 7, 2024

Place and Date of Judgment:

Vancouver, B.C.

April 15, 2024

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Overview

[1] The underlying actions stem from two motor vehicle accidents that occurred on July 15, 2018, and October 29, 2018, respectively. The two actions have been joined for trial. The plaintiff applied under s. 5(6) of the Disbursements and Expert Evidence Regulation, B.C. Reg. 210/2020 [Regulation], for an order that disbursements relating to the cost of two medical assessments be excluded disbursements as defined in the Regulation. Associate Judge Hughes dismissed the plaintiff's application: *Garcia v. Gill*, 2024 BCSC 108 (the "Associate Judge Decision"). The plaintiff, now appellant, appeals to this Court. The appellant also seeks to adduce fresh evidence on this appeal. For the reasons that follow, I deny leave to adduce fresh evidence and dismiss the appeal.

Background and Evidence Before the Associate Judge

[2] The Legislature enacted the Regulation to lower costs of the "litigation based" insurance system that governs motor vehicle claims in BC: *British Columbia (Attorney General) v. Le*, 2023 BCCA 200 at para 5. The Regulation caps disbursements at six percent of a plaintiff's damages following trial or settlement. The Regulation requires the plaintiff to apply to have disbursements excluded from the cap before the disbursement is incurred: *Nagra v. Prasad*, 2023 BCSC 2297 at para. 1.

[3] The relevant parts of s. 5 of the Regulation provides as follows:

Limits on amount of disbursements

5 (1) In this section:

"disbursement limit" means, in relation to a vehicle injury proceeding,

- (a) the amount that is 6% of the total award of damages assessed by the court in the vehicle injury proceeding or, if an offer to settle the vehicle injury proceeding is accepted, 6% of the amount offered, or
- (b) if the court dismisses the vehicle injury proceeding or, at the conclusion of the vehicle injury proceeding, does not make an award of damages, the amount determined by the court;

"excluded disbursements" means the following:

- (d) disbursements for expert evidence, or an expert report, on the issue of liability;
 - (f) disbursements that the court has ordered to be excluded disbursements on application made under subsection (6).
- (2) Only the following may be allowed or awarded to a party in a vehicle injury proceeding as disbursements:
- (a) disbursements up to the disbursement limit;
 - (b) excluded disbursements.
- (6) On application by a party to a vehicle injury proceeding, the court may, if satisfied that the conditions set out in subsection (8) are met, order that the disbursements itemized in the order are excluded disbursements.
- (8) The following are the conditions for the purposes of subsection (6):
- (a) the application is made before the disbursements are incurred;
 - (b) were the disbursements not excluded, the party making the application would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the vehicle injury proceeding.
- (9) In an application under subsection (6), a party must include the following:
- (a) the nature and the evidentiary value of each disbursement that is the subject of the application;
 - (b) evidence of the prejudice the party would suffer were the disbursements that are the subject of the application not excluded, which must include

- (i) evidence that there is a reasonable risk that the total amount of disbursements the party intends to incur to resolve the vehicle injury proceeding will exceed the disbursement limit,
 - (ii) evidence that the disbursements that are the subject of the application are necessary to justly resolve the vehicle injury proceeding in light of the complexity of the vehicle injury proceeding or the importance of the issues in dispute, and
 - (iii) evidence that the party would be unable, without undue hardship, to incur the disbursements that are the subject of the application were those disbursements not excluded.
- [4] When the matter was before the associate judge, the plaintiff intended to obtain reports from two experts and would be doing so regardless of the outcome of the application. The associate judge denied the application to have the upcoming disbursement costs excluded. Among other issues discussed below, there was no evidence as to the cost of the two expert assessments, reports, trial preparation or trial attendance. This is critical information that is required by the Regulation.
- [5] Counsel asked the associate judge to take judicial notice of the cost of the typical expert medical report, including trial attendance. The associate judge declined to do so, as the situation did not meet the stringent threshold for judicial notice outlined in *R v. Find*, 2001 SCC 32 at para. 48. Counsel for the appellant did not ask the Court to similarly take judicial notice of the costs relating to expert reports on this appeal.
- [6] The application was made before the disbursements were incurred, satisfying s. 5(8)(a) of the Regulation. The associate judge then turned to s. 5(8)(b) which requires that, were the disbursements not excluded, the plaintiff would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the vehicle injury proceeding. To determine whether s. 5(8)(b) was met, the associate judge considered the evidence provided pursuant to s. 5(9). In compliance with s. 5(9)(a), the associate judge determined that the plaintiff had established the nature of, and the evidentiary value of, the disbursements.
- [7] The associate judge then went through s. 5(9)(b) to determine whether there was evidence that Ms. Garcia would suffer prejudice were the disbursements not excluded. The evidence needed to include three factors set out in subparagraphs (i)-(iii). The plaintiff satisfied subparagraph (ii) because there was sufficient evidence that the disbursements were necessary to justly resolve the proceeding. The plaintiff also satisfied subparagraph (iii) because there was evidence that the plaintiff would be unable, without undue hardship, to incur the disbursements were they not excluded.
- [8] But the plaintiff failed under s. 5(9)(b)(i): there was no evidence as to the reasonable risk that the total amount of disbursements the plaintiff intended to incur to resolve the proceeding would exceed the disbursement limit. The plaintiff failed because "there was a complete lack of evidence with respect to the total amount of disbursements that the plaintiff intends to incur": at para. 23 of the Associate Judge Decision. As illuminated by the associate judge's statement at para. 13, there was no evidence (not just insufficient evidence)

as to the anticipated costs of the disbursements:

- [13] Given that both appointments were confirmed before this application was filed, I see no reason that counsel could not have provided some evidence as to the anticipated cost of obtaining the expert evidence. Medical experts retained in motor vehicle injury cases will have a fee schedule setting out their anticipated fees for assessment, report-writing, trial preparation and attendance, or could at least provide a written estimate of those fees in advance of the fees being incurred.
- [9] The plaintiff also made no attempt to quantify her losses or potential damage award. Thus, there was no evidence on what the "disbursement limit" may be for the purposes of the Regulation.
- [10] The associate judge was bound by the words of the statute: the plaintiff did not provide the required evidence, and consequently, the plaintiff failed under s. 5(9)(b)(i). Without that evidence, the associate judge could not say that the plaintiff met the conditions demanded in s. 5(8)(b).

Issues

- [11] The parties agree on the appropriate standard of review; therefore, this appeal is confined to two issues:
- 1) Should this Court grant the appellant leave to adduce fresh evidence?
 - 2) On rehearing this matter, was the associate judge's decision incorrect?
- [12] For the reasons outlined below, I decline to admit fresh evidence and I dismiss the appeal.

Standard of Review

- [13] The parties agree that the appropriate standard of review is correctness. Generally, the "clearly wrong" standard applies to purely interlocutory matters that are not vital to the ultimate issues in a case: *Cliff v. Dahl*, 2010 BCSC 1998 at para. 12. However, the standard of review is correctness on interlocutory appeals that involve a point of law on novel legislation: *Kaladjian v. Jose*, 2012 BCSC 357 at paras. 19-23 and the authorities cited therein; see also *Holmberg v. McMullen*, 2019 BCSC 1434 at para. 9. The amendments to the Regulation that lie at the heart of this appeal came into force only weeks before this case's initial hearing. I am satisfied that the matters to be resolved involve a point of law on novel legislation, and thus, correctness is the appropriate standard despite the fact that it is an interlocutory appeal.

The Fresh Evidence Should not be Admitted

- [14] The appellant seeks to introduce the evidence that the associate judge found to be missing in the application at first instance. The fresh evidence the plaintiff seeks to admit is in respect of the anticipated costs of the disbursements sought to be excluded and the cost of the disbursements incurred to date. The respondents oppose this application, arguing that the evidence was available when the application was before the associate judge.
- [15] I decline to admit the fresh evidence on this appeal: the evidence does not meet the four-part test for admission set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 1979 CanLII 8 (S.C.C.). The test from *Palmer* was summarized in *R. v. Sipos*, 2014 SCC 47:
- [29] Generally, fresh evidence should not be received if it could have been obtained at trial by exercising due diligence, although this criterion is not strictly applied in criminal matters when it would be contrary to the interests of justice to do so. The evidence must be relevant in the sense that it relates to a potentially decisive issue and reasonably worthy of belief. Finally, the evidence, if accepted, must reasonably be expected to have affected the result when considered along with the trial evidence.
- [16] The appellant concedes that the evidence they now seek to introduce was available at the time of the initial hearing. However, the appellant argues that the due diligence standard is relaxed in interlocutory appeals. In support of this, the appellant cites a passage from *476605 B.C. Ltd. v. Insurance Corp. of British Columbia*, 2010 BCSC 1149. In 476605, the Court cited the test from an earlier decision for the admission of fresh evidence on an appeal from (what is now) an associate judge's decision:
- [8] As this is an appeal from a final order, the appeal took the form of a re-hearing. In addition, the plaintiff applied for the production of fresh evidence. The test for the introduction of fresh evidence in an appeal of a decision of a Master was summarized by Gray J. in *L.J.B. v. R.W.B.*, 2002 BCSC 1552, at paras. 13-14:

The ordinary rule is that fresh evidence cannot be introduced on an appeal of a master's order unless the applicant demonstrates that the evidence was not available at the time of hearing despite due diligence. It must also be evidence that might have affected the ruling had it been put before the court of first instance. The rule can be more relaxed on an interlocutory appeal. (See *MacMillan Bloedel v. Mullin* (1985), 1985 CanLII 592 (BC CA), 66 B.C.L.R. 258 (C.A.)).

The ultimate question is whether it is in the interests of justice to introduce the fresh evidence. If so, this court is entitled to rehear the matter. (See *Culbert v. Agusti*, [1993] B.C.J. No. 2238 (S.C.), *Leggatt, J. and Abermin Corp. v. Granges Exploration Ltd.* (1990), 1990 CanLII 1352 (BC SC), 45 B.C.L.R. (2d) 188 (S.C.)).

[Emphasis added.]

- [17] The need for certainty and finality generally leaves no room for the admission of fresh evidence on appeal: *Scott v. Scott*, 2006 BCCA 504 at para. 21. While I have the discretion to permit fresh evidence even if that evidence was available at the time of the hearing before the associate judge, the ultimate question is whether it is in the interests of justice to do so: *L.J.B. v. R.W.B.*, 2002 BCSC 1552 at para. 17. I am not convinced I should permit fresh evidence in this case. While there may indeed be a relaxed due diligence standard in interlocutory appeals, I have not been pointed to an authority suggesting that this relaxed standard means there is no standard.
- [18] To the contrary, even in situations with a relaxed standard, the Palmer criteria should not be ignored. As stated by Justice Blok in *A.E. v P.A.*, 2022 BCSC 41:
- [76] I appreciate that family matters, and interlocutory family matters in particular, can operate on urgent timelines, and thus some relaxation of the Palmer criteria may be called for in deserving circumstances. But even in those cases, the criteria are not to be ignored.
- [Emphasis added.]
- [19] In *A.E.*, in an appeal of interlocutory orders, this Court assumed fresh evidence satisfied the due diligence test from Palmer "largely because the claimant did not oppose the admission of [the] records": at para. 77. However, Justice Blok seemed skeptical as to whether the respondent had met the due diligence requirement. In other words, without the respondent's concession, it is not clear that the due diligence requirement had been met. Justice Blok stated:
- [75] counsel for the respondent asked for medical records of the claimant by letter dated February 2, 2021, and counsel for the claimant responded on February 11, 2021, saying no basis for those records had been provided. It is not clear what "diligence" (as per the first Palmer criterion) the respondent exercised after that, if any.
- [20] In the case at bar, not only do the respondents oppose admission, but the plaintiffs failed to demonstrate that they took any steps towards exercising due diligence.
- [21] In this appeal, the appellant has essentially reacted to Associate Judge Hughes' concerns by seeking to have fresh evidence admitted improperly. In *Riemersma v. Riemersma*, 2013 BCSC 474, this Court refused to permit fresh evidence in an appeal from (what is now) an associate judge's interlocutory order because the respondent failed to exercise due diligence and sought to repair their evidence on appeal. The information was available ahead of the hearing. It was not enough that the respondent's former lawyer had failed to inform the respondent that the information at issue was important. As stated by Justice Rogers in *Riemersma*:

- [10] On a plain reading of the respondent's affidavit it becomes clear that he simply failed to appreciate that it would be in his best interests to put forward clear and conclusive evidence on what was for him a very important issue. Now, after reasons for judgment have been delivered and an interim order has been entered, he wishes to repair his case by adducing better evidence than he had in the first instance. This is exactly the kind of maneuver that the rule in *Palmer* was designed to prevent.
- [22] The same must be said here: Ms. Garcia failed to adduce critical evidence that was in her interest. Now that judgment has been entered, Ms. Garcia wishes to repair the deficiencies in the application, *ex post facto*. Indeed, plaintiff's counsel stated: "The fresh evidence sought to be adduced is aimed at addressing the associate judge's concerns as stated above." But that is not the proper basis for the admission of fresh evidence: *L.J.B.* at paras.16-17.
- [23] Due diligence remains relevant in appeals of purely interlocutory decisions of associate judges (such as the decision under appeal), not just interlocutory orders pending a final decision (such as the decision in *Riemersma*). In *Mann v. Jagpal*, 2020 BCSC 1919, this Court declined to admit fresh evidence on appeal. The associate judge dismissed two applications brought by the plaintiff/claimant for the production of documents. The applications were purely interlocutory in nature: at para. 36. On appeal to this Court, Justice Giaschi declined to admit fresh evidence because the plaintiff had not met the due diligence standard:
- [28] Most of the attachments to the affidavit are documents bearing dates well before the appeal before Master Keighley. There is no suggestion that this evidence was not available or discoverable before the initial hearing. In fact, it seems clear that most of it was readily available. Thus, the first part of the test for the admission of fresh evidence is not met.
- [24] Our Court of Appeal came to a similar conclusion in *Wright v. Sun Life Assurance Company of Canada*, 2014 BCCA 309. In *Wright*, the plaintiff appealed the result of an interlocutory application and sought to introduce fresh evidence on appeal. The associate judge granted the insurance company's application for an independent medical examination, and this was affirmed by the chambers judge. The plaintiff sought to introduce two affidavits that were in existence prior to the hearing before the associate judge. The application to adduce fresh evidence failed the due diligence test: the evidence was available at the time of the hearing, and no explanation was given for its absence: at para. 22. It is clear, therefore, that due diligence remains relevant in the appeals of purely interlocutory applications even if that standard may be relaxed in certain circumstances.
- [25] Finally, in *MacMillan Bloedel Ltd. v. Mullin*, [1985] B.C.W.L.D. 1086, 1985 CanLII 592 (C.A.), the decision 476605 cited for its proposition of a relaxed standard, the Court of Appeal still considered due diligence, suggesting that a relaxation of the standard does not remove the standard entirely: at paras. 5-6. The appellant in that case demonstrated some due diligence. It was the unique legal and factual complexities of that case that led the court to conclude that it was in the interests of justice to permit the fresh evidence.

- [26] The authorities suggest that even in situations which may attract a more relaxed standard, due diligence cannot be ignored. There is no evidence that due diligence was exercised in this case. Other than a reference to the novelty of the Regulation, no explanation has been tendered as to why the appropriate steps were not taken to put the evidence before the associate judge. I decline to admit fresh evidence on this appeal.
- [27] In any event, even if the fresh evidence was admitted, it would not change the result. Consequently, admitting this evidence would not be in the interests of justice: 4HD Construction Ltd. v. Dawson Wallace Construction Ltd., 2020 BCSC 1224 at para. 73; M.Y. Sundae Inc. v. International Dairy Queen, Inc., 2018 BCSC 744 at para. 59. In the affidavit submitted on this appeal, the plaintiff has not provided evidence of what the disbursement limit might be because she has again not attempted to quantify her loss or potential damages. The associate judge specifically identified the need for this at para. 24 of the Associate Judge Decision. The court cannot determine whether there is a reasonable risk that the total amount of disbursements incurred will exceed the disbursement limit if there is no damage estimate. Thus, the result would be the same even with the proposed fresh evidence.

The Associate Judge's Decision was Correct

- [28] The associate judge dismissed the application for excluded disbursements and I am satisfied that her decision was correct. Because I have declined to admit fresh evidence, this case must be decided on the evidence that was before the associate judge.
- [29] As a preliminary point, the appellant argues that s. 5(8) does not explicitly state that meeting the evidentiary requirements set out in s. 5(9) is a prerequisite to satisfying s. 5(8)(b). In other words, the appellant argues that these sections can be divorced from one another. The appellant argues that s. 5(8) can be satisfied with or without regard to s. 5(9). I disagree. These sections and subsections must be read together. The words of an Act must be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the legislature: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, 1998 CanLII 837 (S.C.C.).
- [30] The appellant argues that the associate judge made an error of law when she said at para. 17 of the Associate Judge Decision: "In order to assess whether the test in subsection (8)(b) is met, the court needs to consider the evidence provided pursuant to subsection (9)." Section 5(8) provides conditions for an excluded disbursement order. For ease of reference, s. 5(8)(b) specifically states:
- (b) were the disbursements not excluded, the party making the application would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the vehicle injury proceeding.

Section 5(9)(b) then states that an application must contain:

- (b) evidence of the prejudice the party would suffer were the disbursements that are the subject of the application not excluded, which must include
- [31] The associate judge did not err in her consideration and application of ss. 5(8) and 5(9). These sections, read together, show that s. 5(9) is clearly relevant to s. 5(8). I am unable to see how a court could undertake the balancing exercise outlined in s. 5(8)(b) without turning to evidence of the risks the plaintiff faces, evidence which is required by s. 5(9). Similarly, to succeed in an application for exclusion under s. 5(6), the conditions of s. 5(8) must be met, and in an application under s. 5(6), there must be the evidence outlined in s. 5(9). In other words, the sections are interrelated and must be read together.
- [32] Finally, the associate judge determined the plaintiff failed s. 5(9)(b)(i) and, therefore, could not satisfy s. 5(8)(b). I think this is logically sound for the reasons outlined above. However, taking the plaintiff's case at its highest, the associate judge was still correct in her conclusion because an application under s. 5(6) must include the evidence outlined in s. 5(9) - evidence the plaintiff was missing. That is the plain language of the statute.
- [33] I will briefly address a final issue raised by the appellant. The appellant submits that by requiring particularized disbursements, the Regulation goes beyond its objective and collaterally attacks the appellant's right to litigation privilege. They also say that asking the appellant to provide an estimate of her damage value would undermine litigation privilege.
- [34] First, I note that litigation privilege can be circumscribed by statutory rules: *General Accident Assurance Company v. Chrusz*, 45 O.R. (3d) 321, 1999 CanLII 7320 (C.A.) at 18; *Badesha v Haider*, 2017 ONSC 1745 at para. 19.
- [35] In any event, the evidence that has been accepted by this Court in other similar applications to exclude disbursements includes evidence of estimates of a wide range of possible damage awards, that, in my view, would do little to undermine litigation privilege. For example, in *Gill v. Zadeh*, 2024 BCSC 284, the plaintiff assigned a value of between \$100,000 and \$1 million. In *Chan v. Hogan*, 2024 BCSC 328, the plaintiff provided a range of between \$100,000 and \$500,000.
- [36] In *Kwiatkowski v. Russo*, 2024 BCSC 278, Associate Judge Robertson was provided with evidence that the damage award could range from \$65,000 to \$400,000. Although more precision would be helpful, Associate Judge Robertson did not find that more evidence was required. Indeed, Associate Judge Robertson suggested that requiring more precision could be an incursion on litigation privilege: at para. 25.
- [37] The cases make clear that the evidentiary hurdle is not high. However, as discussed above, there is a hurdle to be cleared in order to comply with the Regulation. In this case, the plaintiff has provided no evidence of the possible damage award (or the anticipated costs of the disbursements), and the plaintiff therefore did not meet the statutory requirement.

[38] Read together, to succeed in an application for an excluded disbursement, Ms. Garcia needed to provide "evidence that there is a reasonable risk that the total amount of disbursements the party intends to incur to resolve the vehicle injury proceeding will exceed the disbursement limit." However, the plaintiff tendered no such evidence. There is no evidence of the total amount of disbursements the plaintiff intends to incur. There is no evidence of the anticipated costs of disbursements. Nor did the plaintiff provide evidence on what the disbursement limit may be.

[39] I can find no error in the associate judge's decision. On the evidence before me, I too would dismiss the plaintiff's application for exclusion under the Regulation.

[40] The appeal is dismissed. The respondents are entitled to their costs.

"Majawa J."

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