

CANADA / JUDGMENT

Gustafson v. MacFarlane

2023 BCSC 2159

COURT

Supreme Court of British Columbia

DECIDED

6 December 2023

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2023 BCSC 2159 Gustafson v. MacFarlane

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gustafson v. MacFarlane,

2023 BCSC 2159

Date: 20231206

Docket: S199677

Registry: Vancouver

Between:

Sharlene Gustafson

Plaintiff

And

Doreen MacFarlane

Defendant

Before: The Honourable Mr. Justice Gomery

Supplementary Reasons to Gustafson v. MacFarlane, 2022 BCSC 1872

and 2023 BCSC 1524

Reasons for Judgment Concerning Costs

Counsel for the plaintiff:

J.S. Stanley

Counsel for the defendant:

J.A. Doyle

A.D. Gubeli

Place and Date of Hearing:

Vancouver, B.C.

November 15, 2023

Place and Date of Judgment:

Vancouver, B.C.

December 6, 2023

Introduction

- [1] The plaintiff sued the defendant for damages in this personal injury action. Liability was in issue and the defendant raised a defence of contributory negligence. The plaintiff had suffered catastrophic injuries and the largest head of damages claimed was for the cost of future care.
- [2] The trial commenced on September 12, 2022. In written reasons for judgment indexed at 2022 BCSC 1872, I found the defendant solely at fault and awarded the plaintiff damages of approximately \$5.3 million, including \$4.44 million for the cost of future care. I directed a resumption of the trial to address the plaintiff's claim for a housing allowance as an additional aspect of the cost of future care. Following further proceedings in July 2023, I issued supplementary reasons for judgment indexed at 2023 BCSC 1524 in which I awarded the plaintiff an additional \$493,000. I gave the parties leave to schedule a further hearing to address the issue of costs.
- [3] The plaintiff seeks an order pursuant to Supreme Court Civil Rule 9-1 that she recover double costs from the date of an offer to settle dated August 5, 2022 or, alternatively, from the date of an offer dated August 31, 2022. The first offer was for \$3.4 million, and the second was for \$4.7 million. She says that both offers were ones that should reasonably have been accepted by the defence, and the time and expense of trial avoided.
- [4] The defendant opposes and maintains that double costs should not be ordered. She relies on other settlement discussions, apart from the offers upon which the plaintiff relies, as providing context for consideration of the plaintiff's offers. Understood within that context, she submits that the plaintiff's offers were not ones that should reasonably have been accepted, and she should not be penalized by an order for double costs for having rejected them.

- [5] When this application came on for hearing, plaintiff's counsel initially objected to the defendant's affidavit evidence of other settlement discussions, citing *Kim v. Dresser*, 2021 BCSC 1874, and *Kringhaug v. Men*, 2022 BCSC 185. On further consideration, counsel withdrew the objection and I was not required to rule on it.

Legal framework

- [6] An order for double costs involves the exercise of discretion where a condition precedent - service of an offer to settle as defined in Rule 9-1(1)(c) - is satisfied. An offer must be made in writing and contain the language stipulated in subrule 9-1(1)(c)(iii). In these reasons, I will term such an offer a formal offer.
- [7] A formal offer to settle having been made, Rule 9-1(6) sets out matters I may consider in the exercise of my discretion. It 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.
- [8] The first consideration is whether the formal offer to settle was one that ought reasonably to have been accepted. The reasonableness of an offer is to be assessed under subrule 9-1(6)(a) at the time it was made without regard to the result of trial because a comparison to the result is carried out independently under subrule 9-1(6)(b); *Hartshorne v. Hartshorne*, 2011 BCCA 29, at para. 27; *Kobetitch v. Belski*, 2018 BCSC 2247, at para. 22.
- [9] The consideration is not whether the offer was a reasonable offer. It is whether it was unreasonable for the plaintiff to refuse it; *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26, at paras. 30-31 (leave to appeal to SCC ref'd, [2018] S.C.C.A. No. 533).
- [10] Sometimes the court may find that an offer was not one that ought reasonably to have been accepted, but it is nevertheless appropriate that the offeror be awarded costs in the case of a defendant, or double costs in the case of a plaintiff from the date of the offer. This was the outcome in *Bailey v. Jang*, 2008 BCSC 1372; in *Kobetitch*; and in *Lotimer v. Johnston*, 2020 BCSC 119.

Analysis

Whether the offers ought reasonably to have been accepted

Background to the negotiations

- [11] The action was commenced in August 2019 and was set for trial in March 2021. The trial began in September 2022. It was major litigation. Both sides were represented by experienced counsel. The pleadings took their final form in February 2020. The plaintiff's expert reports were served on June 6, 2022.
- [12] While liability was in issue, the defendant did not do much to explore the issue until very late in the day. There were only three witnesses to the accident: the defendant, the plaintiff's spouse, Mr. Blanes, and his adult son. The plaintiff was present, of course, but had no recollection of the accident. The defendant's counsel had not interviewed Mr. Blanes or his son.
- [13] In June 2022, the defendant's counsel advised of their intention to commence a third party proceeding against Mr. Blanes. The proceeding required leave of the court, which was opposed by the plaintiff and Mr. Blanes. On August 29, 2022, Master Hughes dismissed the defendant's application for leave to bring the proposed third party proceeding against Mr. Blanes.

History of the negotiations

- [14] Settlement negotiations began with an informal email exchange between counsel on June 30, 2022. From the beginning, the negotiations were shadowed by the fact that the defendant was under-insured. She had insurance to the extent of \$2 million, and the plaintiff's claim well exceeded that amount. While the defendant was an elderly widow, she was not without resources. She owned a house on a large rural property. If the case went to trial and the plaintiff recovered a judgment substantially in excess of \$2 million, the plaintiff would be faced with the challenge and nuisance of execution proceedings, and the defendant would be faced with the possible loss of her home.
- [15] The negotiations were complicated by the Health Care Costs Recovery Act, S.B.C. 2008, c. 27 [HCCRA], which subrogated the Province to the plaintiff's rights against the defendant, to the extent of health care services provided to the plaintiff and funded by the Province. In early July, counsel for the Province advised that the Province would waive its rights if insurance coverage was exhausted. However, as a matter of form, the HCCRA claim still had to be addressed in any settlement agreement.
- [16] On July 20, 2022, the defendant formally offered to settle for the policy limits of \$2 million, plus costs and disbursements. In their letter, defendant's counsel suggested that there were substantial issues of contributory and third party liability and that the likely damages would be less than \$1.6 million.
- [17] On July 28, 2022, counsel informally discussed the July 20 offer. Plaintiff's counsel told defendant's counsel that the plaintiff required a personal contribution of \$500,000 from the defendant. No agreement was concluded.

- [18] On August 4, 2022, the defendant made a formal offer to settle, this time for \$2.25 million, plus costs and disbursements. The offer did not include any contribution towards a HCCRA claim.
- [19] Counsel discussed the August 4 offer that day. Plaintiff's counsel advised that the offer was rejected. He said that he anticipated receiving instructions to counter at \$3.4 million plus costs, but felt that his client would still be willing to accept something along the lines of \$2.5 million.
- [20] On August 5, 2022, the plaintiff made a formal offer to settle for \$3.4 million plus costs. The offer did not address the HCCRA claim. It was open for acceptance until 4:00 pm on September 9, 2022. Plaintiff's counsel informally advised defendant's counsel that "while I don't think we are at an impasse, I do think it makes sense to get ready for trial". Defendant's counsel responded that there was a risk that the defendant might change her mind as to whether she would contribute personally to achieve a settlement.
- [21] On August 31, 2022, the plaintiff revoked the offer of August 5 and substituted for it a formal offer to settle for \$4.7 million plus costs together with a payment to the Ministry of Health for its HCCRA Claim. This offer was open for acceptance until 5:00 p.m. on September 13.
- [22] On September 6, 2022, the defendant made a formal offer to settle for \$2.5 million together with costs and disbursements, not including any amount required to settle the HCCRA claim.
- [23] On September 8, 2022, the plaintiff revoked its offer of August 31.
- [24] On September 9, 2022, the defendant made a final formal offer to settle, this time for \$3 million plus costs and disbursements, not including any payment towards the HCCRA claim.
- [25] As already noted, the trial began on September 12, 2022. Subsequent to the first judgment in October 2022, the Province formally waived the HCCRA claim.

Was the defendant's rejection of the plaintiff's offer of August 5 unreasonable?

- [26] Having regard to what was reasonably known to the defendant at the time, I find that her rejection of the August 5 offer to settle for \$3.4 million plus costs was unreasonable. The defendant was well advised. She had seen the plaintiff's expert reports. It should have been obvious to her that she faced a strong claim through which her exposure greatly exceeded the amount of the offer. She had ample time - 26 days before the offer was revoked on August 31 - to consider the offer.

- [27] The defendant's account of the accident, as it emerged at trial, did not provide much support for the defence of contributory negligence; 2022 BCSC 1872 at paras. 23, 26-36. To the extent that the defendant's investigation of the contributory negligence defence was incomplete, because her lawyers had not interviewed Mr. Blanes and his son, it would have been unreasonable for her to assume that further inquiries would unearth substantial support for the defence.
- [28] The defendant submits that what made rejection of the \$3.4 million formal offer reasonable was the informal discussion between counsel, plaintiff's counsel having intimated on August 4 that his client would still be willing to accept something along the lines of \$2.5 million. In short, she submits that it was reasonable to reject a settlement at \$3.4 million because she had reason to believe that she could do better.
- [29] I reject this argument. The defendant did not have a \$2.5 million offer from the plaintiff in hand. Indeed, concurrently with the \$3.4 million offer, plaintiff's counsel warned that it would make sense to get ready for trial. Neither side was committed to offer concessions beyond the positions they had formally staked out. Regardless of what counsel said his client might do, the defendant could only count on the offer actually presented. Anything else was just pie in the sky. If the defendant was willing to settle for \$2.5 million or even \$3 million, her option was to put the plaintiff to the test by making an offer. Eventually she did just that, but by then the plaintiff was holding out for \$4.7 million.
- [30] I need not address whether the defendant's rejection of the \$4.7 million formal offer made on August 31 was independently unreasonable.

The relationship between the terms of settlement offered and the final judgment of the court

- [31] Both offers proposed by the plaintiff were favourable to the defendant by comparison to the result at trial. The plaintiff recovered approximately \$5.8 million, which is much more than the \$3.4 million she was willing to settle for on August 5, 2022.

The relative financial circumstances of the parties

- [32] As in *Kobetich* at paras. 44-47, I do not think that relative financial circumstances are a material consideration in this case. The plaintiff has few personal resources but was not impaired in her ability to retain experts and prosecute her case with the assistance of counsel, presumably acting under a contingency fee agreement. While the defendant was represented by an insurer, there is no evidence to suggest that the insurer used its financial resources in a manner that distorted the litigation process.

Any other factor the court considers appropriate

- [33] The defendant submits that the revocation of the August 5 offer and its replacement with a higher offer on August 31, ten days before it was set to expire, is a factor militating against an award of double costs. I disagree. The defendant had a reasonable period in which to consider the August 5 offer, and there is no evidence that she would have been willing to accept it, but for its premature revocation.
- [34] The defendant submits that she should not be ordered to pay double costs because her conduct is not worthy of rebuke. The argument draws from the following sentence in *Hartshorne* at para. 25:
- [25] An award of double costs is a punitive measure against a litigant for that party's failure, in all of the circumstances, to have accepted an offer to settle that should have been accepted.

[Emphasis added.]

- [35] Punishment is not the purpose, and an award of double costs is not at all comparable to an award of special costs; it is special costs that are awarded where a litigant has engaged in reprehensible conduct that is deserving of rebuke; *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.) at paras. 11-17. Double costs are awarded to encourage settlement, as the Court of Appeal made clear in the immediately following sentences of *Hartshorne*:

Litigants are to be reminded that costs rules are in place "to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer" (*A.E. v. D.W.J.*, 2009 BCSC 505, 91 B.C.L.R. (4th) 372 at para. 61, citing *MacKenzie v. Brooks*, 1999 BCCA 623, *Skidmore v. Blackmore* (1995), 1995 CanLII 1537 (BC CA), 2 B.C.L.R. (3d) 201 (C.A.), *Radke v. Parry*, 2008 BCSC 1397). In this regard, Mr. Justice Frankel's comments in *Giles* are apposite:

- [74] The purposes for which costs rules exist must be kept in mind in determining whether appellate intervention is warranted. In addition to indemnifying a successful litigant, those purposes have been described as follows by this Court:
- "[D]eterring frivolous actions or defences": *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 1988 CanLII 186 (BC CA), 37 B.C.L.R. (2d) 2 at 25 (C.A.), leave ref'd, [1988] 1 S.C.R. ix;
 - "[T]o encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect": *Skidmore v. Blackmore* (1995), 1995 CanLII 1537 (BC CA), 2 B.C.L.R. (3d) 201 at para. 28 (C.A.);
 - "[E]ncouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases: *Bedwell v. McGill*, 2008 BCCA 526, 86 B.C.L.R. (4th) 343 at para. 33;

- "[T]o have a winnowing function in the litigation process" by "requir[ing] litigants to make a careful assessment of the strength or lack thereof of their cases at the commencement and throughout the course of the litigation", and by "discourag[ing] the continuance of doubtful cases or defences": Catalyst Paper Corporation v. Companhia de Navegação Norsul, 2009 BCCA 16, 88 B.C.L.R. (4th) 17 at para. 16.
- [36] In my opinion, the fact that a defendant's conduct is not worthy of rebuke is not a good and sufficient reason not to order double costs.

Conclusion as to double costs

- [37] I conclude that the plaintiff should recover double costs from the defendant from August 12, 2022, which is seven days following delivery of the August 5 offer. Summarizing the analysis reviewed above: in the circumstances reasonably known to the defendant at the time, the offer was unreasonably rejected; the plaintiff obtained a substantially better result at trial; the relative financial circumstances of the parties are a neutral consideration; and the defendant has not identified residual considerations militating against an award of double costs in this case.
- [38] I come to this conclusion with sympathy for both the plaintiff and the defendant. The plaintiff has lost the use of her limbs, has a shortened life expectancy and requires daily personal care. The defendant is losing much or all of her life savings. The fact remains that their lawsuit could and should have been settled prior to trial. The plaintiff offered a generous compromise, which the defendant rejected. Double costs are appropriate in the circumstances.

Disposition

- [39] For these reasons, the plaintiff will recover ordinary costs of the action until August 12, 2022, and double costs thereafter.

"Gomery J."

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