

CANADA / JUDGMENT

Helmer v. KC's Pumping Services Incorporated

2025 BCSC 1530

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 1530 Helmer v. KC's Pumping Services Incorporated

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Helmer v. KC's Pumping Services Incorporated,

2025 BCSC 1530

Date: 20250703

Docket: M189426

Registry: Vancouver

Between:

Andrea Lynn Helmer

Plaintiff

And:

KC's Pumping Services Incorporated and Charles Jette

Defendants

Before: Associate Judge Robertson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

C.C. Godwin

Counsel for the Defendants:

N. Badesha

Place and Date of Hearing:

Vancouver, B.C.

July 3, 2025

Place and Date of Judgment:

Vancouver, B.C.

July 3, 2025

- [1] THE COURT: When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits without affecting the substance or final disposition.
- [2] The application before the court today is brought by the plaintiff who seeks an adjournment of a nine-day trial that is currently scheduled to commence on July 28, 2025 and that, for the purpose of its rescheduling, the issues as to liability and damages be severed with liability being reset at the first available date after November 1, 2025, although, logistically, that timing is likely inevitable. I am advised that there was no particular art in suggesting that date, other than it being sufficient time to address matters. The plaintiff also seeks special costs given the issue as to lack of full and proper disclosure which give rise to the applications.
- [3] For the reasons that follow I have ordered that the trial be adjourned, that the issues as to liability and quantum be severed, and the plaintiff be entitled to a lift in costs given what I have found to be a cavalier attitude by the defendants as to their disclosure obligations that is worthy of some censure.

Background

- [4] This action involves a motor vehicle accident that occurred on September 1, 2016. The plaintiff was driving her vehicle on Highway 1 near Chilliwack crossing over a bridge and about to pass the defendants' vehicle, a concrete pumping truck. As she did so, there was what was described as a "catastrophic failure of the drive train" of the concrete pump truck, the effect of which was to cause pieces of the drive train and/or possibly other parts of the vehicle's machinery to detach and strike the plaintiff's vehicle. The description of the incident is that it was akin to shrapnel hitting the plaintiff's vehicle. The failure of the drive train caused the defendants' vehicle to immediately become demobilized. The plaintiff was able to drive over the bridge, and pullover once it was safe to do so.

- [5] The primary issue that gives rise to the adjournment application is with respect to the investigations into liability and disclosure of relevant documentation in that regard.
- [6] There is evidence before the court that the plaintiff had conversations with ICBC representatives immediately after the accident, during which it was expressed by the ICBC adjuster that there was concern as to the issue of liability. In particular, the plaintiff was initially advised that only Part 7 benefits would be paid until the issue as to liability were investigated further. Subsequently, on or around February 10, 2017, the plaintiff was advised as follows (as quoted from the ICBC adjuster's notes regarding the conversation):

After conducting an investigation and inspecting the available parts, the cause of the sudden and catastrophic failure of the drive train showed no negligence on the part of the driver or of the vehicle. Thus, no tort pay-out will be available to her.

... Thus, before I could continue on the conversation regarding update on treatment, she states she has already spoken to a lawyer and possibly will be going forward with one. She stated she will be in contact with us next week.

- [7] The plaintiff retained counsel in or around September of 2017. Upon that retainer, on October 27, 2017 counsel reached out to ICBC to provide the usual letter to advise of their retainer and request that all future correspondence come to their attention. Counsel also specifically made a demand at that time for "copies of any photographs which were taken from motor vehicles involved in the accident" and "copies of repair invoices and ICBC damage estimate forms with respect to both vehicles." In response to that on November 24, 2017 ICBC wrote to advise as to the identity of the other driver and to include certain records, namely witness statements, the latest material damage estimates, and photos for "all vehicles involved in the loss." Specifically, as to those documents being provided, the letter included the following statement:

In addition to the above, we have included the following records if they are on file ...

[emphasis added]

- [8] The photographs enclosed with the letter were only of the plaintiff's vehicle, with no photographs of the defendants' vehicle included.
- [9] The notice of civil claim was then filed August 29, 2018 in which it was pled that the defendants were negligent, including in failing to maintain the truck in proper repair, failing to have it inspected for safe operations, and knowing or having the means of knowing of the mechanical defects and failing to have those repaired or properly repaired, to ensure that the failure or collision did not occur.

[10] Subsequently a list of documents was delivered which disclosed under Part 4 a document described only as an investigation report, dated January 24, 2017 with the grounds for privilege being the dominant purpose of litigation. The similar disclosure was made with respect to privileged documents on a subsequently amended list of documents dated March 2022, as delivered on the eve of discoveries. In neither list of documents were any photographs of the defendants' vehicles enumerated or disclosed.

[11] At the examination for discovery that occurred on March 22, 2022, the representative of the defendant truck owner, the defendant's shop manager, was asked if there were any photographs of the defendant vehicle. The answer to that question was, "not to my knowledge, not by me," with the following outstanding request being made:

I am going to ask for just some inquiries to be made as to whether or not any photographs were taken of the vehicle or its parts after this event. I appreciate you didn't take any, but there were any, I will just ask that they be produced.

[12] Approximately a month later, on April 21, 2022, a followup letter with a reiteration of the outstanding requests from the discovery was sent by counsel for the plaintiff to counsel for the defendant. By letter of that same date, perhaps with the two letters crossing, the defendants wrote to provide "the requested documents", without, notably, including or referencing any photographs of the defendants' vehicle.

[13] The notice of trial was filed February 22, 2024 by which the July 28, 2025 trial date was set. As such, the 84-day deadline for expert reports fell on May 2, 2025.

[14] On that date, the defendants served an expert report of an engineer, Dave Little, in accordance with the Supreme Court Civil Rules (the "Rules"). What became evident upon review of that report was that there were numerous photographs of the defendant's vehicle and parts that had been taken by and/or were in the possession of Mr. Little but had not been previously disclosed. Specifically, in an appendix to the report Mr. Little itemized all of the documents that he had, including maintenance records with respect to the defendants' vehicle, photos of the plaintiff's vehicle, and three photographs of the defendants' vehicle at the scene of the accident. There were 23 photographs that were embedded in the report itself.

[15] Upon receipt of that report, plaintiff's counsel immediately reached out to defence counsel to ask for a copy of the expert's complete file materials in accordance with R. 11-6(8). On June 5, 2025, as counsel was not specifically in receipt of those documents (although he admits that an email with them had been sent to a member of the plaintiff's counsel's staff who was not in the office at the time such that they did not come to his attention until June 10, 2025), expressing concern as to the failure to, at any prior time, disclose these photographs that were clearly in the hands of the defendants and the expert engineer, including the three that were taken at the accident scene, possibly by the driver himself.

- [16] I do not necessarily suggest that any inappropriate finding should be made against the driver arising from his discovery evidence that he had not taken any photographs as perhaps they were taken by someone other than him at the scene. Nonetheless, it is notable that at least three formal inquiries were made for such photographs, namely the initial request of the adjuster, the request made at discovery, and the follow-up request thereafter and yet at no time in response to these requests did the defendants acknowledge or reference any photographs of the defendant's vehicle.
- [17] The plaintiff argues that she has been prejudiced by this non-disclosure, or late disclosure, as they have not been able to have the information available to them to enable their retainer of an expert in order to prepare an engineer report as to the causation of the drive train failure.
- [18] In this respect, it became evident on discovery that the vehicle itself was no longer available for inspection for that purpose as repairs had been undertaken. In other words, the only ability for the plaintiff to obtain an engineering report would be on the basis of notes (some 900 pages) made with respect to an inspection of the vehicle and/or photographs (over 170) such as were taken, and ultimately delivered on June 10, 2025.

Plaintiff's Position

- [19] The plaintiff argues that, at its simplest, this is a case of the defendants failing to fulfill their obligations to the parties and to the court to undertake their proper disclosure obligations in accordance with R. 7-1, submitting that there is no doubt that photographs of the defendant's vehicle and, although not specifically referenced by the plaintiff, the vehicle's maintenance records, are documents that would prove or disprove a material fact and on that basis are producible under the first and most basic tier of document discovery.
- [20] Further, the plaintiff argues, the defendants also failed to comply with R. 7-1(2), by which parties are obligated to include a brief description of the each of the documents disclosed under part 4 by describing the expert report, with attachments, as the "investigative report". By mischaracterizing the document, it was not evident that there were materials, such as photographs as attached, whether privilege was being properly claimed such that a further inquiry and, if appropriate, an application could have been made well before the 84-day deadline to compel their production, either on the grounds of defeating the privilege claim, or on possibly some other principled basis for their disclosure given that a physical inspection of the truck itself was no longer available.
- [21] Since the service of the engineering report, plaintiff's counsel has reached out and retained his own engineer. It is not in the evidence in terms of when specifically that retainer occurred or when the report is to be expected, however counsel advises that it is not yet in hand and that the last indication from the expert was that he was "in the middle of it." I would have preferred some better evidence as to the turn around time for the report. However, the plaintiff's counsel argues that it is not in the interests of justice to require a

party to rush an expert just so that the trial date can be preserved, particularly given that there was over, as mentioned, some 900 pages of documents and over 170 photographs to be reviewed, documents that were delivered just under 7 weeks prior to trial.

- [22] As things stand today, we are three and a half weeks since the documents were received by plaintiff's counsel. Trial is scheduled to commence in three and a half weeks.
- [23] While the defendant does not take issue with the timing set out above, or that the photographs ought to have been disclosed earlier, the defendant argues that this adjournment application is premature as the report could be delivered any day now and an appropriate remedy would be to allow late delivery of the rebuttal report rather than sacrifice the trial date which is prejudicial to the defendant.
- [24] The plaintiff argues that even if the rebuttal report is delivered in a short period of time, the plaintiff will be prejudiced in its preparation for trial, particularly as to any pivots in strategy that may arise from the results of that report.

Analysis

Trial Adjournment

- [25] The parties do not disagree on the law that applies with respect to adjournment of applications. The principles as set out in *Navarro v. Doig River First Nation*, 2015 BCSC 2173, paras. 18 to 22, are well known.
- [26] Ultimately the granting of an adjournment is a matter of discretion for the court and involves the over-arching consideration of the interests of justice, much of which involves the balancing of the prejudice to the party seeking the adjournment if the matter precedes versus the prejudice to the opposing party if the matter does not proceed as scheduled.
- [27] All of that is informed by the objectives of the Rules as set out in R. 1-3(13) that matters are to be determined on an expeditious basis subject to considerations as to proportionality, as well as the conduct of the parties to date, primarily as to any previous delay.
- [28] For the most part, the factors of *Navarro*, supra do not come into play, or are neutral factors. There is no history of delay in the proceedings, other than as to the delay in disclosing the photographs. There is no allegation as to the timeliness of bringing this application forward once this issue came to light.
- [29] The defence does not argue that there is any particular prejudice to the adjournment of the trial, other than the frustration and inconvenience of an adjournment. However, the defendants do argue that they may be prejudiced by any severance as to the issues of liability and quantum, specifically due to the costs that have been expended and expert reports obtained with respect to the quantum side of the equation. If the matter is adjourned and there is a severance, then those reports may have to be updated, which requires additional cost.

- [30] Although, I note that such a cost is one that both parties will bear, subject to any costs award that may be made at the conclusion of the matter. As such, the financial impact of an adjournment is potentially equally prejudicial.
- [31] In the circumstances of this case, the real prejudice arises from the loss of the plaintiff in being able to prepare their case in the manner they wish to do so and one which is consistent with the timing contemplated in the Rules.
- [32] While it is not necessary for me to determine whether the photographs were or were not subject to privilege, the existence of them was not adequately disclosed in accordance with the Rules to enable the plaintiff to manage, strategize, and prepare for trial in a timely manner.
- [33] On that basis, I agree that it is in the interests of justice that the trial be adjourned so that the rebuttal engineering report can be obtained by the plaintiff without risk of having to rush their expert to meet a trial deadline, which could have easily been met if earlier disclosure had been made.
- [34] I also note the acknowledgement by the defendants that settlement discussions may be aided if the plaintiff is able to obtain its rebuttal report, which is to say, that there is some benefit to both parties if the trial is adjourned, and adjourned prior to the entering the more fulsome phase of trial preparation.
- [35] All of that is to say it is in the interests of justice that the trial date be adjourned.

Severance of Liability and Quantum,

- [36] Turning, then, to whether quantum and liability ought to be severed.
- [37] The test for severance has been set out in *Nguyen v. Bains*, 2001 BCSC 1130, at para. 11, and cited more recently in the *British Columbia (Director of Civil Forfeiture) v. Conrad*, 2024 BCCA 10, at para. 72.
- [72] A large percentage of severance authorities deal with applications to sever the issue of liability from damages. Many of these cases find useful the summary of the correct approach to these issues set out by Justice Martinson in *Nguyen v. Bains et al*, 2001 BCSC 1130 at paras. 10-12 (referring to predecessor Civil Rules numbers):
- [10] Rule 1(5) sets out the overall object of the Supreme Court Rules. That object is "to secure the just, speedy and inexpensive determination of every proceeding on its merits." Rule 39(29) must be interpreted with that object in mind.
- [11] Courts have considered the question of when some issues should be tried before others. These are some of the points that have been made:

- a. A judge's discretion to sever an issue is probably not restricted to extraordinary or exceptional cases. However, it should not be exercised in favour of severance unless there is a real likelihood of a significant saving in time and expense.
- b. Severance may be appropriate if the issue to be tried first could be determinative in that its resolution could put an end to the action for one or more parties.
- c. Severance is most appropriate when the trial is by judge alone.
- d. Severance should generally not be ordered when the issue to be tried is interwoven with other issues in the trial. This concern may be addressed by having the same judge hear both parts of the trial and ordering that the evidence in the first part applies to the second part.
- e. A party's financial circumstances are one factor to consider in the exercise of the discretion.
- f. Any pre-trial severance ruling will be subject to the ultimate discretion of the trial judge.

(See BC Practice: Issue 37 (May/00) where the authors provide a useful overview of the relevant cases and issues arising from them, and *Goldman, Sachs, & Co. v. Sessions*, 1999 CanLII 5749 (BC SC), [1999] B.C.J. No. 1226 (S.C.))

[Emphasis added.]

- [38] The fact that liability is in dispute, which inevitably means that a severance of those issues may bring the action to an end and result in cost savings, is not a basis on its own to order a severance. There must be something more. However, there need not be "exceptional circumstances", but rather a basis for the judge to, in exercising their discretion, find that the "potential benefits of doing so outweigh the possible disadvantages in the context of the case before them" (Conrade, at para. 100).
- [39] Counsel for the plaintiff argues that given that there is no real overlap between the two issues, that the trial is by judge alone, and there are no obvious credibility issues that it is appropriate that the issues be severed, and the advantages clearly outweigh any possible disadvantages.
- [40] In their view, a liability only trial could be completed in three days. A quantum trial would take, the plaintiff argues, five to six days. In other words, the same amount of trial dates would be held at the end of the day. The difference being that if the matters are severed and liability is determined against his client, that will be the end of the matter, which will be a cost savings, and more importantly given the exposure for costs, it means that she will not be liable out of her own pocket for costs of the various experts attending at trial with respect to quantum, there being two medical experts for each side. Further, if the defendants are found to be liable, then a quantum settlement may be possible rendering the second part of the trial unnecessary.

- [41] The defendants argue that the plaintiff is unable to satisfy the court as to the potential benefits, particularly as to any costs savings. Very little evidence was, in fact, led on this point. It is, as stated, an assertion that severance will be preferable and that this will result in cost savings. The court is being asked to take notice or infer that there will be cost savings as a result of the potential savings in not having medical experts testify at trial. Of course, that is lost if the liability is resolved in the favour of the plaintiff unless, of course, a settlement is reached following a decision on liability.
- [42] Notably, the Court of Appeal in *Conrad* commented at paras. 75 and 76 on the court's recognition in *Nguyen*, that an imbalance of financial resources was a factor for consideration even in the absence of evidence of impecuniosity, with the court taking judicial notice that legal fees are out of reach for the average person, and that the costs of legal fees to defend an entire action are likely to be more than the legal fees to defend one issue, concluding as follows at para. 80:
- [80] The court in *Nguyen* was not suggesting that a court must be satisfied on a balance of probabilities that severance will indeed result in a savings in time and expense. That test would be unworkable because the court cannot predict the outcome of the issues that are to be severed, that task must be undertaken by the judge who is actually determining the issues. The court in *Nguyen* recognized that what is involved in weighing this factor is an assessment of what might happen in the future: "could" the issues that are severed be determinative (para. 11(b)); and "would" that avoid other issues, legal evidence or arguments (para. 12).
- [43] It is clear that the issue could be determinative in three days if the trial is severed and liability is determined against the plaintiff. Alternatively, if liability is found against the defendants, although only speculative at this point, settlement may be easier to achieve.
- [44] More importantly, having regard to the overall interests of justice, a severance when considered in the context of this adjournment application will enable the parties to have that matter resolved in a much more timely way than it will be if the whole of the matter is adjourned. Looking at the trial schedule list as it exists today, there are three-day trials available for motor vehicle accident claims starting January 2026, meaning this matter could be secured within six months, meaning little delay in having that threshold issue resolved, which could bring the matter to a conclusion.
- [45] In the circumstances of this case, where the liability issue is one that is likely to be resolved based more on expert testimony, and less on eye witnesses evidence that requires a greater consideration as to the the reliability or credibility of lay witnesses, and little risk of inconsistent findings as between the two issues, the benefits of a severance outweigh any disadvantages.

Orders Made

- [46] [DISCUSSION AS TO TRIAL SCHEDULING]

[47] THE COURT: Okay. Thank you. The July 28, 2025 trial is adjourned generally, with the issues as to liability and quantum being severed, with liability to be determined first. I will leave it to the parties to arrange a new trial date in that respect.

Costs

[48] The plaintiff argues that the conduct of the defendants here is of the standard of reprehensible conduct or conduct worthy of rebuke that is deserving of an order for special costs, having reference to the leading authority on this, *Garcia v. Crestbrook Forest Industries Ltd.*, 1994 CanLII 2570 (BC CA), at para. 14 where the court cites with approval *Stiles v. Workers' Compensation Board of British Columbia* (1989), 1989 CanLII 235 (BC CA), 38 B.C.L.R. (2d) 307 (C.A.), as well as *Antle v. NCC Financial Corp.*, 2009 BCSC 479 where the court approved the consideration as follows:

[48] In *Fullerton v. Matsqui (District)* (1992), 74 B.C.L.R. (2d) 311, 19 B.C.A.C. 284 (C.A.), Mr. Justice Cumming said that special costs were to be awarded when a court sought to dissociate itself from some misconduct (para. 23). The issue here is whether the impugned conduct is deserving of rebuke or reproof, or whether this court seeks to dissociate itself from it.

[49] The plaintiff argues that the conduct which is worthy of some rebuke by the court is the defendants' failure to comply with its obligations as to document disclosure, as noted in *XY, LLC v. Canadian Topsires Selection Inc.*, 2013 BCSC 584:

[43] In addition, such a regime would be inconsistent with the historical role of counsel in ensuring that proper disclosure of documents is effected. Simply put, the fact that a party may, on discovery, deny the existence of a document or a class of documents will not necessarily put an end to the inquiry. Were it otherwise, an unscrupulous or dishonest witness would be capable of defining the ambit of proper document discovery.

[44] In *Boxer v. Reesor* (1983), 1983 CanLII 449 (BC SC), 43 B.C.L.R. 352, at 357, 35 C.P.C. 68 (S.C.), Chief Justice McEachern, as he then was, quoted the following passage from G. Peter Fraser & John W. Horn, *The Conduct of Civil Litigation in British Columbia*, 1st ed., vol. 1 (Markham, Ont: LexisNexis Canada Inc., 1978) at 276-277:

Additionally, the litigant, owing no special duty of loyalty to the integrity of the judicial system, may be unenthusiastic about disclosing the existence of documents harmful to his case. As an officer of the Court, the lawyer has the responsibility to police the conscience of his client in this area.

- [50] In short, the plaintiff submits that what is troubling here is not just the failure to disclose the photographs or to provide the photographs in a timely way, but what appears to be an approach to the disclosure obligation that had the effect of misleading the plaintiff, and caused prejudice in their ability to shore up required expert evidence on the belief that such evidence would not be possible in the absence of photographs, given that the vehicle was no longer available for physical inspection.
- [51] The question before the court is whether that conduct rises to a level that it is worthy of rebuke, or conduct that the court should "disassociate" itself from.
- [52] Where special costs orders are made, there is generally a finding of some sort of conduct that was willful, intentional, and/or overtly dishonest. There is no suggestion that this omission, even if it was effectively a misrepresentation, was willful or intentional. However, when looking at the totality of the correspondence with pointed and specific requests for photographs and responses that not only failed to address the issue but suggest that the defendants did not even turn their mind to properly investigating their response, I am satisfied that there was cavalier attitude towards ensuring that the obligations towards disclosure were being met.
- [53] Given the importance of full and proper disclosure to ensuring that all trials can be fairly conducted, much of which is based on an honour system in that an answer that certain documents do not exist is generally taken at face value, such a cavalier attitude towards meeting that obligation is consequential.
- [54] Thus, while this conduct does not quite rise to the level necessary for a special costs order, I am satisfied that it rises to a level worthy of some censure by the court.
- [55] In *Prokam Enterprises Ltd. v. British Columbia Farm Industry Review Board*, 2023 BCSC 606., at para. 19 the court referred to considerations for making an increased cost award in accordance with s. 2(5) of Appendix B to the Rules:
- (a) the purpose of increased costs is to provide an indemnity, not to punish;
 - (b) increased costs may only be awarded if there are unusual circumstances such that awarding costs on the standard fixed scale would result in a grossly inadequate or unjust award;
 - (c) "unusual circumstances" include:
 - (i) positions or behaviour which have added to the complexity of the litigation;
 - (ii) the importance of the matter to a party;
 - (iii) misbehaviour by a party that added to the expense incurred by the party claiming costs;
 - (iv) the degree of disparity between costs calculated at Scale B and actual legal fees incurred;
 - (v) actions taken in bad faith, disobedience of courts processes, incivility, frivolity, and impertinence; and

(d) when increased costs are awarded on the basis of misconduct, it need not be reprehensible conduct.

[56] As noted in *Heffel v. Cole*, 2023 BCSC 2140, at para. 25:

[25] What constitutes "unusual circumstances" is a fact-based inquiry driven by the nature of the litigation and the conduct of the parties. Allan J. set out the following factors to guide the analysis in *380876 British Columbia Ltd. v. Ron Perrick Law Corp.*, 2009 BCSC 1209, at para 37:

- a) litigation misconduct by the unsuccessful party;
- b) the serious nature of the allegations;
- c) the complexity or difficulty of the issues in the litigation; and
- d) the importance of the litigation to the parties or to the development of the law.

[57] And at para. 27:

[27] As Watchuk J. noted in *Roussy* at para. 66, these factors overlap with those applicable to an award of special costs, with the difference being that the purpose of uplifted costs (formerly referred to as "increased costs") is not to punish, but to indemnify. Since the purpose of an uplift is to compensate a party for unnecessary expense caused by another's litigation misconduct, such an award may be appropriate even if that misconduct does not rise to the level of being "reprehensible" and therefore deserving of the punitive award of special costs.

[58] However, in s. 2(6) of Appendix B, the fact that there is a disparity between actual costs and recoverable costs is not the basis on its own to justify an order for increased costs. There must be something more in the nature of unusual circumstances.

[59] A party's conduct can, in fact, constitute that unusual circumstance, as noted in *Ding v. Canam Super Vacation Inc.*, 2024 BCCA 102, at para. 212.

[60] I do find the conduct here to be of that nature and supporting of uplift costs. As such, I order the plaintiff its costs of this application, as well as the costs thrown away for trial preparation, on an uplift-scale basis, being 1.5 times the usual Scale B. Those costs are payable in any event of the cause.

[61] I will add that defence counsel here today is not the counsel that had conduct of this the matter when these disclosure issues arose. In counsel's approach to this application, she presented herself reasonably and above reproach. Nothing in these reasons is meant to reflect upon her conduct in this matter or with the court today.

[62] Thank you.

"Associate Judge Robertson"

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