

CANADA / JUDGMENT

Herrera v. Miller

2020 BCSC 62

COURT

Supreme Court of British Columbia

DECIDED

8 January 2020

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2020 BCSC 62 Herrera v. Miller IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Herrera v. Miller, 2020 BCSC 62 Date: 20200108 Docket: M1811642 Registry: Vancouver Between: Willard Herrera Plaintiff And Marilyn Louise Miller and John Torrance Miller Defendants Before: The Honourable Mr. Justice Giaschi Oral Reasons for Judgment In Chambers Counsel for the Plaintiff: V. Sewell Counsel for the Defendants: C. Carey Place and Dates of Hearing: Vancouver, B.C. January 7 and 8, 2020 Place and Date of Judgment: Vancouver, B.C. January 8, 2020

- [1] THE COURT: I will deliver my reasons now. I reserve the right to amend these reasons for grammar and clarity, and to include full citations and quotations. The result will not change as a consequence of any such amendments.
- [2] The plaintiff was involved in a motor vehicle accident on November 2, 2017, in which he alleges that he suffered injuries, including to the back, shoulder and neck and that he suffers from chronic pain, headaches, sleeplessness and anxiety. The defendants now apply to have this matter transferred to the Provincial Small Claims Court. The effect of the transfer, if ordered, will be to limit the plaintiff's claim in damages to \$35,000.
- [3] The governing statutory provision is s. 15 of the Supreme Court Act, R.S.B.C. 1996, c. 443: 15 A judge or master may transfer proceedings to the Provincial Court of British Columbia if
- (a) the proceedings are within the jurisdiction of the Provincial Court under the Small Claims Act,
 - (b) a party to the proceedings applies to the judge or master, or all parties to the proceedings agree to the transfer, and
 - (c) the judge or master considers it appropriate to do so.
- [4] Also relevant is Rule 14-1 (10) of the Supreme Court Civil Rules, B.C. Reg 168/2009, which provides that if a plaintiff recovers an amount in the Supreme Court that is within the monetary jurisdiction of the Provincial Court, the plaintiff is not entitled to costs except disbursements, unless the court finds that there was sufficient reason for bringing the matter in the Supreme Court: Costs in cases within small claims jurisdiction

- [10] A plaintiff who recovers a sum within the jurisdiction of the Provincial Court under the Small Claims Act is not entitled to costs, other than disbursements, unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders.
- [5] The appropriate test under s. 15 is two-fold: first, is the proceeding sought to be transferred within the jurisdiction of the Provincial Court?; and second, is transfer appropriate in the circumstances?: *Cort v. Insurance Corporation of British Columbia*, 2011 BCSC 586.
- [6] With respect to the first step in the test, the defendants submit that this matter is within the jurisdiction of the Provincial Court as the damages cannot be more than \$35,000. They submit that the motor vehicle accident was relatively minor, that the plaintiff suffered insignificant injuries for which he received very little treatment, and that the injuries did not seriously affect the plaintiff's enjoyment of recreational and sporting activities, or his employment. The defendants rely heavily upon the evidence of the plaintiff given at his examination for discovery.
- [7] With respect to the second part of the test, there are a number of factors that can be considered, including delay, the need for Supreme Court pre-trial procedures, the availability of jury trials, and the complexity of the case.
- [8] The plaintiff submits that the pain suffered as a consequence of his injuries is now chronic, that he attends massage therapy to manage his pain and plans to have chiropractic treatments to further address his symptoms.
- [9] Both parties have referred me to case law relating to the assessment of damages.
- [10] The defendant refers me to *Sidor v. Coulter*, 2013 BCPC 0011, and the cases cited therein in support of their submission that the plaintiff's damages in this matter will not exceed \$35,000.
- [11] In contrast, the plaintiff refers me to several cases: *Harry v. Powar*, 2018 BCSC 845, *Poulin v. Armstrong*, 2019 BCSC 926 and *Carson v. Ehman*, 2019 BCSC 2120 where they say the plaintiffs had similar injuries and were awarded more than \$35,000 in damages.
- [12] The plaintiff filed an affidavit sworn December 13, 2019. In that affidavit, he deposes that, as a result of the accident, he continues to experience symptoms in his back, shoulders and right hip, and has difficulty sleeping. He complains of pain in his lower back and shoulders when not active, and of pain lasting two to three days if he engages in activities. He further deposed to having difficulty falling asleep and of waking in the night because of lower back pain. He further deposed to attending massage therapy on a more or less weekly basis and that he intends to seek chiropractic treatments.

- [13] In approaching this matter, I am particularly mindful of the caution expressed by Justice McEwan in *Kooner v. Singh*, 2011 BCSC 1384, at paras. 3 and 6. There, he stated it is only in the clearest of cases that a matter should be transferred to the Provincial Court. It is only where there is no possibility of a damage award exceeding the Small Claims' limit that a matter should be transferred to the Provincial Court:
- [3] I have commented on other occasions about these applications. They amount to the Supreme Court being asked to summarily determine that damages could not possibly exceed \$25,000 and also to accept that a trial in Provincial Court is the most expeditious way to deal with the action. On the basis of the material before me, it is not possible to say that the case could not exceed \$25,000. The plaintiff wishes to have the matter heard in Supreme Court, and it would only be on the clearest basis that the court would act to deprive a person who wished to be heard in the Supreme Court of the right to do so.
- [6] I have said as much on the previous occasion of *Chang v. Wren* in oral reasons given June 10, 2011. I see no reason to stray from the outcome in that case which was to the effect that unless the court were persuaded that damages could not possibly exceed \$25,000 the plaintiff should not be deprived of the opportunity to convince a court that their damages exceed that amount. I considered it most unsafe to summarily decide a case on the basis of descriptions that do not include the actual evidence of the parties. Courts certainly have the experience of being persuaded that cases that did not appear to be worth a great deal turn out to be worth much more once they have been heard. I will also say, as I said in *Chang v. Wren*, that I am absolutely not persuaded by any efficiency or cost-saving argument, particularly where, as here, the application is brought at a point post-discovery. There is very little process to avoid at this point and, for the reasons I have already indicated, it is not at all clear that there are cost savings to be realized.
- [14] The plaintiff is relatively young. He apparently had no medical issues prior to the accident. He apparently suffered soft tissue injuries in the accident to the neck, back and shoulders, and continues to suffer from what may be chronic pain which may encumber him for the rest of his life. He also has ongoing sleep difficulties and his injuries have affected his enjoyment of recreational activities. The injuries suffered by the plaintiff and the effects of those injuries are somewhat similar to what is described in *Poulin and Carson*, where the plaintiffs were awarded general damages of considerably in excess of \$35,000.
- [15] In my view, on the basis of the evidence before me and the authorities, there is a possibility that the plaintiff may recover damages at trial in excess of \$35,000. Accordingly, this matter should not be transferred to the Provincial Court, and the application is dismissed.
- [16] Costs, counsel?
- [17] MS. SEWELL: We would seek costs in any event, My Lord.
- [18] MS. CAREY: And our submission is costs in the cause, Your Honour. Or any such thing as you see fit.

- [19] THE COURT: Costs of this application shall be to the plaintiff.
- [20] MS. SEWELL: Can the costs be fixed, or should we deal with that later on?
- [21] THE COURT: You can deal with that at the trial, depending on how matters work out. I should make it clear that my costs order is, if the plaintiff recovers more than \$35,000 at trial, that the plaintiff will be entitled to his costs of this application.
- [22] MS. SEWELL: Thank you, My Lord.
- [23] MS. CAREY: My Lord, if I may, can it be \$35,000 at a settlement perhaps, and not just at trial, in case the matter settles before trial.
- [24] THE COURT: No, you can deal with that in your settlement if you decide to settle.
- [25] MS. CAREY: Thank you, My Lord. "Giaschi J."
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