
CANADA / JUDGMENT

Kaczmarek v. Yamanaka

2008 BCSC 1820

COURT

Supreme Court of British Columbia

DECIDED

4 November 2008

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2008 BCSC 1820 Kaczmarek v. Yamanaka

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kaczmarek v. Yamanaka,

2008 BCSC 1820

Date: 20081104

Docket: M064261

Registry: Vancouver

Between:

Zofia Kaczmarek

Plaintiff

And:

Glen Grant Yamanaka

Defendant

Docket: M064264

Registry: Vancouver

Between:

Slawomir Kaczmarek

Plaintiff

And:

Glen Grant Yamanaka

Defendant

Before: The Honourable Madam Justice Ross

Oral Reasons for Judgment

In Chambers

November 4, 2008

Counsel for the Plaintiff

M. Virgin

Counsel for the Defendant

E. Caissie

Place of Hearing:

Vancouver, B.C.

- [1] THE COURT: This is an application by the plaintiff for an order for separate trials pursuant to Rule 5(6). The action is a personal injury claim that derives from a motor vehicle accident that occurred on April 7, 2005. The plaintiffs are husband and wife. Both allege that they suffered injuries when their vehicle was struck from the rear while they were stopped for a red light. While liability is not admitted, counsel for the defendant concedes that liability is not a foundation for opposition to this motion.
- [2] I will refer to the parties by their first names for simplicity, meaning no disrespect. The trial of the plaintiff Zofia was set on May 1st, 2007 for a 10-day trial to commence November 24th, 2008. On May 15th, 2007 counsel for the defendant filed a Notice of Trial by Jury. On May 23rd, 2008 a consent order was entered for the trial of Slawomir to be heard at the same time as the Zofia action. At that time both counsel were of the view that both matters could be concluded within the 10 days set for the trial of the Zofia matter.
- [3] The plaintiffs subsequently retained different counsel. A pre-trial conference was set for October 2nd, 2008. Each counsel independently reviewed the witness lists and time estimates in preparation for the pre-trial conference and separately concluded that the trials could not be concluded in the 10 days that had been set aside, and that a more realistic estimate was 25 days, excluding time for jury deliberation. In addition, each concluded that 15 days would be required for the trial of the Zofia action. It was clear that it would not be possible to conduct both trials commencing on the current date set. Thus, if severance is not granted, both matters will have to be adjourned. An additional week was obtained from the registry in contemplation of an order of severance being granted. Thus, if the order for severance is granted, the trial of one of the plaintiffs could be undertaken in the days reserved.

[4] The registry advised counsel that the next available dates for a 25-day trial were commencing in January 2010. There was one date for a 24-day trial commencing September 21, 2009, and a further date for a 24-day trial in October. However, I note that the 25-day estimate of counsel did not include time for jury deliberation, and so 24 days does not appear to be sufficient. In addition, it was not known whether counsel were, in fact, available for the 2009 dates, so it cannot be said that these dates were realistic alternatives.

[5] Rule 5(6) of the Rules of Court provides:

Where a joinder of several claims or parties in a proceeding may unduly complicate or delay the trial or hearing of the proceeding or is otherwise inconvenient, the court may order separate trials or hearings or make any other order it thinks just.

[6] Counsel for the defendant submits that a consent order has the same force and effect as an order on the merits. It was counsel's submission that the court has limited discretion to set aside a judgment or order. In order to be set aside the order must: (i) have been obtained by fraud, collusion, or perjury; (ii) constitute an abuse of process; (iii) be undermined by fresh evidence; or, (iv) be obtained by consent on a ground that would invalidate a compromise not contained in a judgment or order: See *Racz v. District of Mission* (1988), 22 B.C.L.R. (2d) 70, 28 C.P.C. (2d) 74. Counsel submits that a consent order represents an agreement between the parties and consequently it may be set aside or altered in substance only upon grounds that would invalidate the underlying contract, namely fraud, illegality, mistake and duress.

[7] Counsel submits that the same test applies for consent orders dealing with interlocutory procedural matters as for issues that go to the merits, and that none of the applicable grounds are present in this case. Accordingly, it was the submission of counsel for the defendant that there is no basis to set aside the consent order and hence no basis upon which the court can order severance.

[8] Counsel for the plaintiff submits that the court retains the discretion pursuant to the Rule. Counsel submits in the alternative that if the matter is to be considered according to contractual principles, then the change in circumstances with respect to the trial amounts to frustration of the contract.

[9] Counsel were not able to direct me to any authority concerning the question of whether the test is the same for interlocutory orders relating to procedural matters as for final orders or orders dealing with the merits. Counsel directed me to *O'Mara v. Son*, 2007 BCSC 871, a decision of Master Taylor. However, in that case, while the same argument was raised before the Master, the Master concluded that it was not necessary to deal with the question because he had concluded that it was not appropriate in any event to grant the order for severance.

[10] Nothing in the language of the Rules suggests that the court's discretion is limited. Indeed, quite the contrary. Rule 5(6) is only engaged in circumstances in which there has been a prior determination that some form of joinder was appropriate. In my view, it would be contrary to the plain language of the Rule and to the objects that the Rules are intended to

further for the court to have more limited discretion in circumstances in which the matters were joined or ordered to be heard together by consent. In my view, a situation in which the court is constrained in its ability to make orders pertaining to process and procedure to react to changes in circumstances does not further the object of the Rules.

- [11] I conclude that my discretion is not fettered by virtue of the consent order as contended by counsel for the defendant. Rather, as Master Taylor stated in *O'Mara*, I must ask myself what, if anything, has changed sufficiently to require me now to sever the two matters that arrive out of the same set of circumstances. In that inquiry I am to be guided by the principles established in the case law. I turn then to the question of what is the test for severance, and Master Taylor summarized the applicable principles in *O'Mara*, commencing at paragraph 23, as follows:
- [23] At pages 5 to 16 of *McLaughlin & Taylor*, a non-exhaustive list of considerations is set out based on *Wirtz v. Constantini*, [1982] B.C.J. No. 792, 137 D.L.R. (3d) 393 (S.C.); *Merritt v. Imasco Enterprises Inc.*, [1992] B.C.J. No. 160, 2 C.P.C (3d) 275 (S.C.-M); *Katinic v. Bruno*, [1995] B.C.J. No. 3065 (S.C.); *Shah v. Bakken*, [1996] B.C.J. No. 2836, 20 B.C.L.R. (3d) 393 (S.C.-M.); and *Insurance Corporation of British Columbia v. Sam*, [1998] B.C.J. No. 947, 24 C.P.C. (4th) 338. Therefore, according to the learned authors, when faced with an application to sever matters pursuant to Rule 5(6), a court should consider:
1. whether the order sought will create a saving in pre-trial procedures;
 2. whether there will be a real reduction in the number of trial days taken up by the trial being heard at the same trial;
 3. whether a party may be seriously inconvenienced by being required to attend a trial in which the party may have a marginal interest;
 4. whether there will be a real saving in expert's time and witness fees;
 5. whether one of the actions is at a more advanced stage than the other;
 6. whether the order sought will result in delay of the trial of any one of the actions and, if so, whether any prejudice which a party might suffer as a result of that delay outweighs the potential benefits which a consolidated trial might otherwise have;
 7. the possibility of inconsistent findings and common issues resulting from separate trials.
- [24] In *Schaper v. Sears Canada Inc.*, [2000] B.C.J. No. 2246, Master Groves, as he then was, and without referring to any of the cases cited above, stated that while "not intending to create an exclusive test, the case law that I have reviewed suggest that the following factors should be considered:

1. Is there prejudice as set out in Rule 5(6), to the parties applying to sever matters if the court does not exercise its discretion to sever? Clearly, to satisfy this test, the party making the request must show that hearing the claims together would unduly complicate, delay the hearing, or otherwise be inconvenient. If a party applying does not meet this threshold, the court need not go further in any analysis and the application should be dismissed.
 2. Have the actions of any party in the proceeding been unreasonable and have they contributed to the complication, the delay, or the inconvenience alleged by the party applying? If this is found, that would strengthen the argument to sever.
 3. Are the issues between the plaintiff and defendant and the issues between the defendant and the third party sufficiently distinct so as to allow them to be tried separately? If so, that strengthens the argument to sever off third party proceeding.
 4. Is the relief claimed by, or the potential obligation of, any party best determined by hearing the evidence of all parties at one hearing? If so, that weakens an application to sever.
 5. Does the prejudice to the party applying, prejudice based on undue complication, delay or inconvenience, outweigh any benefit of matters being heard together, or outweigh any considerations related to the overall objective of the rules to ensure a just, speedy and inexpensive determination of every proceeding on its merits, including the avoidance of a multiplicity of proceedings for the benefits of litigants and having concern to congestion in the courts generally?
- [12] Addressing these factors, first, there is no suggestion that there is here a prospect of any savings in pre-trial procedures in that both matters are ready for trial.
- [13] Counsel for the defendant submits that there will be reduction in trial time if the matters are heard together, as well as a reduction in witness fees, noting the number of common caregivers, common experts, and common lay witnesses. Counsel for the plaintiff submits that the real issue here is the assessment of damages and that in that respect the claim of each plaintiff is quite distinct. Therefore the testimony of each witness, in counsel's submissions, will likely be of roughly the same duration whether the trials are separate or joined. In addition, counsel submits that the complexity of hearing the matters together in front of a jury, coupled with the length of the trial, will add to the length of trial.
- [14] In my view, there will be some savings of time if the matters are heard together in that the experts will only have to be qualified once. However, I agree that hearing the matters together will also likely result in some increases of time, for example, longer jury selection and likely a much longer charge to the jury. In the result, I am of the view that the issue of potential savings of time is likely close to a wash. In my view, any savings of time, or expert time or witness fees, is likely to be modest.

- [15] Each of the plaintiffs will likely be giving evidence not only concerning their own situation, but in relation to the condition of their spouse. It cannot fairly be said that either are only marginally interested in the trial concerning the claim of their spouse; however, it is the case that for each it would be necessary to be in court likely for more time in the case of a joint proceeding.
- [16] Neither action can be said to be more advanced, each is ready for trial. The order sought will permit one trial to proceed on schedule. If the order is not granted, both plaintiffs will face a substantial delay.
- [17] Counsel for the defendant submits that there is risk of inconsistent findings if the trials are separate. However, the true common issue is liability, and counsel does not contend that this is an issue likely to produce inconsistent results. While there are many common witnesses, including common caregivers and experts, the determination of the damages suffered by each plaintiff is a separate exercise. The fact that a trier of fact might come to a different conclusion with respect to all or part of that determination in relation to the different plaintiffs does not mean that the results are necessarily inconsistent.
- [18] Turning to the factors identified by Master Groves, as he then was, it is clear in my view that the plaintiffs have met the threshold for prejudice. It is not contested that the trial of both plaintiffs will be substantially delayed if the order sought is not granted. In my view, none of the parties have been unreasonable to contribute to the delay. Counsel made a good faith estimate of the length of time of trial required. Both counsel agreed when the trials were originally set that the time set aside would be sufficient. Now, as the cases have evolved, both realize that the initial estimate was inadequate.
- [19] The issues, in my view, are certainly sufficiently distinct to allow them to be tried separately. With respect to the question of whether the matters are best determined by hearing all of the evidence in one hearing, there seems to me to be advantages and disadvantages both with respect to hearing them together and hearing them separately. I cannot say that this factor strongly favours either position with respect to the motion.
- [20] The final consideration is the balancing of prejudice, having regard to the object of the Rule in avoidance of a multiplicity of proceedings and concern for the congestion of the courts. I am satisfied that the prejudice, if severance is not granted, is significant. The potential for inconsistent findings and the degree of overlap do not warrant a delay.
- [21] In the result, I have concluded that it is appropriate to grant the motion for severance. I direct the parties to proceed with the trial of the Zofia action on the dates scheduled and the Slawomir action is adjourned.

(SUBMISSIONS RE CASE MANAGEMENT ISSUES)

- [22] THE COURT: I am not going to make an order with respect to production of this file in circumstances in which the witness might not be called. But, on the other hand, I am very anxious to avoid a situation in which whoever it is that winds up being the trial judge in this

matter, and I hear you when you say that you are having productive discussions with your friend, and that is certainly to be encouraged, but I have to case manage from the perspective of getting the tapes ready for trial, so my goal is to have the case ready for the trial judge, that it is ready to go and it is going to proceed smoothly, particularly with the jury.

- [23] It seems to be that if the decision is made by the defendants to call that evidence, that those documents should be produced, and that they should be produced once the decision is made and not wait for the witness to get in the witness box, because if you wait for that, then it is only going to delay the trial.
- [24] So that is the course that I would be urging on you, and it is the course that I would be urging on you with respect to all of the expert files, that all of them on both sides be produced in a reasonable time in advance once the decision is made that these witnesses are going to testify.
- [25] So I think what should happen is that once you get those instructions, presumably towards the middle of next week, if you have the instructions that this evidence is going to be called, then you will then produce the file and produce the videotape at the same time.

(SUBMISSIONS BY COUNSEL RE BILLINGS)

- [26] THE COURT: Well, it seems to me that billings are something that could well be something about which counsel might wish to cross-examine.

(SUBMISSIONS RE TIMING OF DISCLOSURE)

- [27] THE COURT: Well, I mean, it is not as if this is a new issue that -- so what is your proposal; that --
- [28] COUNSEL: Thursday midday, My Lady.
- [29] THE COURT: Well, all right, about this Thursday midday for both. That is what your friend has proposed if you will tell him on Wednesday whether you are calling the evidence, and you will produce it on Thursday.
- [30] COUNSEL: Is that your order, My Lady?
- [31] COUNSEL: She is asking you.
- [32] COUNSEL: I mean, I am proposing that Thursday midday be the deadline if it's going to be earlier than the seven days.
- [33] THE COURT: The deadline is for what though? That --
- [34] COUNSEL: For production.

- [35] THE COURT: It is a bit difficult to communicate when I cannot see you, so we are kind of cut off from that aspect of our conversation. But I just was not clear what - let me go back. Your friend has proposed that on Wednesday you would tell him if the evidence is going to be called and on Thursday you would disclose both the documents and the footage. Have I got that right?
- [36] COUNSEL: Yes. Yes, My Lady.
- [37] THE COURT: That is your proposal?
- [38] COUNSEL: Yes, My Lady.
- [39] THE COURT: Okay. So I was not clear - I appreciate you are asking for more time, but I just was not clear what your proposal was.
- [40] COUNSEL: That's the proposal, My Lady. So the 12th would be the day on which the fact of whether we were relying on that evidence would be forwarded to my friend, and on Thursday the actual documents and tape would be forwarded, so the 13th midday.
- [41] THE COURT: So the 12th then - again, I do not have a calendar, so
- [42] COUNSEL: The 12th is the Wednesday, My Lady, and Thursday the 13th mid-day.
- [43] THE COURT: Okay. Now, I can't see who is speaking , so --
- [44] COUNSEL: That was Mr. Virgin.
- [45] THE COURT: But is that not the same proposal that your friend just made? Are you not agreeing with your friends --
- [46] COUNSEL: Well, I wasn't agreeing, but I was asking, My Lady, that if Your Ladyship sees fit to grant my friend's request for earlier release of this information than what the Rules provide, then I would ask for - the Wednesday be the soonest at which that information is to be disclosed, and that the Thursday be the point at which the documentation be produced, if Your Ladyship sees --
- [47] THE COURT: No, I understand that you are not agreeing to earlier disclosure at all, and I am sorry to be slow about this, but is not what you are proposing, given that you do not agree at all, but now we are at the alternative stage that if I am going to order something earlier, you know, this would be workable for you, is that not the same as what your friend has suggested?
- [48] COUNSEL: I haven't heard my friend say that the 13th would be the date for actual disclosure.
- [49] COUNSEL: My Lady, Edmund Caissie here. Yes, just to clarify, I had asked him to notify me by close of business on Wednesday whether or not he would be using the surveillance evidence at all, and of course if he said no, then I don't need to see any file. If he says yes, then the next day that he would disclose all of the file and the videotapes. So I thought my

friend initially was saying, I need until Thursday at noon for both, to both advise them I'm going to rely on it and provide the material. But you're right, I now hear him to say that I can let him know by close of business on Wednesday and deliver it on Thursday, which I agree with, My Lady, to me, now sounds like the same as I'm proposing, so I might be confused as well.

[50] COUNSEL: I hadn't heard my friend's suggestion of the 13th for delivery, My Lady.

[51] THE COURT: Your friend's proposal was that on Wednesday the 12th you would tell him if you were going to be calling this evidence and by the close of business by 4:00 p.m. on Thursday the 13th, if you were calling the evidence you would produce not only the footage but the documents, and it seems to me that that is what you have just told me, while you do not agree that there should be any relaxation in the Rules, but if there is going to be, that that would be workable for you. Since that seems to be something that is workable for both counsel, that is what I will order be done.

[52] COUNSEL: Thank you, My Lady.

[53] COUNSEL: My Lady, I think that completes, from my point of view, the case management issues, although I suppose I should be careful and just seek clarification that with respect to the motion in both actions we would ask for costs to the plaintiffs in each of those actions for that application for severance.

(SUBMISSIONS ON COSTS)

[54] THE COURT: I am going to order costs in the cause with respect to this motion. Now, are there any case management issues from the perspective of defence counsel that you would like to raise? We have a few more minutes. I do not know if there is anything from the perspective of defence that needs to be canvassed.

[55] COUNSEL: I have nothing further at this point, My Lady.

(DISCUSSION RE AVAILABILITY OF JUSTICE ROSS)

[56] THE COURT: All right, we are adjourned then.

"Ross J."

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