

CANADA / JUDGMENT

Kapoor v. Starbucks Coffee Canada, Inc.

2024 BCSC 1458

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1458 Kapoor v. Starbucks Coffee Canada, Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kapoor v. Starbucks Coffee Canada, Inc.,

2024 BCSC 1458

Date: 20240812

Docket: S205398

Registry: Vancouver

Between:

Rishi Kapoor

Plaintiff

And

Starbucks Coffee Canada, Inc., The Board of Education of School

District No. 39 (Vancouver) and Canadian Property Holdings (Broadway) Inc.

Defendants

And

Stuarta Claire Breman and Thomas Nelson Urban

Third Parties

Before: Associate Judge Bilawich

Reasons for Judgment

Counsel for the Plaintiff:

J. Gagnon

G. Rainforth

Counsel for the Defendants:

B. Johnston

A. Little

Counsel for the Third Parties:

C. Ronning

Place and Date of Hearing:

Vancouver, B.C.

July 25, 2024

Place and Date of Judgment:

Vancouver, B.C.

August 12, 2024

Introduction

- [1] This is an occupier's liability claim. The plaintiff claims for injuries, loss and expense he allegedly suffered as a result of a fall at a Starbucks coffee shop located at 2505 Granville Street, Vancouver, BC (the "Premises"). The first-named defendant ("Starbucks") operates the business / is lessor of the Premises. The second and third-named defendants are registered owners of the Premises.
- [2] On this application, the plaintiff seeks an order that the defendants produce copies of certain documents over which they claim litigation privilege, including:
- a) February 2, 2020 email correspondence. This is an internal Starbucks email from the Store Manager to others within the organization. It forwards a January 27, 2020 letter received from plaintiff's counsel;
 - b) JPG image of January 27, 2020 letter from Warnett Hallen LLP [plaintiff's counsel's original firm]. Defendants' counsel says this was listed separately in error and is properly part of item a) above;
 - c) March 10, 2020 transcript of claims adjuster's interview of an unidentified Starbucks employee;

- d) April 17, 2020 transcript of claims adjuster's interview of an unidentified Starbucks employee;
 - e) Adjuster's notes dated June 3, 2020. These are file notes of Sedgwick, a third-party claims administrator retained by Starbucks.
- [3] The defendants oppose all of the relief sought. The third parties take no position.

Background

- [4] On October 31, 2019, the plaintiff fell while he was in the defendant Starbucks' Premises (the "Incident"). He says he sustained a comminuted skull fracture and brain hemorrhage as a result. Fire service and ambulance attended the scene. Fire department personnel described him as "babbling, yelling and unable to answer questions". He was taken to Vancouver General Hospital, where he underwent decompressive craniotomy surgery. He was in hospital and later in a rehabilitation facility for several months. He says his injuries have left him permanently unable to return to his career as an accountant and unable to pursue property development projects, which is something he was involved in prior to the Incident.
- [5] The plaintiff has no memory of the Incident. His counsel argues that due to his injuries, he was not able to return to the scene to try to ascertain what caused his fall. Defendants' counsel notes that the plaintiff was in the company of a friend at the time of the Incident, albeit the friend apparently did not see the plaintiff fall.
- [6] Starbucks has produced its "Procedure for Responding to Customer Incidents". It includes:
- 4) Ask the injured customer and any other witnesses how the incident occurred and note their names, addresses and telephone numbers. Involve the store manager on duty.
 - 5) Inspect the scene carefully and gather as much detail about the incident as possible. If helpful, take photographs if a camera is available.
 - 6) Ask any partners and others that witnessed the event to complete a Written Statement Form.
 - 7) Call [number redacted] and follow the voice prompts to report the incident within 24 hours. If the incident involves serious injury, contact Customer Service Center IMMEDIATELY after the incident at [number redacted].
 - 8) Call in to report the incident within 24 hours. Report facts, not opinions or assumptions.
- [7] Plaintiff's counsel complains that none of the documents contemplated by this procedure have been produced by Starbucks. Defendants' counsel says that, despite there being a policy, no statements were completed, nor were any photographs taken of the scene at the time.

[8] The Premises are equipped with video cameras. The plaintiff's wife, Sarah Kapoor, contacted Starbucks on December 11, 15, 21, 2019 and January 3, 2020, requesting access to any video footage of the Incident that may exist. Her first request was as follows:

My husband fell at this location. I'm wanting to get the video so we can understand what happened. I am not a lawyer or law enforcement person. I want to understand how I can best get access to the video. If you can call me or email me please. If I need to ask law enforcement or a lawyer I can but if you can please get back to [me] I would appreciate [it]. Thanks

[9] Her follow-up sent December 15, 2019 was to similar effect, but added mention that her husband had taken a very bad fall and she would like to understand what happened by viewing the security video with the doctors.

[10] On January 6, 2020, Ms. Lopez, a "legal administrative assistant" with Starbucks [US] Law & Corporate Affairs Operations, General Support Team in Seattle, WA, USA responded as follows:

Hello Sarah,

This has been sent to our security department to preserve video if it is available. Starbucks policy is that a valid Washington state subpoena is required before any video footage is provided.

Thank you.

[11] On January 8, 2020, Ms. Kapoor responded that she was in the process of hiring a lawyer, who would be in touch soon.

[12] On January 27, 2020, plaintiff's counsel wrote to Starbucks at the Premises address, as follows:

Our Client: KAPOOR, Rishi

Incident Date: October 31, 2009 [sic]

Location: 2505 Granville Street

Our firm has been retained by Rishi Kapoor with respect to the above noted incident.

Our client was injured as a result of the incident and he is currently receiving medical treatment. Our investigation of the accident reveals that it occurred as a direct result of your negligence and accordingly our client has instructed us to advance a claim for damages on their behalf.

Please provide our office with a copy of the completed incident report and video surveillance from October 31, 2021 from 12:00 pm till 3:00 pm as soon as possible.

Please ensure that any evidence, including maintenance logs and video surveillance footage are preserved.

Please forward this letter to your insurance company and ask the adjuster to contact us.

We look forward to hearing from you in the near future.

[underlining added]

[13] I will refer to this letter as the "Claim Letter".

[14] The Store Manager, Ms. Beale, swore an affidavit stating she received the Claim Letter on February 2, 2020 and that based on it, she thought a claim for damages would be brought against Starbucks relating to the Incident. The same day, she forwarded it to her District Manager, Ms. Kirk, by attaching it to and forwarding an October 31, 2019 email which has a brief report regarding the Incident. The October 31, 2019 portion of that email has been produced, but the message Ms. Beale added on February 2, 2020 has been redacted based on a claim of litigation privilege. The email's subject line is "Subject: Ref: 191031-009413 - Under the Influence - Store 4327 Incident Report". It has a hyperlink to "Case details". It is not clear what the link connects to. The summary on the earlier email is as follows:

Additional Detail:

Synopsis: Man was talking on phone in cafe and collapsed against boxes. bleeding from head. ambulance called and arrived six minutes later. Man conscious as was taken away in ambulance. Customers rattled but ok.

Event Date & Time: 10/31/19 01:45 PM

[15] Plaintiff's counsel says the subject line is inaccurate, as there is no evidence that the plaintiff was under the influence of alcohol or drugs at the time of the Incident.

[16] Ms. Hendley, Senior Claims Adjuster with Starbucks [US] Risk Management, has sworn an affidavit describing her involvement. Her duties included assigning claims or expected claims against Starbucks [US] and its Canadian affiliate to a third-party claims administrator for investigation and claims handling on Starbucks' behalf. She states:

5. In late February or early March 2020, I received a copy of a letter dated January 27, 2020 addressed to Starbucks in Vancouver, B.C., from Julie Gagnon of Warnett Hallen LLP (the "Claim Letter") When I reviewed the Claim Letter, I understood Warnett Hallen LLP to be a law firm and Ms. Gagnon to be an attorney.
6. On or about March 3, 2020, I telephoned Ms. Gagnon to discuss the Claim Letter and during our call, I understood her to say she had filed a statement of claim.
7. As of March 3, 2020, based on the Claim Letter and my conversation with Ms. Gagnon, I understood that litigation had been started against Starbucks relating to the incident described in the Claim Letter (the "Claim") and, because of that, I decided to assign Sedgwick to investigate the Claim to help Starbucks prepare for the litigation.

- [17] Ms. Gagnon did not swear an affidavit in response to Ms. Hendley's evidence, but she did say during her submissions that she had no recollection of having had such a telephone call with Ms. Hendley and she has no file note regarding such a call.
- [18] Ms. Hendley says on March 3, 2020, she engaged Sedgwick, a third-party claims administrator which was providing claims processing services to Starbucks [US]. She told two Sedgwick representatives about the Claim and that the plaintiff's attorney had indicated she had filed a claim. She asked them to set up a file and investigate the Incident, including obtaining statements from Starbucks employees. At their request, she authorized Sedgwick to retain a Ms. Dickout of Coast Claims to conduct interviews of Starbucks employees as part of the investigation. She subsequently learned that Ms. Dickout had taken statements from two employees; one on March 10, 2020 and a second on April 17, 2020. These interviews were recorded and transcripts created from the audio recordings. Litigation privilege has been claimed over the recordings and transcripts.
- [19] Ms. China, Team Lead with Sedgwick, has sworn an affidavit confirming Ms. Hendley contacted her on March 3, 2020 and indicated that the plaintiff's attorney had told Ms. Hendley that a claim had been filed.
- [20] On May 22, 2020, plaintiff's counsel filed the notice of civil claim.
- [21] On June 2, 2020, Ms. China learned that Starbucks had received the notice of civil claim and was appointing external legal counsel to defend the action. A senior paralegal with Starbucks requested her file notes. On June 3, 2020, she created a file with Sedgwick's claim notes and forwarded it to Starbucks. She says her expectation was that it would be provided to legal counsel to assist them with the defence of the claim. Litigation privilege is claimed over the Sedgwick file notes document
- [22] On September 14, 2020, the owner defendants filed their response to civil claim. On September 17, 2020, Starbucks filed its response to civil claim.
- [23] Mr. Thomas, Manager, Global Security & Resilience with Starbucks [US] has sworn an affidavit stating that at the time of the Incident, the Premises were equipped with four fixed-position CCTV cameras and a network video recorder which was connected to a video network. The cameras were oriented to capture (a) the backroom area, (b) point of sale terminals and safe, (c) entry/exit door and (d) an area immediately inside a second entry/exit door. None of the cameras were oriented to capture customer areas, other than what may have been captured incidentally. The video files were automatically overwritten after 90 days. He says there are no records indicating that video from the Premises on the date of the Incident were accessed by anyone, or that any effort was made to preserve it. He does not believe it would have captured images of customer seating areas, other than what may have been recorded incidentally.

Applicable Law and Analysis

[24] Litigation privilege provides a protected area in which communications and documents created for and used in preparing for and engaging in litigation are free from "adversarial interference" and "premature disclosure". It allows parties engaged in the adversarial process of litigation to investigate, prepare and develop positions and strategies free from intrusion from their adversary. See *Hamalainen (Committee of) v. Sippola*, [1991] B.C.J. No. 3614 (QL), (1991), 62 B.C.L.R. (2d) 254 (BCCA) ["Hamalainen"] and *Raj v. Khosravi*, 2015 BCCA 49 ["Raj"] at para. 7.

[25] The test for whether litigation privilege applies is [Hamalainen at para. 18 and Raj at para. 8]:

1. Was litigation in reasonable prospect at the time it was produced; and
2. If so, what was the dominant purpose for its production?

[26] The onus is on the party claiming privilege to establish, on a balance of probabilities, that both parts of the test are met in connection with each document for which privilege is claimed: Hamalainen at para. 18 and Raj at para. 9.

Was Litigation In Reasonable Prospect?

[27] The test for when litigation is considered to be in reasonable prospect is discussed in Hamalainen at para. 21:

21 I am not aware of any case in which the meaning of "in reasonable prospect" has been considered by this Court. Common sense suggests that it must mean something more than a mere possibility, for such possibility must necessarily exist in every claim for loss due to injury whether that claim be advanced in tort or in contract. On the other hand, a reasonable prospect clearly does not mean a certainty, which could hardly ever be established unless a writ had actually issued. In my view litigation can properly be said to be in reasonable prospect when a reasonable person, possessed of all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without it. The test is not one that will be particularly difficult to meet. I am satisfied it was met in this case in connection with all of the documents in issue. The circumstances of this accident, and the nature of Mr. Hamalainen's injuries, were such that litigation was clearly a reasonable prospect from the time the claim was first reported on December 1st, 1986.

[underlining added]

[28] See also Raj at para. 10:

10 The threshold for determining whether litigation is "in reasonable prospect" is a low one. It is an objective test based on reasonableness. It does not require certainty but the claimant must establish something more than mere speculation. A bare assertion of "in reasonable prospect" will not be sufficient.

11 In *Sauvé v. ICBC*, 2010 BCSC 763, Mr. Justice Joyce succinctly summarized this part of the test as follows:

- [30] Obviously, the court must consider the particular circumstances of each case when applying the legal test. As was stated in *Hamalainen*, the first part of the test will often not be hard to meet. "Reasonable prospect" does not mean certainty. It does not require the commencement of an action. The essential question is this: would a reasonable person being aware of the circumstances conclude that the claim will not likely be resolved without litigation? [Emphasis added.]
- [29] The defendants rely primarily on the January 27, 2020 Claim Letter from plaintiff's counsel to Starbucks advising she had been retained, that the plaintiff had been injured and was receiving treatment, that counsel had investigated the Incident and concluded that it had occurred as a direct result of Starbucks' negligence and that the plaintiff was advancing a claim for damages. The Store Manager received this letter on February 2, 2019. Viewed objectively, this clearly indicated that litigation was not only in reasonable prospect, but rather a virtual certainty.
- [30] This was reinforced on or about March 3, 2020, when Ms. Hendley says she spoke to plaintiff's counsel about the Claim Letter and understood counsel to have said that a "statement of claim" had already been filed. Her understanding was not accurate, in that an action had not been started at that point in time. "Statement of claim" is also not terminology that plaintiff's counsel would be expected to use in this instance. However, Ms. Hendley's evidence has not been directly challenged and is supported indirectly by Ms. China.
- [31] The plaintiff argued generally that the Claim Letter was prompted by Starbucks rebuffing Ms. Kapoor's requests for access to video of the Incident. Starbucks' said it would only release video if it received a valid Washington State subpoena. Ms. Kapoor was just trying to determine what had happened at that point. Plaintiff's counsel argued that, despite what is stated in her letter, there had not yet been a substantial investigation of the circumstances of the Incident when she sent her letter.
- [32] I agree that, viewed objectively, the representations made in the Claim Letter were a sufficient basis for the Starbucks' representatives to reasonably conclude that litigation was in reasonable prospect as of the date that the Store Manager Ms. Beale received it, February 2, 2020. Further, the nature of Incident (a slip and fall) involving apparently serious injuries which necessitated attendance of first responders, transport to hospital and ongoing medical treatment more than three months after the Incident likewise supported the conclusion that the plaintiff's claim would likely not be resolved without litigation.
- [33] All of the documents which are the subject of this application were created on or after February 2, 2020. Accordingly, the first part of the test has been made out in respect of all of the documents in issue.

What Was The Dominant Purpose For Production?

[34] A party claiming litigation privilege must establish that the dominant purpose for production of the document in issue was to obtain legal advice or to conduct or aid in the conduct of litigation. See Hamalainen at para. 22. Documents can be produced for dual or multiple purposes: see Raj at para. 17:

17 A claim of privilege will succeed when a party can establish that a document produced for dual or multiple purposes, one of them being litigation, was produced for the dominant purpose of litigation. There is no absolute rule for determining whether litigation was the dominant purpose for the document's production (Hamalainen at para. 25). A finding of dominant purpose involves an individualized inquiry as to whether, and if so when, the focus of the investigation/inquiry shifted to litigation. This is a factual determination to be made based on all of the circumstances and the context in which the document was produced. As Wood J.A. explained in Hamalainen:

[24] Even in cases where litigation is in reasonable prospect from the time a claim first arises, there is bound to be a preliminary period during which the parties are attempting to discover the cause of the accident on which it is based. At some point in the information gathering process the focus of such an inquiry will shift such that its dominant purpose will become that of preparing the party for whom it was conducted for the anticipated litigation. In other words, there is a continuum which begins with the incident giving rise to the claim and during which the focus of the inquiry changes. At what point the dominant purpose becomes that of furthering the course of litigation will necessarily fall to be determined by the facts peculiar to each case. [Emphasis added.]

[35] The defendants argue that all of the documents in issue on this application were created after Starbucks received the Claim Letter. The evidence tendered also establishes that they were created to aid Starbucks in the conduct of the reasonably anticipated litigation. In particular:

- a) The Store Manager Ms. Beale testified that after receiving the Claim Letter on February 2, 2020, she thought that a claim for damages would be brought against Starbucks. She forwarded her comments and attached a copy of the claim letter to her District Manager and others within Starbucks. Only her comments appear to have been redacted;
- b) With regard to the witness interview recordings and related transcripts, these were created after Ms. Hendley read the Claim Letter, called plaintiff's counsel and came away with the belief that a claim had already been started. Her steps in response to that included engaging Sedgwick to manage the claim and approving Sedgwick retaining Ms. Dickout of Coast Claims to obtain employee statements. I accept that she did this to help Starbucks respond to the litigation;

- c) With regard to the Sedgwick adjuster's notes file made June 3, 2020, this was created after Starbucks received the notice of civil claim. The file was created to assist Starbucks and its counsel to defend the claim. The individual notes in Sedgwick's file were likewise created under the same circumstances as item b) above.

[36] The defendants rely on *Drewniak v. Law*, 2017 BCSC 1565. In that case the plaintiff applied for production of an independent adjuster's report and audio statements over which litigation privilege had been claimed. The documents were created after plaintiff's counsel had written to the defendant, invited her to contact her home insurance provider about the incident and stated that action was contemplated by the plaintiff. At para. 5:

5 Both on an evidentiary basis and as a matter of common sense, I am persuaded that the defendants have met the dominant purpose test. I find that the circumstances of this case mirror those discussed in *Wuest v. C.N.K. Holdings Ltd.*, [1996] B.C.J. No. 2880 at paras. 3 and 4, and *Panetta v. Retrocom Mid-Market Real Estate Investment Trust*, 2013 ONSC 2386 at paras. 61 and 62 (as cited in *Plenert v. Melnik Estate*, 2016 BCSC 403 at para. 40. See also *Raven v. City of Kamloops* (unreported, May 28, 1999, Vancouver Registry action number C975896) at paras. 9 to 12. Really, the only purpose served by the adjuster interviewing (or at least attempting to) all parties and any independent witnesses was to assist in the anticipated litigation. There were not any other kinds of investigations required by the liability insurer.

[37] In the present case, the adjuster's materials were also created after plaintiff's counsel invited Starbucks to contact its insurer and indicated that a claim for damages was being advanced.

[38] The defendants also rely on *Plenert v. Melnik Estate*, 2016 BCSC 403 at paras. 40-42:

40 As noted, counsel for Emil Anderson conceded that the test from *Hamalainen* (Committee of) was the test to be met. He referred me, however, to the Ontario Superior Court of Justice decision of *Panetta v. Retrocom Mid-Market Real Estate Investment Trust*, 2013 ONSC 2386 at paras. 61 and 62:

[61] I think that, in third-party or tort claims (as opposed to claims by an insured against his or her own insurer), there is no preliminary investigative phase where privilege does not attach to notes, reports and files of adjusters. In third-party insurance claims, the sole reason for any investigation by or on behalf of an insurer is because of the prospect of litigation. It is naive to think otherwise; and the fact that the investigation may be used to arrive at a pre-lawsuit settlement does not detract from the point that I make. The prospect of litigation inherently includes the prospect of settlement.

[62] I agree with the submissions of Wahlman that there is no purpose for the creation of documents by an insurer in a tort context other than: (1) for anticipated litigation; (2) for setting reserves; or (3) for seeking legal advice. For completeness, I would add, as a corollary to (1): for the purpose of settlement, which I see as inextricably entwined with "anticipated litigation."

41 Here, as in Panetta, Emil Anderson argues that there is no investigative stage. There is no other conceivable purpose for the production of the reports and documents other than defending the claim. Further, the evidence of all involved was that contemplated litigation was the only purpose for the investigation from the outset.

42 I do not go so far as to say that in all circumstances the investigations of liability insurers will be privileged, but I am satisfied that the documents in issue in this case are protected by litigation privilege. There is no evidence that they were created for multiple purposes. The evidence is that the only reason for the investigation was to defend against potential litigation, which I have found was reasonably in contemplation. That evidence is supported by the limited role of the liability insurer in this matter, which was to defend and indemnify Emil Anderson and the Province.

[39] In the present case, there is no evidence that the subject documents were created for a purpose other than assisting Starbucks to defend against the plaintiff's claim.

[40] The plaintiff emphasizes that Starbucks' Procedure for Responding to Customer Incidents contemplates that there be an investigation which includes inspecting the surrounding area, creation of a report, identification of witnesses and creation written statements for them and photographs being taken if a camera is available. This is all in the nature of discovering the cause of the Incident rather than preparing for litigation.

[41] Defendants' counsel says most of those investigative steps were not actually taken in this instance. The documents in issue on this application were all created many months later, after receipt of and in response to the Claim Letter. It is significant that Sedgwick and Coast Claims were not involved in an initial investigation, they were only engaged after March 3, 2020.

[42] The defendants have tendered evidence from multiple deponents working for Starbucks, Starbucks [US], Sedgwick and Coast Claims, all of whom support the conclusion that the documents in issue on this application were created after receipt of, and in response to plaintiff counsel's Claim Letter of January 27, 2020. I accept they were all created for the dominant purpose of obtaining legal advice, or to conduct or aid in the conduct of anticipated litigation. Accordingly, the defendants have established that the subject documents are protected by litigation privilege.

Is It In The Interests Of Justice That Privilege Be Waived?

[43] The plaintiff argues that, in the event the defendants are able to establish litigation privilege exists in relation to the subject documents, it is in the interests of justice that the court waive or over-ride that privilege and order production in any event. Counsel relies on *Kaiser v. Bufton's Flowers Ltd.*, [1993] B.C.J. No. 1695 (SC) [Kaiser], in which Justice Melnick identified the factors considered when deciding whether to exercise the court's discretion to waive privilege in the interests of justice:

56 The factors which guide the exercise of the court's discretion as envisioned by Supreme Court Rule 26(10), were set out by Mr. Justice Finch in *Lowry v Can. Mountain Holidays Ltd.* (1984), 59 B.C.L.R. 137 at p. 143 (S.C.), quoted with approval in *Power Consolidated*, supra at p. 323:

The plaintiffs also cite *Arpeg Hldg. Ltd. v Vancouver* (1981), 28 B.C.L.R. 273 (C.A.), *Bates v Stubbs* (1979), 15 B.C.L.R. 65, 11 C.P.C. 299, 1010 D.L.R. (3d) 623 (C.A.), and *D'Angelo v Trace* (1981), 28 B.C.L.R. 396 (C.A.), as examples of how the court's discretion has been applied in other cases. These cases show that there are a number of factors to weigh in considering the justice of a party's demand for disclosure of an otherwise privileged document. The factors include the need to correct any imbalance between the parties, to avoid trial by ambush, to see that litigants are not taken by surprise late in the day, and to develop conditions that will lead to settlement of the litigation short of trial. Justice is the only criterion for the exercise of the court's discretion referred to in R. 26(10). Under R. 1(5) the factors of time and expense in the conduct of litigation may also be taken into account, along with the fundamental requirement for justice.

[underlining added]

[44] Counsel also relies on *Brown v. Wilkinson*, 2012 BCSC 398 [Brown] at paras. 36 et seq. In that case, the plaintiffs alleged their home had been damaged by a fire which originated from the defendant neighbours' premises. The defendants' insurer conducted an investigation, taking photos and taking notes. The plaintiffs also retained an investigator but the defendants' insurer refused them access to the defendants' premises. The plaintiffs' insurer indicated it would likely be bringing a subrogated claim and asked that all evidence be preserved. Despite that request, physical evidence was removed and destroyed. The defendants claimed privilege over all emails, interviews and adjusters' reports. The plaintiffs argued the documents were not privileged and, even if they were, they should be produced in any event. Master Baker found that if privilege did attach to certain of the fire investigation documents, it must be waived in the interests of justice. There was such an imbalance between the parties that justice required that the early fire investigation documents be produced to the plaintiffs. At para. 42:

42 Preventing Mr. Wood or anyone else on the plaintiffs' behalf from attending at the fire site was not a trivial matter. I do not have to conclude whether or not spoliation per se has occurred; that is for a trial Judge to decide. But not only is it, by any reasonable and objective view, essential that the on-site investigation be permitted, it was specifically and emphatically made clear by Ms. Alward that the investigation was sought and that at the very least the evidence should be preserved. In the face of all this all physical evidence was eventually removed without any opportunity for physical examination by the plaintiffs. That resulted in such an obvious imbalance that justice requires the production of the communications and documents over which privilege is claimed. I think that any evidence in these documents that may address the physical evidence in all likelihood would be found in documents 4.1 through 4.6 , 4.14, 4.15, and in that portion of 4.16 pre-dating September 2008. It seems reasonable that documents after August would have "moved on" to other aspects of the claim.

- [45] The plaintiff argues that Starbucks failed to follow its own procedure which would have preserved key evidence following the Incident. This has prejudiced the plaintiff's ability to meet his burden of proving and causation and liability in the action. The plaintiff has no memory of the Incident, he did not have the opportunity to conduct his own investigation and there is no video evidence available. In the circumstances, production of the subject documents, and the witness statements in particular, are necessary to address the imbalance between the parties. The employee statements in particular were supposed to have been taken immediately after the Incident, during the investigation stage, and thus served a dual purpose. Full disclosure is essential to the truth-seeking function in this case.
- [46] The defendants argue that in both *Kaiser* and *Brown*, the court did not actually make an actual finding of litigation privilege, and as such the statements relating to waiver of privilege are obiter dicta. Neither case articulates a principled approach or sets out a test for when justice requires waiver of privilege. They argue a high bar ought to apply, such as actionable misconduct on the part of the party claiming litigation privilege. They refer to the reasons of Justice Fish in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para. 45:
- 45 Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed.
- [47] They also argue that *Kaiser* and *Brown* are both distinguishable on their facts. In *Kaiser*, a defendant named *Lauder* had cooperated with the plaintiff's preparation of expert reports regarding a fire, at a time when he did not expect to be named as a defendant. He only learned two years after the incident that he was being named as a defendant. It was impossible at that point for him to retain his own experts to gather the necessary information, so he was seeking production of the plaintiff's expert reports. That is not analogous to the present case.
- [48] In *Brown*, the defendant's adjusters had refused the plaintiff's experts access to the scene to investigate, failed to preserve physical evidence and removed physical evidence. Production of some early fire investigation materials was necessary to address the imbalance between the parties.
- [49] The defendants say in this case there is no evidence of denial of access to the Premises, no evidence of deliberate removal or destruction of evidence or of any similar conduct which could amount to actionable misconduct on their part. With regard to security footage, the evidence is that it would not have captured images of the customer seating areas, which is where the plaintiff's fall occurred. The cameras were in place to support the safety and security of Starbucks employees and to assist with loss prevention. Any footage that may have existed was over-written after 90 days. Also, no subpoena was ever provided, as required by Starbucks [US] policy. They also argue that the plaintiff's argument that he did not have an opportunity to conduct his own investigation is at odds with what is stated on

the face of the Claim Letter from plaintiff's counsel. It asserts an investigation had occurred and led to the conclusion that the Incident occurred due to Starbucks' negligence. The plaintiff did not tender any evidence regarding the investigative steps taken on the plaintiff's behalf.

- [50] I agree that Kaiser and Brown are distinguishable on their facts. This appears to have been an unexpected and traumatic incident which resulted in fire service and ambulance personnel being called to attend. There is no indication or suggestion that physical evidence in terms of a possible cause for the plaintiff's fall, if such existed, was removed, altered or destroyed. Written statements were not taken at the time, but the Starbucks employees who were present that day have been identified.
- [51] Defendants' counsel noted that Starbucks employee witnesses were cooperating by providing responses to written questions via defendants' counsel. This is the same process that the parties used when defendant's counsel asked to interview the plaintiff's friend who was accompanying him at the time of the Incident. Plaintiff's counsel complains that many of the responses were either non-responsive or essentially monosyllabic in nature and not at all informative.
- [52] The plaintiff has filed a separate application seeking orders for pre-trial examination of certain Starbucks employees, pursuant to Rule 7-5 of the Supreme Court Civil Rules, B.C. Reg. 168/2009. That was one of three applications that originally came before me. There was not sufficient time available to hear that application, so it was adjourned to a date in late August 2024. If successful, plaintiff's counsel will be in a position to examine those Starbucks employees directly. This is not a situation where the employee witnesses are completely unavailable to the plaintiff. I note that in *Rintoul v. Granger*, 2008 BCSC 1852 at para. 28, Justice Griffin emphasized the availability of other tools to pursue discovery of relevant information in civil cases and the relatively limited scope for ordering production of privileged documents:

28 I cannot accede to the suggestion that the court has discretion to order production of a privileged document so that one party can learn what the other party knows. This position, with respect, would give rise to applications to produce all kinds of privileged documents. There are many tools available to discover relevant information in a civil case. Production of privileged documents is not one of the tools unless the document fits within a recognized exception to privilege.

- [53] I am not persuaded that this is an appropriate case for the court to exercise its discretion to order production of the documents in issue despite having found that they are subject to litigation privilege. I decline to do so.

Orders Made

[54] The documents identified in paragraph 2 a), b), c), d) and e) of these reasons are protected by litigation privilege. This is not an appropriate case in which to order production despite this privilege. The plaintiff's application is dismissed.

[55] The defendants have been successful and are entitled to costs of the application from the plaintiff.

"Associate Judge Bilawich"

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