

CANADA / JUDGMENT

Klassen v. Epp

2025 BCSC 1056

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Supreme Court of British Columbia

DECIDED

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2025 BCSC 1056 Klassen v. Epp

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Klassen v. Epp,

2025 BCSC 1056

Date: 20250606

Docket: S-S-244509

Registry: Victoria

Between:

Donna Marie Klassen

Plaintiff

And:

Elmer Peter Epp

Defendant

Before: The Honourable Justice K. Wolfe

Reasons for Judgment

Counsel for the Plaintiff:

E. T. Kähns

Counsel for the Defendant:

J.C. Chandler

Place and Date of Hearing:

Victoria, B.C.

February 20, 2025

Written Submissions of the Plaintiff:

February 27, 2025

Written Submissions of the Defendant:

March 4, 2025

Place and Date of Judgment:

Victoria, B.C.

June 6, 2025

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Overview

- [1] The defendant applies under R. 9-5(1)(d) of the Supreme Court Civil Rules [Rules], to strike the whole of the plaintiff's notice of civil claim on grounds that it is an abuse of process. The plaintiff and the defendant are former spouses. The parties' family law claims were the subject of a separate family law proceeding filed in the Kelowna Registry, which was settled by a final consent order granted November 22, 2022 (the "Final Order"). The defendant says the claims the plaintiff seeks to pursue in this civil proceeding were dealt with and dismissed under the Final Order. He says those issues are res judicata and the present claim

is an improper attempt to relitigate them.

- [2] The subject of the present claim is the plaintiff's claim for tort damages for an alleged sexual assault in November 2018 during the parties' relationship. The plaintiff says the tort claim was not properly the subject of the family law proceeding and therefore was not disposed of by the Final Order. The plaintiff maintains that her amended counterclaim in the family law proceeding (which, on its face, included a claim for damages from alleged family violence and the sexual assault) could not have been captured by the Final Order because it was filed in error. In any event, she says her counsel clarified that her claim for damages from the sexual assault was excluded from the Final Order before the plaintiff endorsed it. As a result, the plaintiff says she is not precluded from pursuing the present claim. She also relies on cases that suggest survivors of sexual assault and intimate partner violence should be afforded greater flexibility when seeking to pursue tort claims.
- [3] Given the issues and the parties' positions, the litigation and procedural history of the parties' family law proceeding is critical to the present application. I have carefully considered that background, the parties' submissions and the applicable legal principles. For the reasons that follow, and in the specific factual context of this case, I find the plaintiff's present claims are barred by the doctrines of res judicata and abuse of process. I therefore allow the defendant's application and strike the plaintiff's notice of civil claim in its entirety.

Issues

- [4] The overarching issue before the Court is whether the plaintiff's current claim is an abuse of process because the plaintiff previously advanced claims relating to the sexual assault as part of the parties' family law proceedings, such that those claims were addressed by the Final Order. This requires somewhat detailed consideration of the extent to which issues relating to the sexual assault were at play in the parties' family law proceedings. I must also consider if the plaintiff's claims relating to family violence and sexual assault were excluded from the Final Order's dismissal of all other claims and counterclaims, including because the amended counterclaim was a nullity or because the parties knew or should have known those claims were excluded from the Final Order.
- [5] The defendant's notice of application seeks special costs; at the hearing, both parties submitted the issue of costs should await the Court's decision on the merits.

Factual Background

[6] As noted, the parties are former spouses. Following the end of their relationship, there were criminal proceedings and family law proceedings, both of which predated the present claim. To situate my analysis, I will first provide an overview of the relevant aspects of the parties' relationship and its dissolution, and will briefly address the criminal proceedings. I will then address in some detail the family law proceedings leading up to the Final Order, before outlining the litigation history of the present claim and the application before me.

The parties' relationship

- [7] The parties began to live together in a marriage-like relationship in 1992 and were married October 30, 1999. Both parties were previously divorced. They have no children together, but both had children from previous relationships, resulting in a blended family. At the time the family law proceedings were commenced, there were no "children of the marriage" within the legal meaning of that term.
- [8] The materials provided to me for this application support that the defendant was the primary income earner during the parties' relationship, although the plaintiff also worked at various times. The materials also demonstrate that, after a lengthy period of sobriety and abstinence, the plaintiff began drinking and using drugs again in 2015. The parties admit they drank together. It appears the plaintiff has struggled with depression and anxiety throughout much of her life.
- [9] The plaintiff has advanced numerous allegations, in all three proceedings, regarding intimate partner sexual violence by the defendant. The intimate partner violence is alleged to have included the defendant digitally penetrating the plaintiff while she slept (which she says she attempted to remedy by wearing underwear to bed). More specifically, the plaintiff alleges that on November 18, 2018, the defendant sexually assaulted her, including engaging in sexual intercourse and digital penetration, while she was unconscious after a night of drinking. The plaintiff says that while she did not feel right the next morning, she learned of the assault about a week later when the defendant told her what he had done.
- [10] The plaintiff says that after the alleged assault in November 2018, her drinking and drug use increased dramatically, to the point where she would miss entire weeks of work due to alcohol consumption. The defendant appears to accept the plaintiff's struggles with alcohol and drug use increased in 2019, but disputes any causal connection to his alleged behaviour in November 2018. It is common ground that the plaintiff entered a rehabilitation centre in Nanaimo, British Columbia, in early December 2019 and never resumed living with the defendant after that point.
- [11] Between December 2019 and May 2020, the plaintiff was in and out of various treatment centres due to relapses. The plaintiff says it was through treatment that she realized the impacts of the defendant's actions and began trying to address them. The record before me includes text messages between the parties regarding the plaintiff's allegations of sexual

misconduct and the defendant's responses; the plaintiff demanded the defendant disclose them as part of document production in the family law proceedings. The plaintiff says she made the decision to end her marriage in May 2020, and in June 2020, she reported the alleged November 2018 sexual assault to police. She says she did not ask for charges to be pressed against the defendant until September 2020.

- [12] When the plaintiff entered rehabilitation in December 2019, she was 61 years old. The defendant was 68 years old.
- [13] In February 2021, the defendant was charged criminally with sexual assault of the plaintiff arising from the November 18, 2018 incident. The defendant initially pleaded guilty before the British Columbia Provincial Court, but subsequently advised the Provincial Court he intended to withdraw his guilty plea. The plaintiff's notice of civil claim in this matter pleads the defendant was found guilty in December 2023 and there was a copy of a conditional discharge / probation order in the record before me. However, at the hearing of the application before me, defendant's counsel (who is not counsel on the criminal file) suggested there had been subsequent developments in the criminal proceedings. There was no evidence before me regarding those subsequent developments or the current status of the criminal proceedings, however, that information is not relevant to my decision.

The family law proceedings

- [14] On August 10, 2020, the defendant filed a notice of family law claim in the Kelowna Registry of the British Columbia Supreme Court (File No. 128406). In the family law proceedings, the defendant was the "claimant" and the plaintiff was the "respondent". To avoid confusion, I will continue to use the parties' roles in this proceeding when discussing the family law proceedings. As well, to properly understand the sequence of events, I independently reviewed certain filed materials in the family law court file.
- [15] Based on my review, it appears the notice of family claim was amended August 20, 2020 to properly include Schedule 1. The defendant sought, among other things, an order for divorce on grounds of having lived separate and apart since December 3, 2019, and an order for unequal division of the family property. The plaintiff filed a response to the amended family claim on September 16, 2020 and a counterclaim on September 23, 2020.
- [16] In her original counterclaim, the plaintiff agreed the parties had lived separate and apart since December 3, 2019, but also sought a divorce on "other grounds", described as follows:

Current RCMP investigation regarding assault on the [plaintiff] by the [defendant]:

Per 8(2)(b)(ii) treated the other spouse with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses

[Emphasis added.]

[17] The plaintiff's counterclaim also sought an unequal division of family property on various grounds including:

Reapportionment of family assets in the [plaintiff's] favour to assist the [plaintiff] in becoming independent and self-sufficient given her advanced age and other factors including financial, mental and physical cruelty.

[Emphasis added.]

[18] The plaintiff retained her present counsel on the family law proceedings in May 2022. There were communications between counsel as well as various procedural steps and appearances while plaintiff's new counsel was getting up to speed through fall of 2022. It is clear from the record that counsel's dealings with each other have not been easy; those difficulties continued through and beyond the hearing before me. In June 2022, the defendant unilaterally set the trial for end of October 2022; the parties subsequently agreed to adjourn it to early January 2023.

[19] As the notice of trial had already been filed, the plaintiff sought consent to amend her counterclaim, both to revise the date of separation to May 2020 and to include a claim for damages for the "tort of family violence". When the defendant refused to consent, the plaintiff filed a notice of application on September 13, 2022, seeking, among other things, leave to amend her counterclaim and to adjourn the trial from January 2023 until after April 2023, when the defendant was next expected to appear in the criminal proceedings.

[20] In the defendant's application response, filed September 20, 2022, the defendant asserted the issues in dispute were simple and confined to asset division and spousal support. The defendant's response resisted any suggestion of a connection between the criminal proceedings and the family law claims, stating "[i]f the [plaintiff] wants to file a separate notice of civil claim for the alleged sexual assault, nothing is preventing her from doing so." The response later acknowledged that, in addition to spousal support and property division, the trial may also apparently deal with the "issue of sexual assault", which is "alive (according to counsel for the [plaintiff])." However, the response further asserted that the "tort of family violence" does not appear to relate to a "family law case" but rather a "civil cause of action".

[21] The plaintiff was discovered on September 22, 2022. During her examination for discovery, plaintiff's counsel expressly stated his position on the record that this was the defendant's opportunity to ask questions regarding the sexual assault allegations, and if such questions were asked, the plaintiff would argue that constituted acknowledgment that the issues were relevant to the family law claim. The plaintiff was asked questions about and gave evidence regarding the alleged November 2018 sexual assault and the other intimate partner violence alleged to have been committed by the defendant. The plaintiff was specifically asked about the impacts of the alleged resulting trauma on her ability to work, as well as about the treatment she pursued and the individuals in whom she confided regarding the allegations. She was also asked questions about her reports to the police regarding the alleged

November 2018 sexual assault and why she did not report the other intimate partner violence.

- [22] On October 11, 2022, plaintiff's counsel filed an affidavit of a legal assistant in his office attaching as an exhibit an independent medical examination report regarding the plaintiff, dated October 6, 2022, prepared by registered psychologist Dr. L. Klubben. At a high level, the instruction letter from plaintiff's counsel (Appendix C to the report) asks Dr. Klubben to opine on any psychological injuries the plaintiff may have sustained as a result of the November 2018 sexual assault, to confirm causation of the psychological injuries, and to describe any effect on the plaintiff's ability to work or perform her daily living activities, as well as any potential long-term effects of the sexual assault on the plaintiff. The report was provided to defendant's counsel as part of the family law proceedings.
- [23] Based on my review of the materials in the family law court file, on October 18, 2022, the parties appeared before Justice Wilson in relation to both the plaintiff's September 13, 2022 application and an application filed by the defendant on September 20, 2022 seeking an interim distribution of funds to finance the litigation. In respect of the defendant's application, the Court granted reciprocal interim distributions to each party and ordered the plaintiff to produce an updated financial statement. The plaintiff's application was not heard on its merits; it was adjourned to November 2, 2022 on terms requiring the parties to exchange materials relevant to the application by specific deadlines. Of particular relevance, the Court ordered the plaintiff to "provide a draft of their amended response to family claim and counterclaim" by October 24, 2022 (emphasis added).
- [24] However, on October 24, 2022, rather than providing a draft, and despite the absence of an order granting the plaintiff leave (as required by R. 8-1(1)(b) of the Supreme Court Family Rules [SCFR]), the plaintiff filed her amended response to family claim and amended counterclaim in the Kelowna Registry. In the filed amended counterclaim, the plaintiff sought the following relief:

Reapportionment of family assets in the [plaintiff's] favour to reflect general, aggravated and punitive damages for the [defendant's] tort of family violence and sexual assaults committed against the [plaintiff] (Schedule 4: Property and Debt, para. 6)

Pursuant to the Common Law Tort of Family Violence and/or Sexual Assault, separate and additional general, aggravated and punitive damages in favour of the [plaintiff] for the sexual and emotional violence the [defendant] inflicted on her over the course of the marriage, including unconsented digital penetration, and intercourse on or around November 18, 2018 (Schedule 5: Other Orders, para. 5).

[Emphasis added.]

- [25] On November 1, 2022, the defendant was discovered. He was asked about the alleged sexual assault and intimate partner violence during the parties' relationship. He was also asked about certain statements from the psychologist's expert report that had been obtained and provided by the plaintiff.
- [26] The plaintiff's application to amend her counterclaim was heard before Justice Hardwick on November 2, 2022, and judgment was reserved. It is not clear if the Court was advised the plaintiff had already filed an amended counterclaim and if so, whether submissions were made about how that document should be treated.
- [27] On November 3, 2022, the defendant filed a trial brief. He identified "pleading issues" as an issue in dispute, stating that the plaintiff had filed her amended counterclaim and a response to family claim in error, notwithstanding the outstanding application for leave to file those pleadings. He stated the counterclaim was "deficient, should not have been filed, and should be struck."
- [28] On November 4, 2022, the plaintiff filed a trial brief. The plaintiff listed the registered psychologist's report, dated October 6, 2022, as an expert report on which she intended to rely at trial. In relation to the issue of spousal support, the plaintiff's stated position included the following:

The [plaintiff] now 64 has limited employment skills and is no longer working, because of a disability and because of the [defendant's] conduct during the marriage. The [plaintiff], who was abstinent for the majority of the marriage, increased her drinking and drug use in the year following the [defendant's] assault against the [plaintiff] for which he was charged criminally and initially pled guilty with the aid of legal counsel. The [plaintiff] has required considerable counselling and rehabilitation after this assault but [sic] during the marriage and following the marriage.

[Emphasis added.]

- [29] On November 7, 2022, the defendant sent the plaintiff a letter enclosing an offer to settle the family law proceedings in their entirety. The specific terms of the initial offer were not before me.
- [30] On November 9, 2022, the plaintiff responded by email attaching a letter of the same date with the filename "Settlement Offer - November 9, 2022.pdf". The subject line of the email is "Epp v Klassen". The letter references the November 7, 2022 offer from the defendant and confirms the plaintiff's acceptance, subject to what plaintiff's counsel described as "minor" changes. The complete text of the proposed settlement is then set out within the body of the letter under the heading "Settlement Proposal". I therefore consider this letter to be in the nature of a counter-offer. As I was not provided the initial offer, the nature of the plaintiff's changes are not clear to me, but the proposed text of the settlement has three headings addressing property division, spousal support and general terms. Under the heading "General", the following proposed term is included:

10. BY CONSENT, the claims and counterclaims of the within proceeding are dismissed as if adjudicated on their merits.

[Emphasis added.]

- [31] After the proposed terms, the letter from plaintiff's counsel includes a heading entitled "Deadline to accept compromise of claim". Under this heading, plaintiff's counsel states that the plaintiff's "compromise of her claim is intended to avoid further legal expense for both parties." Plaintiff's counsel notes that, in his offer, the defendant acknowledges the plaintiff is entitled to spousal support, and then states:

Of course, Ms. Klassen will be entitled to considerably more if she is able to show either that:

- Mr. Epp's conduct during the marriage further impacted her ability to work; OR
- The Separation Date is May 2020.

We are confident that the parties' text correspondence will show both.

[]

other available objective evidence supports a plain reading of the parties' text correspondence. This other objective evidence, includes but is not limited to Ms. Klassen's contemporaneous clinical records and Cathy Coates' anticipated evidence.

[Italics in original, underlining added.]

- [32] The letter concludes with the statement that the offer remains open until the earlier of 4:00 p.m. on November 18, 2022 or the day before Justice Hardwick renders her oral reasons on the plaintiff's application to amend (among other things). There are no other caveats or qualifications.
- [33] On November 13, 2022, while the plaintiff's settlement offer remained open for acceptance, plaintiff's counsel sent another email with a separate subject line of "Consent order to withdraw pleadings filed in error". In that email, plaintiff's counsel asks if defendant's counsel is willing to endorse a consent order to withdraw the plaintiff's amended counterclaim and amended response to family claim. Plaintiff's counsel states: "As advised on October 24, 2022, these were filed in error by our office" and says they will have to be withdrawn even if Justice Hardwick grants the plaintiff's application for leave to amend because they reference an order purportedly made by Justice Wilson on October 18, 2022. Plaintiff's counsel explains: "Given that Justice Wilson made no such order, these pleadings are ineffectual." There is no reference in plaintiff's counsel's email to the open settlement offer and no suggestion the request for consent to withdraw the filed pleadings is connected to or modifies the terms of the settlement offer. Defendant's counsel responds minutes later saying: "Yes, that seems reasonable. Please provide me with your proposed form of order."

- [34] On November 15, 2022, at 11:19 a.m., plaintiff's counsel responds to the same email thread attaching a draft consent order to withdraw the amended pleadings that were "filed in error on October 24, 2022" as well as copies of the filed amended counterclaim and amended response to family claim. I was not provided with a copy of the draft consent order. Plaintiff's counsel repeats his position that the "pleadings are ineffectual" and states that if Justice Hardwick grants leave to amend, the plaintiff's intention is to refile those pleadings properly. Again, plaintiff's counsel's email does not reference the open settlement offer in any way, or suggest the offer is now dependent on successful withdrawal of the amended pleadings. On the face of the email chain, there is no express or implied connection between the two.
- [35] On November 15, 2022, at 2:21 p.m., an assistant in the office of defendant's counsel responds to the email thread regarding the settlement offer (subject line "Re: Epp v Klassen"), attaching a letter of the same date from defendant's counsel. The letter accepts the plaintiff's November 9, 2022 counter-offer and states that it is enclosing "the relevant order for entry". There are five enclosed pages. The first four pages are a signed form of the Final Order which mirrors the terms of the settlement proposal set out in the plaintiff's November 9, 2022 letter with four modifications: it includes an order for divorce (I have assumed that term was contemplated as it was consistently agreed to by both parties in their pleadings); it does not include a consent term that both parties retain assets in their own name; it specifies that the lump sum spousal support amount may be paid from funds held in trust following the sale of the family home; and it includes an additional general term that unless referenced, all interim orders are vacated. The covering letter states that "[t]o avoid delay", the lump sum spousal support can be paid from funds held in trust. There are no other conditions or qualifications to the acceptance. The fifth page (labelled page 5 of 5) is a draft form of "notice of withdrawal in family law case in which a divorce is claimed" to permit the plaintiff to withdraw the whole of her response to family law claim and counterclaim. In the draft, the two pleadings are not identified by dates.
- [36] About an hour later, at 3:20 p.m., as part of the same email thread, plaintiff's counsel responds thanking defendant's counsel for his letter and stating this: "Attached is the Notice of Withdrawal Ms. Klassen is prepared to sign, along with the Final Order provided." On its face, this statement appears to confirm the plaintiff was prepared to sign the form of Final Order signed and provided by the defendant, however the form of Final Order was not attached to the email. I was also not provided the draft notice of withdrawal the plaintiff was prepared to sign. Defendant's counsel responds to the same thread by email at 3:57 p.m. stating the "final order has not been provided. Please provide it."

[37] In the intervening period on the same day, between the emails of 3:20 p.m. and 3:57 p.m. discussed in the previous paragraph, there is a separate email exchange between counsel which continues the other email thread regarding withdrawal of the response to family claim (subject line: Re: Consent order to withdraw pleadings filed in error). Given the issues before me, I will set out the exchange in full. On November 15, 2022 at 3:50 p.m., plaintiff's counsel writes:

We wish to make it clear - before we execute the Final Order on Ms. Klassen's behalf - that the Amended Counterclaim and Response to Family Claim cannot form part of the within proceedings, with or with [sic] your consent to withdrawal, for the reasons previously mentioned.

We will assume unless advised otherwise that you had advised Mr. Epp of this before you executed the Final Order on his behalf. As per our correspondence below, and elsewhere, you had acknowledged that the Amended pleadings were filed in error, not part of the within proceedings and should be withdrawn, before you executed the Final Order on his behalf.

In the interests of fairness, and to make the record clear, we will allow the deadline to Friday [November 18, 2022] to continue in order for Mr. Epp to agree on this basis.

If there is no response, we will file the Final Order and the Notice of Withdrawal provided in our earlier email, with this understanding. And bring this communication to the courts [sic] attention, should there be any claimed "misunderstanding" in the future.

[Italics in original, underlining added.]

[38] Defendant's counsel responds four minutes later, at 3:54 p.m., as follows:

No, that is not part of the deal.

You made allegations in your Response to Family Claim and Counterclaim which included allegations of an apparent sexual battery. There will be no further litigation between these parties.

This offer, which has been accepted, included those claims. We will seek instructions to sue on this agreement if you attempt to set it aside.

[Emphasis added.]

[39] Plaintiff's counsel did not respond to the email from defendant's counsel setting out the defendant's position about the scope of the parties' settlement. Nor, in fact, does there appear to have been any further substantive communication between counsel in respect of these issues.

[40] Instead, on November 16, 2022, plaintiff's counsel filed a notice of withdrawal (dated November 15, 2022), withdrawing the whole of the plaintiff's response to family claim filed September 16, 2020 and the counterclaim filed September 23, 2020. As is permitted by R. 4-5(3) of the SCFR, the plaintiff filed the notice of withdrawal herself, without the need for the defendant's consent. The amended counterclaim and amended response to family claim

were not withdrawn. At 4:55 pm on November 16, 2022, plaintiff's counsel sent defendant's counsel the filed notice of withdrawal, together with a copy of the Final Order he had executed on behalf of the plaintiff, by replying to the thread relating to the settlement offer (subject line: Re: Epp v Klassen). The email does not reference counsel's exchanges the previous day pursuant to a different email thread regarding the scope of the settlement.

- [41] Based on my review of the court file, on November 17, 2022, defendant's counsel submitted a requisition, attaching the form of Final Order signed by both counsel, and asking the Court to grant the Final Order as a desk order. The requisition states the case is an "undefended family law case" (presumably in reliance on the filed notice of withdrawal); it was supported by the defendant's affidavit for a desk order divorce. On November 22, 2022, the Court granted the Final Order; it was entered December 1, 2022.
- [42] It is common ground that Justice Hardwick did not render a decision on the plaintiff's application to amend her counterclaim. Although not expressly addressed before me, I assume this is because the terms of the Final Order were designed to and did bring the family law proceedings to conclusion, rendering the need for a decision moot.

The plaintiff's civil action and the present application

- [43] On January 10, 2024, the plaintiff filed a notice of civil claim against the defendant in the Victoria Registry seeking tort damages and past and future costs of health care as a result of injuries alleged to arise from the defendant's sexual assault of the plaintiff in November 2018. The statement of facts in Part 1 of the notice of civil claim focuses exclusively on the alleged sexual assault in November 2018 and states the defendant was convicted criminally of that assault in or around December 2023. There is no reference to other allegations of sexual misconduct by the defendant against the plaintiff. Part 1 of the notice of civil claim acknowledges the parties are former spouses, but does not reference the family law proceedings or the Final Order.
- [44] On January 19, 2024, the defendant filed his response to civil claim. The defendant's response does not engage substantively with the allegations in the notice of civil claim, other than blanket denials in Part 1, Division 1. Instead, the response takes the position that the plaintiff advanced "the same or similar allegations" in the family law proceedings. It quotes paragraphs from the plaintiff's amended counterclaim where she sought reapportionment of family property based on the sexual assault, as well as orders for general, aggravated and punitive damages for sexual and emotional violence during the marriage and in particular on November 18, 2018. The response references the term of the Final Order which dismissed the claims and counterclaims "of the within proceeding as if adjudicated on their merits." The legal basis of the response seeks dismissal of the plaintiff's claims on the basis of res judicata and abuse of process.

- [45] On January 22, 2024, the defendant served a notice to admit on the plaintiff, asking the plaintiff to admit the facts in the civil claim "are the same or similar to" the facts in the family law proceeding, and attaching the August 10, 2020 notice of family claim, the September 16, 2020 response to family claim and the September 23, 2020 counterclaim.
- [46] On February 1, 2024, the plaintiff responded to the notice to admit, stating that it is "Admitted with qualification". The plaintiff's qualification states that her amended counterclaim included an additional claim based on the "tort of family violence", which while based on similar facts, "was a separate issue that was never resolved by the parties' settlement" of the family law proceedings. In support of her position, the plaintiff references her "unresolved application to amend her counterclaim", the defendant's examination for discovery, the lack of reference to the "separate tort" or the November 2018 sexual assault in the plaintiff's settlement offer, and the correspondence before and after the defendant's acceptance of that offer.
- [47] On April 19, 2024, the defendant filed the present application to strike the plaintiff's claim as res judicata and an abuse of process, given the settlement of the family law proceedings pursuant to the Final Order. The application acknowledges that the plaintiff "appears to be adopting the position that the amended counterclaim is a nullity given it was filed in the face of a notice of trial", but asserts the counterclaim was nonetheless filed and added allegations now sought to be addressed in the civil claim (Part 2, para. 10).
- [48] The plaintiff filed her application response on April 26, 2024. In the response, the plaintiff asserts, among other things, the defendant accepted the settlement offer in the family law proceedings after acknowledging the amended counterclaim was "filed inadvertently and ineffectual" and the defendant knew or should have known the settlement did not waive or release him from the plaintiff's tort claims. The legal basis of the response advances three grounds on which the plaintiff opposes the application to strike: first, based on contractual principles, the settlement offer did not include the plaintiff's tort claims; second, the tort claims are not res judicata; and third, the interests of justice favour allowing tort actions for damages resulting from family violence to be pursued separately.
- [49] The application was originally scheduled to be heard in June 2024 and counsel exchanged written submissions in preparation for it; unfortunately, the hearing did not proceed. The parties reset the application to the assize week of February 18, 2025. I heard the application February 20, 2025; counsel for the plaintiff appeared in person and, with permission, counsel for the defendant appeared remotely via MS Teams. At the start of the hearing, counsel for the plaintiff handed me a physical copy of the defendant's written submissions, dated February 20, 2025. At the start of his submissions, plaintiff's counsel provided his own written submissions, which were dated June 18, 2024.
- [50] Following the lunch break, and before continuing his submissions, plaintiff's counsel advised me he had not reviewed the defendant's written submissions until the lunch break (despite having handed them to the Court that morning) and as a result, had not realized

they were different from those previously provided to him in June 2024. In particular, he asserted he had been "ambushed" by the defendant's arguments about the effect of R. 21-5 of the SCFR in relation to the amended counterclaim. Rule 21-5 addresses non-compliance with the SCFR and whether a failure to comply is treated as a "nullity" or an "irregularity". Defendant's counsel explained those arguments were in reply to the plaintiff's position that the amended counterclaim was a nullity (as set out in her response and her previous written submissions). Despite this, plaintiff's counsel insisted the arguments were improper as they ought to have been included in the defendant's notice of application. Plaintiff's counsel proposed an adjournment; defendant's counsel objected. To avoid wasting further court time, I ordered the parties to provide a maximum of five pages of written submissions solely to address legal arguments with respect to R. 21-5. I expressly prohibited the parties from providing additional evidence and set the following deadlines: February 27, 2025 for the plaintiff's submissions and March 6, 2025 for the defendant's submissions. I did not permit the plaintiff a reply.

- [51] On February 27, 2025, plaintiff's counsel provided five, single-spaced pages of written submissions (without room for counsel's signature), together with an affidavit of a legal assistant, filed February 26, 2025. The affidavit attaches emails about, and defendant's counsel's written submissions from, June 2024 and February 2025. The affiant deposes the differences between the two sets of submissions were not raised or otherwise identified. The submission of the February 26, 2025 affidavit is both contrary to my order of February 20, 2025 and unnecessary. There was no dispute defendant's counsel had prepared new written submissions for the hearing before me, some eight months after the parties' last appearance; they were clearly dated that day. I do not accept plaintiff's counsel's assertion that defendant's counsel was obliged to draw any changes from the previous version to his attention. All counsel have an obligation to prepare for court hearings, including by reviewing materials provided in advance. I have not considered the affidavit.
- [52] With respect to plaintiff's counsel's submissions, in my view, they go well beyond the scope of what I permitted in my order of February 20, 2025. Rather than being confined to legal arguments regarding the effect or interpretation of R. 21-5 of the SCFR, the submissions: invite the Court to find the defendant's arguments regarding R. 21-5 are an abuse of process; expand on contractual arguments already advanced during the hearing, including suggesting the Court "set aside" the parties' settlement (and arguably therefore the Final Order) in a different proceeding if the requisite consensus ad idem is found lacking; and repeat arguments that the plaintiff's tort claims were neither included nor concluded as part of the family law proceedings. As a result, I have only considered those portions of the plaintiff's further written submissions that directly address the application of R. 21-5 of the SCFR to the amended counterclaim.

- [53] Defendant's counsel provided one-and-a-half pages of written submissions on the morning of March 4, 2025. Defendant's counsel submitted the plaintiff's further submissions went beyond the scope of my order and the affidavit was contrary to that order. Defendant's counsel limited his submissions to the effect of R. 21-5 of the SCFR. I have considered his submissions.
- [54] On the afternoon of March 4, 2025, plaintiff's counsel sent a further, five-page letter to Supreme Court Scheduling, asking that it be brought to my attention. Although I had not given permission for further communications or submissions, the subject line of the letter suggested it was addressing an error or omission. As a result, I agreed to review it and I have. The letter begins by defending plaintiff's counsel's submission of the additional February 26, 2025 affidavit. I do not consider those comments appropriate to provide to the Court, and I have already addressed the impropriety of that affidavit above. The letter also attempts to clarify an alleged "error" or "omission" about whether plaintiff's counsel had requested a specific document be included in the application record (it was not ultimately included). Seemingly to explain the rationale for writing, the letter provides lengthy submissions respecting the Rules and the Code of Professional Code, as well as excerpts of counsel's behind the scenes exchanges. The offered clarification is not material to the issues before me, particularly as plaintiff's counsel reproduced the salient points from the document in question in his written submissions. I have not considered those portions of the letter either. In future, I encourage plaintiff's counsel to reflect carefully on what constitutes a necessary communication to the Court.

Analysis

- [55] At the outset of my analysis, it is important to clarify that the defendant's application to strike does not call on the Court to determine the veracity of the plaintiff's allegations of sexual assault or intimate partner violence, nor to make credibility findings about who is telling the truth. The plaintiff's written submissions set out the factual basis for the allegations and their impacts in significant detail. During the hearing, plaintiff's counsel expressed his view that it would be important for the Court to understand how meritorious the plaintiff's claims are. I do not wish to be insensitive to what are understandably difficult issues. However, the question before me is not whether the plaintiff's claims might have merit. The defendant did not advance this application on grounds that the plaintiff's civil claim lacks merit. Rather, he applies to strike the claim on the basis that the issues regarding the alleged November 2018 sexual assault, which the plaintiff now seeks to litigate in this civil action, either were already addressed and settled in the family law proceedings, or could and should have been brought forward in those proceedings.

The applicable legal framework

- [56] There is no dispute regarding the legal principles that govern an application under R. 9-5(1)(d) of the Rules or the doctrines of res judicata and abuse of process. Rule 9-5(1)(d) reads:

Rule 9-5 - Striking Pleadings

- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

[]

- (d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[57] On an application under R. 9-5(1)(d) (unlike under R. 9-5(1)(a)), evidence is permitted because the application is contextually driven and context must be provided to establish the required findings. For applications based on *res judicata*, this requires findings regarding matters outside the current litigation: *Krist v. British Columbia*, 2017 BCCA 78 at paras. 24-26.

[58] Both parties addressed Justice Douglas' decision in *McCann v. Barends*, 2023 BCSC 2000. In that case, the Court was similarly asked to determine if a civil claim for damages arising from alleged violence during the parties' relationship should be struck as an abuse of process because it was relitigating issues previously raised in the family law proceedings. Douglas J. concisely summarized the applicable principles as follows:

[29] Abuse of process is a broad and flexible doctrine, grounded not only in R. 9-5(1)(d) but also in the court's inherent jurisdiction to prevent abuses of the court's process; it allows the court to strike a claim where to do otherwise would violate principles of judicial economy, consistency, finality, and the integrity of the administration of justice: *Krist* at para. 52; *First Majestic Silver Corp. v. Davila Santos*, 2012 BCCA 5 at para. 22.

[30] Claims that are *res judicata* are encompassed by the concept of abuse of process and may be properly struck pursuant to R. 9-5(1)(d): *Boyd v. Cook*, 2016 BCCA 424 at para. 16, citing *Chapman v. Canada (Minister of Indian and Northern Affairs)*, 2003 BCCA 665 at para. 14. The doctrine of *res judicata* has two aspects: cause of action estoppel and issue estoppel: *Erschbamer v. Wallster*, 2013 BCCA 76 at para. 12.

[31] Cause of action estoppel bars proceedings that allege the same cause of action between the same parties, if that cause has been determined by the courts. It also bars subsequent proceedings covering the same subject matter and arising out of the same relationship between the parties, even if the second litigation is based on a different legal description or conception of the case: *Chancery Estate Holdings Corp. v. Sahara Real Estate Investment Inc.*, 2011 BCSC 1067 at para. 85, *aff'd Chancery Estate Holdings Corp. v. Jetha*, 2013 BCCA 145 [Chancery Estate], citing *Royal Bank of Canada v. United Used Auto & Truck Parts Ltd. et al.*, 2006 BCSC 1192, *aff'd Mott v. United Used Auto & Truck Parts Ltd. (Trustee of)*, 2007 BCCA 111 at para. 38.

[32] In *Re Cliffs Over Maple Bay Investments Ltd.*, 2011 BCCA 180 at para. 13 [Cliffs], Justice Newbury cited with approval the following statement of the law from *Henderson v. Henderson* (1843), 3 Hare 100 at 114-115, [1843-60] All 67 E.R. 378 (Ch.):

In trying this question, I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[Emphasis in original.]

[59] The following criteria are necessary to establish cause of action estoppel:

- there must be a final decision of a court of competent jurisdiction in the prior action [the requirement of "finality"];
- the parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action [the requirement of "mutuality"];
- the cause of action and the prior action must not be separate and distinct; and
- the basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

See *McCann* at para. 33, citing *Re Cliffs Over Maple Bay Investments Ltd.*, 2011 BCCA 180 [Re Cliffs] at para. 28.

[60] As explained in *Re Cliffs*, "[i]n this context, 'cause of action' does not refer to the name or classification given to the wrong or remedy, but to a factual situation which entitles one to a remedy" (at para. 28, citations omitted, emphasis added).

[61] In contrast to cause of action estoppel, which may operate even where the cause of action was not directly raised, issue estoppel may bar subsequent proceedings or claims between parties (or their privies) in relation to a particular issue or question that was "distinctly put in issue and directly determined" by a court: *Re Cliffs* at paras. 10, 31. The three pre-conditions to the operation of issue estoppel, as set out at para. 25 of *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, can be summarized as follows:

- a) The same question has been decided in earlier proceedings;

- b) The earlier judicial decision was final; and
 - c) The parties to that decision or their privies are the same in both proceedings.
- [62] When assessing if the "same question" has been decided, the Court must consider if the question said to give rise to the estoppel is "fundamental" to the earlier proceeding; in other words, the estoppel "extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings": Danyluk at para. 24, see also para. 54. Questions that arose "collaterally or incidentally" in the earlier proceeding, or that must be "inferred by argument" are not sufficient: McCann at para. 35; Danyluk at para. 24.
- [63] However, the rules governing issue estoppel are not to be applied mechanically and even where the pre-conditions are met, the Court retains discretion to determine if estoppel ought to be applied: Danyluk at para. 33. The Court must bear in mind the underlying public policy purpose, which is to balance, on the one hand, the public interest in the finality of litigation and in protecting an individual from being "twice vexed", with, on the other hand, the public interest in ensuring justice is done on the facts of a particular case and the private interests of litigants in having their cases decided on the merits: *Re Cliffs* at paras. 25-26; see also Danyluk at para. 33.
- [64] The doctrine of res judicata also applies to consent orders: *Chancery Estate Holdings Corp. v. Sahara Real Estate Investment Inc.*, 2011 BCSC 1067 at para. 88 [Chancery Estate], *aff'd* *Chancery Estate Holdings Corp. v. Jetha*, 2013 BCCA 145, leave to appeal to SCC *ref'd*, [2013] S.C.C.A. No. 237, citing *Spender (Guardian of) v. Spender*, [1999] B.C.J. No. 910 at paras. 18-22, 1999 CanLII 6548 (S.C.). As Douglas J. stated in McCann:
- [38] In determining whether res judicata applies in the context of a consent order, the court can and must look to the pleadings, to any written agreements or releases executed by the parties, and to any correspondence, in order to ascertain the precise shared intention of the parties that has been given judicial effect by the consent order: *Spender* at para. 20. Where the court's inquiry into the parties' intention reveals an agreement to compromise all possible claims between the parties, the consent order gives rise to cause of action estoppel: *Spender* at para. 22.
- [65] In addition to the specific categories of res judicata, the more flexible doctrine of abuse of process may be applied to bar an action that is an attempt to relitigate a claim that has already been determined, by allowing the Court to prevent the use of its processes in a manner that would bring the administration of justice into disrepute: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paras. 35, 37.

The parties' positions

- [66] The parties provided extensive oral and written submissions, which I will not recite in detail. In my view, their positions can fairly be summarized as follows.

- [67] The defendant says the material facts regarding the alleged November 2018 sexual assault and its impacts on the plaintiff were squarely raised in the family law proceedings. Those issues were raised in the plaintiff's original counterclaim through her express reference to the RCMP investigation into an assault and her claim for reapportionment of family property on grounds of "mental and physical cruelty". The defendant says while those claims were pleaded broadly, that is not unusual in family law, which allows litigants to plead claims broadly so they need not fear they have missed something. The defendant says the plaintiff's claims were then further particularized and clarified through the amended counterclaim which the plaintiff did file, even if in error.
- [68] The defendant says the centrality of the alleged November 2018 sexual assault to the family law proceedings is apparent from both the plaintiff's approach to the family law proceedings and the evidence she marshalled in support of her claims. In this regard, the defendant points, among other things, to the following:
- a) Document production: the plaintiff requested the defendant to produce text messages between the parties from January 2018 to present (at the time, August 2022) and voluntarily produced her treatment and counselling records, all of which addressed the factual circumstances and impact of the alleged sexual assault. The defendant says those records were only required to be produced if they could be used to prove or disprove a material fact in issue.
 - b) Expert evidence: the plaintiff not only obtained but provided an expert independent medical examination report from a registered psychologist who was specifically asked to opine on the impact of the alleged November 2018 sexual assault on the plaintiff, including in terms of her daily activities, capacity to work and future treatment / prognosis.
 - c) Discoveries: both parties were asked detailed questions on discovery about the alleged November 2018 sexual assault and its impacts; plaintiff's counsel stated his position on the record that if the plaintiff was asked those questions, that represented acknowledgment that those issues were relevant in the litigation.
 - d) Procedural steps: the plaintiff sought consent and then applied to amend her counterclaim to more specifically articulate her claim for damages arising from the alleged sexual assault; in support of her application, the plaintiff swore an affidavit on October 19, 2022 in which she admitted there was "significant overlap" between her family law claims and her tort claims and she wanted to address all claims together in order to reduce both legal expenses and trauma; the plaintiff repeatedly sought to adduce evidence about the defendant's criminal law proceedings and applied to adjourn the trial until after the anticipated conclusion of the criminal law proceedings on the basis the outcome would bear on the family law claim; and the plaintiff squarely raised the impacts of the alleged November 2018 sexual assault as an issue in her trial brief.

- [69] The defendant says further that, while it was not filed in compliance with the SCFR, the amended counterclaim was in fact filed, and pursuant to R. 21-5(2) of the SCFR, its filing is to be treated as an irregularity, not a nullity. As it was never withdrawn, its claims were dismissed as if adjudicated on their merits under the Final Order. In any event, even if the amended counterclaim was a nullity, the defendant says the original counterclaim and the plaintiff's evidence and litigation strategy all demonstrate the November 2018 sexual assault was distinctly put in issue in the family law proceedings.
- [70] The defendant resists any suggestion the plaintiff's claims were excluded from the parties' settlement noting the plaintiff expressly sought to leverage those claims in her November 9, 2022 letter and settlement proposal (arguing she would be entitled to "considerably more" based on his conduct). It was in this context - which clearly contemplated the financial and other impacts of the alleged November 2018 sexual assault - that the plaintiff's offer included a term proposing to dismiss "all claims and counterclaims" as if adjudicated on their merits. The defendant says the settlement offer was not modified before his acceptance. Further, when plaintiff's counsel attempted to retract the tort claims from the scope of the settlement after his acceptance, the defendant made his position clear. He says if the plaintiff did not agree with his articulation of what was being settled, it was open to her not to endorse the form of Final Order. Instead, she chose to endorse it.
- [71] The defendant cited a number of older authorities from other jurisdictions in which those courts held civil claims for alleged abuse during the parties' relationship brought after the resolution of family claims were barred by res judicata. At the hearing, the defendant acknowledged the law has evolved to permit a party to pursue a subsequent civil claim when they lack the wherewithal to raise issues of alleged abuse as part of their family law proceeding. However, the defendant says that principle has no application to this case. Here, the plaintiff directly and repeatedly raised the issue of the alleged sexual assault and its impacts through her pleadings, expert and affidavit evidence, and her approach to litigation. He says where the factual allegations and resulting losses were so directly raised in the previous proceedings, the whole of which was determined through the Final Order, the plaintiff should not be permitted to relitigate those issues in this proceeding.
- [72] The plaintiff says the defendant's application to strike misapprehends both the law and the applicable facts, and this is not a case where the Court should bar the civil claim based on the doctrines of res judicata or abuse of process.
- [73] With respect to the law, the plaintiff says the jurisprudence has evolved to recognize important public policy and interests of justice reasons to allow victims of family violence to pursue tort claims either as part of or separate from previous family law proceedings. She says McCann and the decisions in Ahluwalia v. Ahluwalia, 2022 ONSC 1303, rev'd in part 2023 ONCA 476, leave to appeal to SCC granted, [2023] S.C.C.A. No. 529, both support the need to take a broader, more flexible approach to claims by victims of family violence. She says McCann in particular establishes that a litigant who raises allegations of sexual violence and physical abuse in family law proceedings is not necessarily precluded from bringing a

separate tort claim for damages, particularly if those claims were not addressed and resolved in the family proceedings. While plaintiff's counsel readily conceded during the hearing that the plaintiff's civil damages claim overlaps with the previous family law claim, he maintained the two were sufficiently distinct that the plaintiff should be allowed to pursue her civil action.

- [74] On the factual side, the plaintiff says the defendant knew or should have known: first, that the plaintiff never intended to release the defendant from her tort damages claim; and second, that the amended counterclaim (and its specifically articulated tort claim) could not have formed part of the "claims or counterclaims of the within proceeding" that were dismissed under the Final Order.
- [75] In this regard, the plaintiff says her November 9, 2022 settlement offer was confined to offers to settle her property division and spousal support claims. Relying on principles of contractual interpretation, the plaintiff says that because there was no mention of the separate tort claim in the settlement offer (unlike in a previous offer she made), it is clear it was not included. The plaintiff also says the defendant actively sought to prevent her inclusion of the tort claim in the family law proceedings, and prior to his acceptance of the settlement offer, had acknowledged on multiple occasions (including in his trial brief) that the amended counterclaim had been filed in error. She argues it is a nullity, not an irregularity. On that basis, the plaintiff says her tort claim was not part of the "within proceedings" that were dismissed, and, given her counsel's clarification, it is inconsistent for the defendant to argue otherwise. Accordingly, since her specific claim for tort damages was not "decided" in the family law proceedings, the plaintiff says the doctrine of res judicata does not apply.

Discussion

- [76] There is no question the parties to this civil claim are identical to those in the family law proceedings. There is also no question the Final Order constitutes a final decision of the Court in the family law proceedings, regardless of having been made by consent. The questions are first, the extent to which the alleged November 2018 sexual assault and its impacts were or could have been raised in the family law proceedings, and second, whether they were decided or resolved by the Final Order.
- [77] With respect to the first question, my review of the litigation and procedural history of the family law proceedings above demonstrates that the subject matter of the current civil claim - namely, the alleged November 2018 sexual assault - was clearly "put in issue" in the prior proceedings. In my view, it is not credible to suggest otherwise.
- [78] The alleged sexual assault and its impacts were directly referenced in both the original and amended counterclaim. Documents addressing the alleged sexual assault and its impacts, including treatment and counselling records and text communications, were produced and demanded as part of document disclosure. Both parties were discovered in respect of issues

concerning the alleged sexual assault, with plaintiff's counsel taking the position those questions demonstrated the relevance of those facts to the family law proceeding. The plaintiff conceded she obtained the expert report of Dr. Klubben to support her tort claims as well as her claim for spousal support; the central focus of that report was the alleged November 2018 sexual assault and its monetary and other impacts. The plaintiff took multiple procedural steps that demonstrated the centrality of the alleged sexual assault to her theory of her family law claims. I agree with the defendant that it is difficult to understand the impetus for taking all of these steps if the issue of the alleged November 2018 sexual assault was not going to be squarely addressed in a trial of the family law claims had the trial proceeded.

- [79] Given what appeared to be an attempt by the plaintiff to distinguish her family law claims regarding the alleged sexual assault from her tort claims for the same incident, it bears repeating that cause of action estoppel is not concerned with the specific classification or name of the claim that is sought to be pursued, but rather with whether the factual circumstances that give rise to a remedy were raised in the prior proceeding. I find the factual circumstances of the alleged November 2018 sexual assault were clearly raised, in a central and substantive way, in the parties' family law proceedings.
- [80] In my view, the McCann case is clearly distinguishable. In McCann, the alleged sexual and physical violence were not included in any of the family law pleadings. The factual circumstances of the alleged violence were only raised in a notice of application and two affidavits filed by Ms. McCann seeking interlocutory relief in the form of a protection order and an order for exclusive possession of the former family residence: McCann at paras. 11-13, 44. The allegations were not raised in any other context in the proceedings or relied on for any other relief. There was no suggestion of document disclosure, expert evidence or discoveries in relation to Ms. McCann's allegations. Viewed in context, the allegations in McCann were truly collateral to the family law proceeding: McCann at para. 46.
- [81] I acknowledge the comments of both the Ontario Superior Court and the Ontario Court of Appeal in the Ahluwalia decisions that recognize the seriousness of intimate partner violence and the need to ensure the legal system does not create systemic barriers for those who seek redress for harms they have suffered. But the issue in Ahluwalia was not whether the respondent mother could pursue her claim for damages separate from the family law proceeding. Rather the question was whether, within the family law proceeding, the Court should recognize a new tort of family violence. The lower Court created a new tort, finding the existing torts inadequate. The Ontario Court of Appeal disagreed, overturning the trial judge's decision to create a new tort and finding that existing torts, properly applied, were sufficient to address the harms suffered. The Supreme Court of Canada granted leave to appeal, and the appeal was argued on February 12, 2025. At the time of this judgment, the decision remains under reserve.

- [82] In Ahluwalia, the focus was on how to address damages for family violence within the context of the family law proceeding, not whether separate proceedings were required or in what circumstances they may be permissible. I also accept, as acknowledged in McCann, that there may be many reasons why claims of spousal violence are not raised or pursued at the same time as family law proceedings, including concerns about aggravating already difficult situations and lack of awareness of the option to advance a claim: McCann at para. 62, citing *Costantini v. Costantini*, 2013 ONSC 1626 at paras. 21-22. Again, that is not the question before me. I have found the alleged November 2018 sexual assault was directly raised in the parties' family law proceedings. The question is, where the factual circumstances of an alleged sexual assault were squarely raised in family law proceedings, can those same factual circumstances then form the basis of a subsequent civil action for damages? This brings me to the second question, namely, whether the plaintiff's claims regarding the alleged sexual assault were decided by the Final Order.
- [83] The plaintiff submits, based on contractual principles, that her November 9, 2022 settlement proposal was only in relation to property division and spousal support. On the face of the proposal itself, I cannot agree. While it is true the November 9, 2022 settlement proposal contained headings and terms respecting property division and spousal support, it also contained a "general" section which included terms respecting "all other claims and counterclaims" and "costs". This is common practice in contracts and settlement proposals, and it is inaccurate to suggest those terms were not part of the settlement proposal.
- [84] The plaintiff also submits that because she made a previous settlement offer specifically referencing the lower court decision in Ahluwalia (and presumably the tort claims arising from the alleged sexual assault), the absence of that reference in the November 9, 2022 settlement proposal demonstrates a clear intention to exclude those claims from the latter offer. The text of the plaintiff's previous offer was not before me; rather, the plaintiff's affidavit sworn October 19, 2022 in the family law proceeding attached emails between counsel that briefly referred to the previous offer, including its mention of Ahluwalia. The defendant takes a different view of this context. He says the specific reference to Ahluwalia in the previous offer and tort claims for alleged family violence demonstrates the parties' settlement discussions were about settling all claims between them. He says that intention is captured by the general term of what became the Final Order, which dismisses "all claims and counterclaims as if adjudicated on their merits."
- [85] I accept the defendant's position. When the plaintiff made her settlement offer in November 2022, all indications leading up to that point supported the plaintiff's intention to advance a claim for compensation arising from the alleged November 2018 sexual assault as part of the family law proceedings. Plaintiff's counsel specifically addressed the impacts of the alleged sexual assault on the plaintiff in correspondence as early as June 29, 2022, stating in an email to defendant's counsel: "Ms. Klassen has understandably been traumatized by your client's violent offence against her, and also by having to relive it through these recent criminal and family law proceedings." As set out above, she had gathered expert evidence,

sworn affidavits, produced and demanded documentary disclosure, conducted discoveries and been discovered, and applied to adjourn the trial and amend her pleadings, all in relation to the alleged sexual assault. In light of this specific factual matrix, I find the general term releasing "all claims and counterclaims of the within proceeding" was intended to capture all claims sought to be advanced by either side as part of the family law proceedings.

- [86] In my view, given the history of the litigation and the settlement discussions to that point, if the plaintiff's intention was to exclude her tort claim regarding the alleged November 2018 sexual assault from her settlement offer, it was incumbent on her to make that express. I do not accept that plaintiff's counsel's statements that the amended counterclaim was "ineffectual" and should be withdrawn, which were made after the settlement offer was provided and without any reference to the settlement offer, somehow amount to a modification or clarification of the scope of the settlement. It was open to plaintiff's counsel to draw the connection between what appeared to be a housekeeping request to tidy up the pleadings and the live settlement offer. He did not do so.
- [87] The plaintiff also submits, relying on McCann, that as there is no express mention of the "tort claims" arising from the alleged November 2018 sexual assault in the November 9, 2022 settlement proposal or in the Final Order, those claims were not included. In McCann, the family law proceedings were resolved after a mediation, and the resulting minutes of settlement were incorporated into a consent order. Justice Douglas noted that the family violence allegations were not specifically referenced in any of the "closing documents" (the minutes, the consent order or its final release term), nor in the pleadings, despite the involvement of legal counsel: McCann at paras. 41-43, 45. However, as set out above, in the present case, the factual context that preceded the plaintiff's settlement proposal and the Final Order was very different, and that necessarily informs the scope of what was determined between the parties. McCann does not assist the plaintiff in this regard.
- [88] I turn next to the parties' arguments about whether the amended counterclaim is a nullity or an irregularity. The relevant provision is R. 21-5 of the SCFR:

If party does not comply with the rules

- (1) If a party does not comply with these Supreme Court Family Rules, the court may do one or more of the following:
 - (a) if the party who has not complied is a claimant or a respondent who has brought a counterclaim,
 - (i) strike out the notice of family claim, counterclaim or petition, and
 - (ii) grant judgment dismissing the claims made in the notice of family claim, counterclaim or petition;

- (b) if the party who has not complied is a respondent or a respondent to counterclaim, strike out the response to family claim, response to counterclaim or response to petition;
- (c) set aside a step taken;
- (d) make an order for costs against the party;
- (e) make any other order it considers will further the object of these Supreme Court Family Rules.

Non-compliance with rules

- (2) Unless the court otherwise orders, a failure to comply with these Supreme Court Family Rules must be treated as an irregularity and does not nullify

- (a) a family law case,
- (b) a step taken in the family law case, or
- (c) any document or order made in the family law case.

[89] As the defendant noted during the hearing, the jurisprudence does not appear to address the present situation, where a party who failed to comply with the applicable rules in filing a document subsequently argues its own document is a nullity. Rather, the caselaw, in both the civil and family contexts, deals with situations where the innocent party who receives a non-compliant document applies to the Court to set it aside or find it invalid, and the non-compliant party seeks to uphold it. In the present case, there is no dispute the amended counterclaim was filed before leave to amend it had been granted and in the absence of the defendant's consent, contrary to R. 8-1(1)(b) of the SCFR. In her further written submissions, the plaintiff suggests (at para. 14) it was incumbent on the defendant to apply to have the amended counterclaim declared an irregularity rather than a nullity.

[90] There is caselaw in the civil context under R. 22-7 of the Rules (and its predecessors) which finds a document that is presumed to be irregular is not a nullity until the Court so orders and the onus rests on the party seeking to set the document aside as a nullity to bring that application: *Saric v. Toronto Dominion Bank*, 2000 BCSC 899 at para. 10 (dealing with a reply filed well out of time). *Saric* was distinguished by Master Joyce in *Lanci v. Marpole Transport Ltd.*, 2000 BCSC 1227, which concerned a jury notice filed outside the applicable time limits. In *Lanci*, Master Joyce held that, in his case, the "just result" was to place the onus on the party who filed the jury notice out of time (and therefore failed to comply) to apply to the Court to address the problem, finding it would be absurd to place an obligation on the innocent party to set aside the jury notice, when the non-compliant party required leave of the Court to obtain a jury trial after time expired (at paras. 33-34).

[91] *Lanci* in turn relied on earlier civil decisions that concluded where leave or a court order is required and a step is taken without the requisite leave or order being granted, that step is a nullity, rather than an irregularity: *McLean v. Retail Solutions Inc.*, 37 B.C.L.R. (2d) 131, 1989

CanLII 2750 (S.C.) (writ of summons served outside jurisdiction without first obtaining leave); *Skrastins v. City of Kelowna*, [1992] B.C.J. No. 525, 1992 CanLII 1301 (S.C. Chambers) (amended writ of summons purporting to add new defendants absent an application to add parties). In his further written submissions, defendant's counsel cited *Strata Plan NW 3079 v. Chan*, 2010 BCSC 527 (Chambers) [Chan], which concerned a proceeding commenced by the wrong process. At para. 35 of Chan, the Court held, referring to the precursor to the current R. 22-7(3) of the Rules, that "[a]ny proceeding or application to the court that can be fairly said to be an honest attempt to properly claim relief before the court cannot be held to be a nullity, and any error in practice or procedure should be corrected as long as it can be done without injustice" (citations omitted). The defendant says the plaintiff's filing of the amended counterclaim, in the context of the family law proceedings as a whole, was an honest effort to properly claim relief and ought not to be considered a nullity.

- [92] I am conscious, however, that the wording of R. 22-7 of the Rules and its predecessors is not identical to that of R. 21-5 of the SCFR. Counsel did not provide, nor was I able to locate, caselaw addressing an analogous situation in the family law context, where a pleading which could not have been amended absent leave or consent (neither of which existed) was nonetheless filed in the Court Registry. The existing family law jurisprudence primarily involves cases where an incorrect form is filed (e.g. *Pearce v. Napier*, 2023 BCSC 1295) or a notice of family claim was filed in error to commence a proceeding that had already been started by the filing of a separation agreement (e.g. *Halliday v. Halliday*, 2015 BCCA 82).
- [93] Ultimately, it is not necessary for me to decide if the amended counterclaim is a nullity or an irregularity. Even if the amended counterclaim was a nullity, rather than an irregularity (because leave was required), I am satisfied that the issues of the alleged November 2018 sexual assault were sufficiently raised in the original counterclaim and through the evidence and litigation approach of the plaintiff; at worst, the amended counterclaim and the materials filed in support of the application to amend, serve as part of the factual background to the family law proceeding, evidencing the issues the plaintiff considered to be in play.
- [94] Finally, the plaintiff says she is not estopped from bringing the present civil action because there was no final decision from the Court on the "tort of sexual assault" and her tort claims are distinct from her family law claims. With respect, this argument belies too narrow a conception of the doctrines of res judicata and abuse of process. By focusing on the "tort of sexual assault", the plaintiff seeks to parse out the specific "classification" of the wrongs advanced. As noted, in this context, "'cause of action' does not refer to the name or classification given to the wrong or remedy, but to a factual situation which entitles one to a remedy": *Re Cliffs* at para. 28 (citations omitted). Cause of action estoppel bars subsequent proceedings covering the same subject matter and arising out of the same relationship, even if based on a different legal description or conception of the case: *McCann* at para. 31, citing *Chancery Estate* at para. 85 and others. Issue estoppel, while narrower, still "applies to the issues of fact, law, and mixed fact and law that are necessarily bound up with the

determination of that issue in the prior proceeding": McCann at para. 35, citing *Re Cliffs* at para. 32 and *Danyluk* at para. 54.

- [95] The present context is very different from the one at issue in *McCann*. Here, the factual situation regarding the alleged November 2018 sexual assault and its impacts on the plaintiff were central and fundamental elements of the family law proceeding. To the extent the plaintiff says there were additional remedies that flowed from that factual situation, and that were not argued or expressly included, I find they could have been argued, and given the evidence that had been marshalled, likely would have been, had the matter proceeded to trial. The family law proceeding, in its entirety, was decided and disposed of through the Final Order, which dismissed all claims and counterclaims involved in the family law proceeding "as if adjudicated on their merits". This represents a final decision by the Court on those issues.
- [96] Accordingly, I find the plaintiff's civil action is barred by the doctrines of *res judicata* and abuse of process.

Conclusion

- [97] For the above reasons, I allow the defendant's application and grant an order pursuant to R. 9-5(1)(d) of the Rules, striking the plaintiff's notice of civil claim, filed January 10, 2024, in its entirety.
- [98] As the defendant has been successful on this application, he is presumptively entitled to his costs. While the defendant sought special costs in his notice of application, in their written submissions, both parties reserved the right to address costs following my decision on the merits of the application. I also did not receive submissions on special costs, which are required if special costs are sought.
- [99] If either party wishes to make submissions on costs, they may do so in writing by filing a maximum of five pages of submissions, which must meet the following formatting requirements: one-inch margins, 12-point font, lines spaced 1.5 lines apart, and signed by counsel on the final page. The cover page with the style of cause and counsel's names does not count in the five-page limit. The first cost submissions must be filed with the Supreme Court Registry on or before June 30, 2025. Any responding cost submissions must be filed no later than 21 days after the first set of submissions. There will be no right of reply. If the defendant wishes to make cost submissions, he is entitled to file his submissions first. If no further cost submissions are received, the defendant is entitled to his costs at Scale B.

"K. Wolfe J."

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