

CANADA / JUDGMENT

Lungu v. Cabrita

2025 BCCA 435

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 435 Lungu v. Cabrita

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Lungu v. Cabrita,

2025 BCCA 435

Date: 20251201

Docket: CA50246

Between:

Viorica Lungu

Appellant

(Plaintiff)

And

Tanya Cabrita

Respondent

(Defendant)

Before:

The Honourable Madam Justice Fenlon

The Honourable Justice Fleming

The Honourable Justice Warren

On appeal from: An order of the Supreme Court of British Columbia, dated

November 12, 2024 (Lungu v. Cabrita, 2024 BCSC 2059,
Abbotsford Docket S03765).

Oral Reasons for Judgment

The Appellant, appearing in person:

V. Lungu

Counsel for the Respondent:

A.D. Atkinson

A.P.P. Severide

Place and Date of Hearing:

Vancouver, British Columbia

November 19, 2025

Place and Date of Judgment:

Vancouver, British Columbia

December 1, 2025

Summary:

The appellant challenges the summary dismissal of her claims in negligence, battery, and lack of informed consent arising from a medical treatment performed by the respondent doctor. The appellant argues the chambers judge erred in misapprehending parts of the evidence and in making findings of fact, in accepting and relying on the respondent's expert evidence, and in finding the matter suitable for summary determination.

Held: Appeal dismissed. The chambers judge correctly found the appellant could not establish her claims in negligence and lack of informed consent without producing expert evidence. The chambers judge properly determined suitability and her treatment of the evidence, including the respondent's expert evidence and findings of fact do not reflect any error.

FLEMING J.A.:

Introduction

[1] This appeal arises from a medical malpractice action involving a trigger point needling treatment performed by the respondent Tanya Cabrita, a medical doctor specializing in physiatry. The appellant, Viorica Lungu, alleged Dr. Cabrita performed the trigger point needling treatment without her informed consent and pierced and destroyed her bones with the needles, causing disabling and permanent pain.

- [2] Ms. Lungu, who is self-represented, brought claims in negligence, lack of informed consent and battery against Dr. Cabrita. Following a summary trial, the chambers judge dismissed Ms. Lungu's claims in reasons for judgment indexed at 2024 BCSC 2059 (the "Reasons").
- [3] In dismissing the negligence and informed consent claims, the chambers judge accepted the expert opinion evidence of Dr. Heather Finlayson, relied on by Dr. Cabrita. In her report, Dr. Finlayson opined that Dr. Cabrita met the standard of care of a reasonable and competent physiatrist in providing the treatment and post-treatment care. In her view, failing to address the risk of injuring bones by needling was not a breach of the standard, because to the best of her knowledge, the risk did not exist. Dr. Finlayson also opined that Ms. Lungu's post-treatment imaging did not show any signs of needle trauma or other injury that might have been caused by the treatment.
- [4] The chambers judge concluded Ms. Lungu could not establish her negligence and informed consent claims, absent expert evidence of her own to contradict Dr. Finlayson's opinions.
- [5] An unusual feature of this case arises from Ms. Lungu's assertions that she did not know why she was attending an appointment with Dr. Cabrita, and her family doctor had referred her by mistake. On the appeal, Ms. Lungu says she was supposed to be referred to a psychiatrist for an assessment, not a physiatrist. The evidence at the summary trial included her family doctor's referral, which was for physiatry and to Dr. Cabrita at the Canadian Pain and Regenerative Institute ("CPRI"), but the stated reasons for referral are consistent with what Ms. Lungu asserts. She asks this Court to admit fresh evidence that includes a letter from her family doctor that says the referral was made by mistake and she intended to send Ms. Lungu to a psychiatrist for an assessment.
- [6] Along with arguing her evidence supported her claims, Ms. Lungu alleges that the chambers judge made a number of errors. They include misapprehending parts of the evidence, erring in making findings of fact, erring in admitting and accepting Dr. Finlayson's evidence, and erring in finding the case suitable for summary trial.

Background

- [7] Dr. Cabrita performed the trigger point needling treatment during an appointment on May 10, 2021 (the "Treatment").
- [8] The parties disputed what happened at the appointment.
- [9] The record included online intake forms and questionnaires completed about two days before the appointment ("CPRI Intake Forms") that indicated Ms. Lungu had current pain in her neck, headaches caused by neck pain and headaches rated as severe. Although Ms. Lungu denied completing the CPRI Intake Forms, the judge found she did, or at the very least provided the information they included: Reasons at para. 14.

- [10] Dr. Cabrita's evidence was that Ms. Lungu provided her medical history at the beginning of the appointment. After completing a physical examination, Dr. Cabrita diagnosed Ms. Lungu with soft tissue myofascial pain and discussed treatment options including trigger point injections and needling. According to Dr. Cabrita, after Ms. Lungu agreed to undergo trigger point injections, she expressed concern about what was in the syringe. Ms. Lungu then agreed to trigger point needling instead. Dr. Cabrita said she documented Ms. Lungu's verbal agreement to the Treatment in her consultation notes, Ms. Lungu cooperated with her instructions during the Treatment, which did not involve injections, and never asked her to stop: Reasons at para. 24.
- [11] Ms. Lungu denied she was suffering from pain at the time that would require trigger point needling. She also denied that Dr. Cabrita examined her, asked her any questions, or explained trigger point injections, the Treatment or the risks involved. Acknowledging that she followed Dr. Cabrita's instructions and did not tell her to stop during the Treatment, she denied ever verbally consenting and said she felt she could not object or say no.
- [12] Ms. Lungu filed her notice of civil claim on April 14, 2023.
- [13] Well in advance of the summary trial on October 24, 2024, Dr. Cabrita served Ms. Lungu with the report of Dr. Finlayson who is also a psychiatrist.
- [14] Dr. Cabrita's counsel told Ms. Lungu that she needed her own expert report to prove the standard of care and causation elements of her negligence claim. The original hearing date for the summary trial was then adjourned, which provided her with more time.
- [15] Ms. Lungu did not produce an expert report. Along with her own affidavit evidence, she relied on extensive materials including imaging reports and medical records "going back several years" all of which the chambers judge considered. Although Ms. Lungu referred to a plan to obtain an expert report, the chambers judge found the plan was not specific and had no timeline. The Reasons also indicate Ms. Lungu believed she had all the evidence she needed and urged the chambers judge to accept her interpretation of the medical evidence.

Discussion

- [16] I start by recognizing, as the chambers judge did, it is clear Ms. Lungu was confused and upset by her interaction with Dr. Cabrita. I understand she finds the idea that her claims could be dismissed without a trial incomprehensible.
- [17] Most of the errors she alleges involve the chambers judge's understanding of the evidence, findings of fact or exercises of her discretion.
- [18] Required to assess and weigh all of the admissible evidence, the chambers judge was entitled to accept some, none or all the evidence of either party, and the expert opinion evidence of Dr. Finlayson.

- [19] In reviewing a judge's findings of fact, we are not permitted to conduct our own assessment of the evidence or to reweigh it. Instead, we can only intervene if satisfied the chambers judge has made a palpable and overriding error, meaning an obvious error that affected the outcome of the case. The same is true of her understanding of the evidence. Only a misapprehension that goes to the core of the reasoning process will constitute a palpable and overriding error: *Greenway-Brown v. MacKenzie*, 2019 BCCA 137 at para. 19.
- [20] Further, discretionary decisions must be shown considerable deference on appeal. This Court cannot intervene unless we find the chambers judge's exercise of discretion was clearly wrong, in that no weight or insufficient weight was given to relevant considerations, or it appears that the decision itself is clearly wrong and may result in an injustice: *Gichuru v. Pallai*, 2013 BCCA 60 at para. 34; *McGregor v. Van Tilborg*, 2005 BCCA 217 at paras. 21-22.

Suitability for summary determination

- [21] Ms. Lungu submits the chambers judge erred in determining the case was suitable for a summary trial.
- [22] At the summary trial, along with opposing Dr. Cabrita's application to dismiss her claims, Ms. Lungu sought an order to cross-examine Dr. Finlayson, which the chambers judge dismissed.
- [23] Under R. 9-7 of the Supreme Court Civil Rules, B.C. Reg. 168/2009, determining whether a case is suitable for summary trial is discretionary. In exercising that discretion, the court considers two main factors and the circumstances of the application: *Gill v. Gill*, 2022 BCCA 264, at para. 56. Those factors include whether the facts necessary to decide the issues in the case can be found, and whether it would be just to decide the case summarily.
- [24] After reciting the rule and discussing the applicable legal principles, the chambers judge considered both factors and the relevant circumstances, namely the potential barrier to finding the facts necessary posed by conflicts in the evidence, and the potential prejudice to Ms. Lungu.
- [25] The findings and reasons of the chambers judge on this issue include:
- the primary problem with Ms. Lungu's claim was the absence expert evidence to support her claims, because without it a finding of professional negligence could not be made on the facts alleged in the pleadings;
 - Ms. Lungu's failure to obtain expert evidence was not because she was self-represented or had insufficient time;
 - by taking Ms. Lungu's case at its highest and assuming some of the evidence she described but was not in the record, the case could be decided without any unfairness to her;
 - similarly, given the differences in the parties' evidence, she fully accepted Ms. Lungu's version of the communication with Dr. Cabrita regarding informed consent; and

· resolving the conflict in the evidence about what else was said prior to the Treatment was unnecessary, because of the legal requirements for proof of informed consent and Dr. Finlayson's opinion evidence on the issue of risk.

[26] On this last point, the chambers judge correctly concluded that to succeed in her lack of informed consent claim, the law required Ms. Lungu to show the undisclosed risks she said she was not informed of are material, special or unusual risks of trigger point needling; and they actually materialized and caused damage. Again, the chambers judge accepted Dr. Finlayson's evidence that she was not aware the risk existed and therefore it was not one she would inform her patients of.

[27] I pause at this stage to endorse the chambers judge's conclusion regarding the central problem with Ms. Lungu's claim. The conclusion that Ms. Lungu required expert opinion evidence to establish her medical malpractice claim in negligence is well supported by the case law: *Ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, at paras. 39-41, 1995 CanLII 72.

[28] I can see nothing wrong in the chambers judge's determination of suitability. On the contrary, she carefully addressed the factors and relevant circumstances, with particular sensitivity to the difficulties faced by Ms. Lungu as a self-represented litigant pursuing a medical malpractice action.

[29] To the extent Ms. Lungu also challenges the chambers judge's decision to dismiss her application to cross-examine Dr. Finlayson, again the decision is discretionary, and I do not see it as wrong. The basis for the decision--absent an expert report there was no basis for a productive or useful cross-examination--was justified.

Admissibility and weight of expert evidence

[30] Ms. Lungu argues the chambers judge erred by admitting and relying on Dr. Finlayson's report, in failing to consider Dr. Finlayson's bias towards Dr. Cabrita and her lack of firsthand knowledge of the underlying events. Instead, Ms. Lungu complains, Dr. Finlayson relied on Dr. Cabrita's false account of what happened.

[31] One of four criteria for the admission of expert opinion evidence is it must be offered by a properly qualified expert. Issues of bias or lack of impartiality are considered under this criterion in determining admissibility: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 53.

[32] In her application materials, Ms. Lungu alleged Dr. Finlayson's report should not be accepted because it was "done in solidarity" with Dr. Cabrita. She also referred to an old boys' club, and, before us, a brotherhood amongst doctors.

[33] The chambers judge found Dr. Finlayson was qualified to give expert evidence as a specialist in physical medicine and rehabilitation, also known as physiatry. She did not address Ms. Lungu's allegation of bias expressly.

- [34] However, in my view, the allegation is not capable of establishing bias or partiality.
- [35] I say this because it is clear that being a fellow physiatrist, the foundation of Ms. Lungu's allegation, is not enough. The question is whether Dr. Finlayson had a relationship with or connection to Dr. Cabrita that resulted in her being unable to carry out an expert's primary duty to provide the court with fair, non-partisan and objective assistance: White Burgess at para. 53. Ms. Lungu has not suggested there is any other basis for answering yes.
- [36] Before leaving this issue, I would note that before us, Ms. Lungu also argued she suffered an unfair disadvantage in trying to prove her case without an expert report, suggesting she had been unable to obtain a report because doctors are unwilling to speak against a fellow colleague. Appreciating the difficulty she says she encountered, the reality is that all or virtually all medical malpractice cases involve expert evidence adduced by plaintiffs in support of their claims. Consequently, I am not able to accept that Ms. Lungu was unable to obtain an expert report as a result of bias in the medical profession.
- [37] Ms. Lungu's other allegation that the chambers judge failed to consider the flawed factual foundation for Dr. Finlayson's opinions in accepting them, engages the issue of the weight given to those opinions.
- [38] In preparing her report, Dr. Finlayson reviewed the parties' pleadings, the CPRI records from May 10 to November 4, 2021, which I take to include Dr. Cabrita's clinical records regarding Ms. Lungu, and post-treatment imaging.
- [39] It is well recognized that the weight to be placed on the opinion of the expert may depend on the degree to which their factual assumptions have been proven by other admissible evidence or the reliability of any hearsay, where that hearsay is not proven by other admissible evidence: Mazur v. Lucas, 2010 BCCA 473 at para. 40.
- [40] However, an appeal court will not interfere with a judge's weighing of expert opinion evidence, like fact evidence, absent a palpable and overriding error.
- [41] The chambers judge did not comment specifically on the factual basis for Dr. Finlayson's opinions in accepting them. But, as it relates to the parties' competing version of events, the chambers judge rejected Ms. Lungu's allegations that Dr. Cabrita coerced and forced her to continue being treated after questioning whether she was injecting her with anything, intending to cause injury and permanent damage. The chambers judge found the allegations did not have an air of reality. This finding was open to her. The law permitted the chambers judge to rely on her common sense in assessing and making findings based on the evidence. Further, considered in the context of the record, I would be inclined to interpret the Reasons as implicitly accepting Dr. Cabrita's findings based on physically examining Ms. Lungu, despite her denial of any exam. Dr. Cabrita's findings are consistent with the information contained in the CPRI Intake Forms, which the judge found were completed by Ms. Lungu or with information provided by her. All of this leads me to conclude that Ms. Lungu has not shown the chambers judge made a palpable and overriding error in accepting Dr.

Finlayson's opinions as reliable.

Fresh Evidence

- [42] Ms. Lungu's January 17, 2025 affidavit attaches a letter from her family doctor dated January 6, 2025, that states she referred Ms. Lungu to Dr. Cabrita by mistake, and meant to refer her to a psychiatrist instead.
- [43] The test for adducing new evidence on appeal is well established and includes four criteria: *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775, 1979 CanLII 8.
- [44] Based on the letter, Dr. Cabrita accepts the chambers judge erred in finding that Ms. Lungu was referred to her because of long-standing pain.
- [45] I can understand how, from Ms. Lungu's perspective, the letter supports her appeal. Certainly, it reinforces what the chambers judge accepted was a confusing and stressful experience for her.
- [46] But, in my view, the letter cannot satisfy the last of the four *Palmer* criteria: whether the evidence, if believed could have affected the result at trial. This is because I am not able to accept that the family doctor's mistake in referring Ms. Lungu to Dr. Cabrita would have impacted the chambers judge's conclusion that Ms. Lungu required her own expert evidence to prove negligence (and lack of informed consent). Nor am I persuaded that the family doctor's mistake would have affected the chambers judge's acceptance of Dr. Finlayson's opinions. Ms. Lungu has not suggested Dr. Cabrita ought to have known the referral was in error. But, even if she should have, again there is no expert evidence that could establish proceeding with the Treatment, in light of all of the other findings, would involve a breach of the standard of care.

Battery

- [47] Ms. Lungu asserts the chambers judge made a palpable and overriding error in finding Dr. Cabrita reasonably believed Ms. Lungu was consenting to the trigger point needling.
- [48] The chambers judge correctly noted that, in the medical context, consent can be oral, written or implied by the patient's words or conduct: *Kemp v. Vancouver Coastal Health Authority Ltd.*, 2017 BCCA 229 at paras. 104-105. Applying this law, the finding of the chambers judge is well supported by Ms. Lungu's own version of events, that is, she did not consent verbally, but she followed Dr. Cabrita's instructions and did not tell her to stop.

Negligence

- [49] Ms. Lungu argues the chambers judge made palpable and overriding errors that involve misapprehending evidence that supported her conclusion Ms. Lungu failed to prove a breach of the standard of care or causation. Ms. Lungu also argues the chambers judge made palpable and overriding errors of fact in finding that Ms. Lungu filled out the intake forms and was referred to Dr. Cabrita because of long-standing pain in her neck and shoulder area.
- [50] Given my conclusion the chambers judge correctly decided Ms. Lungu could not succeed in her negligence claim without expert evidence of her own, in my view, none of these alleged errors, could be overriding, that is affect the outcome of the case. Nonetheless, I will consider them because of their significance to Ms. Lungu's view of her appeal.

Misapprehensions of the evidence

- [51] Ms. Lungu argues, first, that the chambers judge misapprehended the evidence of her past medical history in finding that her "medical history shows a long history of pain in her neck, emanating to the shoulders. Various records refer to this pain as 'chronic': Reasons at para. 66. What her medical records actually demonstrate, Ms. Lungu says, is that she used to suffer from pain arising from multiple car accidents, but it had resolved before 2021.
- [52] The Reasons indicate that, along with making the finding, the chambers judge expressly disagreed with Ms. Lungu's assertion that she had no pain requiring treatment at the time of the appointment, based on her review of Ms. Lungu's extensive materials, which included old medical records and more recent medical reports and results.
- [53] I am not able to conclude the finding was unsupported by any evidence. In addition to pre-treatment medical records, the evidence included the results of Dr. Cabrita's physical assessment of Ms. Lungu--she found Ms. Lungu had restrictions in the range of motion in her neck, tenderness on palpation, taut myofascial bands, and bilateral shoulder girdle dysfunction. Further, Ms. Lungu herself stated, in a letter to the College of Physicians and Surgeons of British Columbia dated March 8, 2022, "[b]ecause of my constant neck pains, my family doctor decided to send me to a specialist, Tanya Cabrita ": Reasons at para. 20.
- [54] I also see no merit in Ms. Lungu's second assertion that the chambers judge erred in failing to find the post-treatment MRI imaging proved the Treatment caused her injury. That imaging appeared to indicate joint osteoarthritis, cartilage loss, tendinopathy, and bursitis. Ms. Lungu maintains this was enough to establish causation, on the theory those conditions were not there before.
- [55] In my view, the chambers judge correctly identified the difficulty of establishing causation without expert evidence, in light of the nature of the injury Ms. Lungu was alleging--damage to bones caused by needling. It is clear that assistance from a medical expert was necessary to make a factual finding based on this allegation. Absent evidence to the contrary, the

chambers judge was entitled to accept Dr. Finlayson's finding that the post-treatment imaging of Ms. Lungu did not show signs of needle trauma or any other injury that could be attributed to the Treatment: at para. 67.

Factual errors

- [56] I turn to the asserted factual error involved in finding Ms. Lungu completed the CPRI Intake Forms (or at the very least provided the information that was inputted into them).
- [57] In making this finding, the chambers judge considered and reviewed all the conflicting evidence on this issue including screenshots of the CPRI Intake Forms, the referral form, and Ms. Lungu's denial and her other evidence that she did not know why she was at the appointment with Dr. Cabrita, her family doctor sent her to the wrong place, was overwhelmed, mixed up her mother's file with hers, and wanted to cancel the appointment, but her receptionist forgot to do so.
- [58] Alive to the factual dispute, it was open to the chambers judge to reject Ms. Lungu's denial and make the finding she did. Appreciating Ms. Lungu also alleged that aspects of the personal information in the CPRI Intake Forms were inaccurate, I am satisfied at least some aspects of the information, including specific personal information, are consistent with other evidence she herself provided. Further, I am not aware of any evidence related to the inference Ms. Lungu says the chambers judge should have drawn--that someone else completed the CPRI Intake Forms without her involvement. In other words, the record supports the chambers judge's implicit conclusion that Ms. Lungu's denial was not plausible.
- [59] Regarding the referral issue, at the hearing of the appeal, Dr. Cabrita conceded the chambers judge made a factual error in finding Ms. Lungu was referred to Dr. Cabrita because of long-standing pain, in light of the letter from her family doctor that forms the basis for her fresh evidence application.
- [60] But even assuming the error is obvious, I am not able to agree with Ms. Lungu that it affected the outcome of the case. My reasons for dismissing the fresh evidence application explain why. Summarizing, again, the factual error points to a mistake made by Ms. Lungu's family doctor, not Dr. Cabrita; and I am not persuaded the error impacted the chambers judge's conclusion Ms. Lungu required her own expert evidence to prove negligence (and lack of informed consent); or her acceptance of Dr. Finlayson's opinions.

Conclusion

- [61] Like the chambers judge, I have sympathy for Ms. Lungu, given the distress she has experienced from her appointment with Dr. Cabrita and the Treatment. Ultimately however, I conclude that Ms. Lungu has not established the chambers judge made any reversible errors.

Disposition

[62] I would dismiss the appeal.

[63] FENLON J.A.: I agree.

[64] WARREN J.A.: I agree.

[65] FENLON J.A.: The appeal is dismissed.

"The Honourable Justice Fleming"

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