

CANADA / JUDGMENT

Lungu v. Cabrita

2025 BCCA 105

COURT

British Columbia Court of Appeal

DECIDED

1 April 2025

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2025 BCCA 105 Lungu v. Cabrita COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Lungu v. Cabrita, 2025 BCCA 105 Date: 20250401 Docket: CA50246 Between: Viorica Lungu Appellant (Plaintiff) And Tanya Cabrita Respondent (Defendant) Before: The Honourable Madam Justice Bennett (In Chambers) 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). The Appellant, appearing in person: V. Lungu Counsel for the Respondent: A.D. Atkinson H.K. Nijjar Place and Date of Hearing: Vancouver, British Columbia March 14, 2025 Place and Date of Judgment: Vancouver, British Columbia April 1, 2025 Summary: The respondent applies for an order that the appellant post security for costs of the appeal in the amount of \$5,000 within 30 days. The underlying appeal is from the dismissal of the appellant's personal injury action against the respondent after a summary trial. The appellant's no fee application was dismissed because her appeal lacked merit. On this application, the appellant claims that she has fresh evidence to support her appeal. Held: Security for costs are ordered, in the amount of \$1,000 and within 60 days. The merit of the appeal is doubtful but it is not clear that it is bound to fail, given the appellant's fresh evidence application. The appellant has very limited financial means and would be unable to pursue the appeal if the value of security that the respondent requested was ordered. However, the respondent is unlikely to be able to recover the costs of the appeal if successful if security is not ordered. Balancing the prejudice to each party, ordering a lower value of security and a longer timeline to raise the funds is appropriate in this case. Reasons for Judgment of the Honourable Madam Justice Bennett:

- [1] The applicant (respondent on appeal), Dr. Cabrita, seeks security for costs of the appeal against the appellant, Ms. Lungu. In particular, Dr. Cabrita seeks the following orders:
- a) An order that Ms. Lungu post security for costs in the amount of \$5,000 within 30 days;
 - b) An order staying Ms. Lungu's appeal until security is posted;
 - c) An order providing that in the event that Ms. Lungu does not post the ordered security within 30 days, Dr. Cabrita is at liberty to apply for an order dismissing Ms. Lungu's appeal as abandoned; and
 - d) An order dispensing with the requirement of Ms. Lungu's signature.

- [2] In the underlying appeal, Ms. Lungu challenges the order of Justice Whately, which was made following a summary trial of Ms. Lungu's tort claim against Dr. Cabrita. Ms. Lungu alleged that she was injured as a result of a trigger point needling treatment that was administered by Dr. Cabrita, which treatment was administered negligently, without informed consent, and in a manner that amounted to battery. Justice Whately granted the respondent's application on the summary trial and dismissed Ms. Lungu's claims, with reasons for judgment indexed as *Lungu v. Cabrita*, 2024 BCSC 2059 [RFJ].

Background

- [3] Dr. Cabrita is a physiatrist. As a result of neck pain, Ms. Lungu was referred to Dr. Cabrita by her family practitioner. At the summary trial, Ms. Lungu claimed that she had not been seeking treatment for neck pain, and that she did not understand why she was receiving trigger point needle treatment. However, Whately J. found that Ms. Lungu's position was inconsistent with the other evidence before her, including: an intake form that appeared to have been prepared by, or with, Ms. Lungu, indicating neck pain; and a letter written by Ms. Lungu, dated after she received treatment from Dr. Cabrita, stating, "Because of my constant neck pains, my family doctor decided to send me to a specialist, Tanya Cabrita": RFJ at paras. 14, 20.
- [4] Ms. Lungu claimed that during the trigger point needling treatment, Dr. Cabrita "pierced her bones with the needles and that this destroyed her bones, destabilized her body, and injured her spinal cord and her ligaments": RFJ at para. 26. Dr. Cabrita asserted that at no point during the treatments did she pierce or touch Ms. Lungu's bones with the needle. Dr. Cabrita tendered an expert report, which Whately J. accepted, opining that there was no way that any of the forms of injury Ms. Lungu alleged could have been caused by the treatment and that Ms. Lungu's medical documentation and scans did not indicate any injury to her bones. The expert, Dr. Finlayson, also confirmed that Dr. Cabrita's treatment of Ms. Lungu met the requisite professional standard of care: it was not a breach of the standard of care for Dr. Cabrita to fail to inform Ms. Lungu of a risk of bone injury, because, to the best of Dr. Finlayson's knowledge, such a risk did not exist: RFJ at para. 58.
- [5] Despite being informed on multiple occasions that she would need to file an expert report in order to substantiate her claims, Ms. Lungu did not do so. Referring to several decisions of the B.C. Supreme Court, Whately J. observed that it is generally the case that where a defendant has adduced expert evidence that the standard of care has been met, and the plaintiff fails to adduce evidence to the contrary, the plaintiff's claim will fail. Without any contradictory expert evidence, Ms. Lungu's own lay interpretation of the medical evidence was insufficient to prove a breach of the standard of care.
- [6] As to the question of informed consent, the judge acknowledged that she could not make a finding as to what was actually said in the lead up to the treatment, given the nature of a summary trial. However, she noted that resolving this question was unnecessary, because to establish a claim for lack of informed consent, Ms. Lungu would need to prove "an

undisclosed material, special, or unusual risk" that "actually materialized and caused [her] damage": RFJ at para. 69, citing *Liu v. Chuo*, 2019 BCSC 109 at para. 81 and *Kooijman v. Bradshaw*, 2016 BCSC 2316 at para. 68. In light of this standard and the fact that she accepted Dr. Finlayson's evidence that she did not consider "the risks of needles piercing bones, or needles causing injury to bones, or permanent pain" to be "material, special, or unusual" risks of which Ms. Lungu ought to have been informed, Whately J. held that Ms. Lungu had not met the burden of proving wrongdoing based on a lack of informed consent: RFJ at paras. 69-76.

- [7] Finally, Whately J. held that Ms. Lungu had not met the burden of proving that Dr. Cabrita's treatment amounted to battery. In the judge's view, taken at its highest, Ms. Lungu's evidence either supported or was consistent with Dr. Cabrita's reasonable belief that Ms. Lungu had consented to the treatment. Accordingly, there was no air of reality to Ms. Lungu's allegation that Dr. Cabrita had "a 'set up intention' to harm her bones": RFJ at paras. 80-81.
- [8] For the foregoing reasons, Whately J. dismissed Ms. Lungu's claim in its entirety.
- [9] Ms. Lungu has appealed to this Court. On January 21, 2025, she was denied an order exempting her from the requirement to pay court fees, on the basis that her appeal, assessed as generously as possible, was without discernable merit: *Lungu v. Cabrita*, 21 January 2025, Vancouver Docket CA50246 (Chambers) [No Fee Reasons]. Justice Riley observed that Ms. Lungu had identified no reviewable error in the judge's decision, and that even if, as Ms. Lungu suggested, the judge erred in her analysis of causation, Ms. Lungu's claim had--more fundamentally--been dismissed because there was no expert evidence that Dr. Cabrita's treatment breached the requisite standard of care: No Fee Reasons at paras. 21-22. Ms. Lungu's claim alleging a lack of informed consent failed because there was no evidence of the treatment posing a "material risk of any of the injuries Ms. Lungu claims to have suffered, nor was there any evidence that those risks actually materialized": No Fee Reasons at para. 23. The battery claim also failed, fundamentally, for a lack of evidence: No Fee Reasons at para. 24.
- [10] Justice Riley noted that at the hearing of the no fee application, Ms. Lungu identified what amounted to two errors on the part of the judge. The first alleged error consisted of the judge's overlooking "the fact that Dr. Cabrita proceeded to administer trigger point injection treatments more or less immediately", without assessing Ms. Lungu's needs or referring her to other specialists: No Fee Reasons at para. 27. Justice Riley observed that the judge made findings contrary to this position, including based on Ms. Lungu's historical medical records and her own evidence and submissions (including the letter in which she stated that she had been referred to Dr. Cabrita because of "constant neck pains"): No Fee Reasons at para. 27. As to the claim that Dr. Cabrita acted wrongfully because she didn't refer Ms. Lungu for other assessments or tests, Riley J.A. stated that he could not "see how the judge erred in failing to consider that point", because the only expert evidence before her was Dr. Cabrita's expert report, which indicated that Dr. Cabrita met the requisite standard of care and that Ms. Lungu was an appropriate candidate for trigger point needling: No Fee Reasons at para.

27.

- [11] At the hearing of the no fee application, Ms. Lungu also submitted that Whately J. erred in relying on Dr. Cabrita's expert report, because the report was biased and merely offered an opinion to support a fellow physician: No Fee Reasons at para. 28. Justice Riley noted that the expert's report contained an acknowledgement that she owed a duty to the Court to present an objective opinion and held that absent "some case-specific reason for questioning the veracity of that statement", the judge could not be held to have erred in relying on the report in deciding the case: No Fee Reasons at para. 28.
- [12] Given that he held that Ms. Lungu's appeal had "no prospect of success", Riley J.A. declined to grant the no fee order: No Fee Reasons at para. 33.
- [13] In Court, during the application before me, Ms. Lungu handed me a signed letter and an unsworn affidavit from her family physician that stated that her assistant had made an error in the referral, and that she had intended on sending Ms. Lungu to a psychiatrist, not a physiatrist, and that she never recommended trigger point treatment. Ms. Lungu has not filed an application to adduce fresh evidence on the appeal, however, I assume that is what she intends to do once the affidavit is sworn. Issue
- [14] As noted above, the issue on this application is whether the following orders ought to be made:
- a) An order that Ms. Lungu post security for costs in the amount of \$5,000 within 30 days;
 - b) An order staying Ms. Lungu's appeal until security is posted;
 - c) An order providing that in the event that Ms. Lungu does not post the ordered security within 30 days, Dr. Cabrita is at liberty to apply for an order dismissing Ms. Lungu's appeal as abandoned; and
 - d) An order dispensing with the requirement of Ms. Lungu's signature on the order. Discussion
- [15] Pursuant to s. 34(1)(a) of the Court of Appeal Act, S.B.C. 2021, c. 6, a single justice may order an appellant to pay into court security for the costs of their appeal. The appellant against whom such an order is sought bears the onus of showing why security for costs should not be ordered: *Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA 285 at para. 9 (Chambers). In other words, it is presumed, in every case, that security for costs should be ordered. To rebut this presumption, the appellant must satisfy the Court that security is not required on the basis of the following factors, set out in *Lu v. Mao*, 2006 BCCA 560 at para. 6 (Chambers):
- a) The appellant's financial situation;
 - b) The merits of the appeal;
 - c) The timeliness of the application; and

- d) Whether the costs will be readily recoverable in the event the appellant is unsuccessful.
- [16] The ultimate question to be considered is the interests of justice: Lu at para. 6.
- [17] The applicant did not file a draft Bill of Costs, which weighs against making the order. Normally, a draft Bill of Costs is filed as part of a security for costs application. The appellant's financial situation
- [18] Ms. Lungu has indicated that she is currently on disability income assistance, and, as indicated by an affidavit sworn in support of Dr. Cabrita's application for security for costs, Ms. Lungu has advised Dr. Cabrita's counsel that she has no money. Appellants, whatever their financial circumstances, should not be deprived of their ability to pursue a meritorious appeal: *Creative Salmon*, at para. 12; *Lindholm v. HY-Wave Inc.* (1997), 89 B.C.A.C. 197 at para. 15 (Chambers). However, where an appellant does not meet the merits threshold, an order requiring security for costs will not create an injustice: *Buchy v. Villars*, 2008 BCCA 237 at para. 15 (Chambers). The merits of the appeal
- [19] Ms. Lungu's notice of appeal simply re-states her claims against Dr. Cabrita and does not identify an error of law or fact that, if established, would permit this Court to interfere with the judge's decision. The errors she did allege in her oral submissions on the no fee application--that the judge erred in overlooking what Ms. Lungu maintains is the fact that Dr. Cabrita began to administer treatment immediately and without consultation or referrals and that the judge erred in accepting the expert report because the report was biased--do not seem to have a foundation in the relevant law or evidence. The standard of review is highly deferential as the issues raise questions of fact (or mixed fact and law) reviewable on a standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 21. Where an evidentiary foundation exists for a judge's conclusion on a question of fact or mixed fact and law, appellate courts should not become involved in an unjustified reweighing of the evidence: *Housen* at para. 22.
- [20] An appeal is not an opportunity to relitigate matters that were settled in the court below, absent a reviewable error.
- [21] I also see no error in the judge's conclusion that, without a contrary expert report, Ms. Lungu could not meet the onus of proving that Dr. Cabrita breached the relevant standard of care: while expert evidence is not always required to assess whether a medical professional has adhered to the standard of care, it is generally necessary to establish negligence in treatment and disclosure of risks: *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674 at para. 40, citing *J.G. Fleming, The Law of Torts* (7th ed, 1987) at 109; see also the authorities cited in the RFJ at para. 62. The judge's statement of the law on this issue appears correct; what remains is the second issue identified by Ms. Lungu, that is, whether the judge erred in relying on the expert report because, in Ms. Lungu's submission, the expert was biased in Dr. Cabrita's favour, based on the submission that they are both doctors and protecting their profession.

- [22] With respect, and with appreciation for the fact that Ms. Lungu may sincerely feel that it is unfair for one physician to approvingly review another's work, this submission is not conceptually tenable. The first reason for this is the fact that Ms. Lungu has not pointed to anything in the expert report that indicates that the expert provided a biased opinion. The second reason is that accepting Ms. Lungu's submission would make it impossible for judges to rely on expert evidence in professional negligence cases, as those cases often raise issues outside of the ordinary competence of triers of fact; accordingly, expert opinion evidence from other professionals in the same field is necessary to understand what happened and, crucially, what should have happened. If no professional could provide expert evidence relating to another professional's work, no expert opinion evidence could ever be admitted in an action relating to professional negligence. Without a "case-specific reason" to infer bias on the part of the particular expert who gave evidence in this case, Ms. Lungu's submission is entirely at odds with the law governing expert evidence: see *No Fee Reasons* at para. 28.
- [23] The "fresh evidence", if submitted, may raise an arguable ground of appeal, however, as the evidence was likely available at the time of trial, Ms. Lungu will have difficulty in meeting the test to have it admitted.
- [24] In summary, while I would not say that her appeal is doomed to fail, given she has an avenue for fresh evidence to explore, it has little merit and will not likely be successful. Timeliness of the application
- [25] The application was brought in a sufficiently timely manner. Whether the costs will be readily recoverable in the event the appellant is unsuccessful.
- [26] It is clear, given Ms. Lungu's submission, that Dr. Cabrita will not be able to recover her costs if the appeal is unsuccessful. On the other hand, Ms. Lungu will likely not be able to proceed with her appeal if security for costs is ordered. Interests of justice
- [27] Ms. Lungu truly believes that she was injured by the treatment she received from Dr. Cabrita. I have no doubt she will view not being able to proceed with her appeal due to her financial circumstances as a significant injustice. She may have an arguable appeal, or at least an appeal that is not doomed to fail, depending on whether she submits a fresh evidence application, and the evidence is what she thinks it is. On the other hand, Dr. Cabrita will very likely not be able to recover any costs if the appeal is unsuccessful.
- [28] Weighing the two positions, it is, in my view, in the interests of justice to order security for costs, but in a smaller amount than requested by Dr. Cabrita and providing Ms. Lungu a longer period of time to raise the security.

Conclusion

[29] In conclusion, I order that:

- a) Ms. Lungu post security for costs in the amount of \$1,000 within 60 days;

- b) Ms. Lungu's appeal be stayed until security is posted;
- c) In the event that Ms. Lungu does not post the ordered security within 60 days, Dr. Cabrita is at liberty to apply for an order dismissing Ms. Lungu's appeal as abandoned; and
- d) Ms. Lungu's signature, as to the form of the order, is dispensed with. "The Honourable Madam Justice Bennett"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/25/01/2025BCCA0105.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/lungu-v-cabrita-2025>

Prepared on 29 October 2026 · Esheria