

CANADA / JUDGMENT

M.P.W. v. Victoria (City)

2020 BCCA 351

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 351 M.P.W. v. Victoria (City) COURT OF APPEAL FOR BRITISH COLUMBIA Citation: M.P.W. v. Victoria (City), 2020 BCCA 351 Date: 20201209 Docket: CA46915 Between: M.P.W. Appellant (Plaintiff) And City of Victoria, Mark Knoop, and Cory Moore Respondents (Defendants) Before: The Honourable Madam Justice Newbury (In Chambers) On appeal from: An order of the Supreme Court of British Columbia, dated June 9, 2020 (M.P.W. v. City of Victoria, 2020 BCSC 858, Victoria Docket S124134). Reasons for Judgment The Appellant, appearing in person (via teleconference): M.P.W. Counsel for the Respondents (via teleconference): D.G. Butcher, Q.C. Place and Date of Hearing: Vancouver, British Columbia November 23, 2020 Place and Date of Judgment: Vancouver, British Columbia December 9, 2020 Summary: Application for indigent status under Rule 56 of Court of Appeal Rules dismissed. Chambers judge not satisfied applicant cannot pay court fees without undue hardship. Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] Mr. W. sued the City of Victoria and two Victoria Police Department ("VPD") police officers for alleged wrongful arrest and negligence in connection with their investigation of allegations made in 2010 by a 7-year-old family member, "VW", of sexual impropriety on his part. The police had arrested Mr. W. without warrant on November 30, 2010 and released him four hours later. In early January, 2011, the Crown decided it would not charge Mr. W. in connection with the "disclosures" and Mr. W was so informed.
- [2] Mr. W.'s claims for damages were tried in the Supreme Court before Madam Justice Forth between late 2019 and early 2020. No constitutional issues were raised; rather, the issues were factual, involving mainly the circumstances of VW's disclosures, whether she had been 'coached' by her mother, her mother's credibility and that of the police officers. At paras. 114-125 of her reasons, however, Madam Justice Forth considered Mr. W.'s credibility, especially his claims that the child's mother was mentally ill and was abusing VW during the time of the investigation. (The couple were evidently in the process of divorcing and were disputing custody and access.) These allegations against the mother were found not to be supported by the evidence at trial. At para. 124, Forth J. also recounted: The plaintiff testified at trial that [the mother's] claim to the VicPD that he had been supporting her financially was false. He stated he was late on rent, credit card bills, and "even in default". He later qualified his answer by stating he was "not fully" supporting her and was

sporadically supporting her. Yet, in his February Affidavit, he swears that up to December 2010, he had been paying for all of the respondent's living expenses, including rent, utilities, groceries, and all costs associated with V.W. In his notice of family claim filed December 21, 2010, he claims that he had been paying for all the respondent's expenses, including rent, utilities, groceries and additional spending money.

- [3] As a result of the apparent inconsistencies, the judge said that a "concern" in her mind had been raised concerning Mr. W.'s evidence. The main issues that had to be decided at trial, however, concerned the propriety of the arrest without warrant and the procedures followed by the arresting officers in interviewing VW and her mother.
- [4] For lengthy reasons indexed as 2020 BCSC 858, Forth J. dismissed all of Mr. W.'s claims. The final order has not yet been entered.
- [5] Before me, Mr. W. said that his main ground of appeal would be that the trial judge did not appreciate his health difficulties in assessing his credibility and that he had therefore been unfairly treated. He has produced various records relating to his medical condition, which he says is due to a concussion suffered in a motor vehicle accident and a mild stroke that occurred mid-trial. Evidently, he is suffering from cognitive deficits, poor memory, dizziness and poor balance, and experiencing hearing difficulties.
- [6] Before Groberman J.A. on November 4, 2020, Mr. W. said he was in the process of obtaining a "merits assessment" of his proposed appeal from a pro bono lawyer, but it was taking a long time -- one of the reasons why extensions of time were required. Mr. W. told me in chambers on November 23 that he had received the assessment two weeks ago and that the lawyer had said the appeal had no merit and that he was therefore unwilling to take on the appeal pro bono. Mr. W. did not have the lawyer's letter with him and had not filed it.
- [7] Mr. W.'s application before me is for an indigent status or 'no fee' order under R. 56 of the Court of Appeal Rules. The Rule states: 56 (1) Subject to subsection (2), if a justice, on application made in accordance with Rule 38 before or after the commencement of an appeal or application, finds that a person cannot afford to pay the fees under Schedule 1 of Appendix C without undue hardship, the justice may order that no fees are payable under that Schedule.
 - (2) A justice may not make an order under subsection (1) respecting a person if the justice considers that the position being argued by that person
 - (a) lacks merit,
 - (b) is scandalous, frivolous or vexatious, or
 - (c) is otherwise an abuse of the process of the court. Mr. W. understands that the Rule refers only to court fees and would not relieve him of the necessity to pay for transcripts of the trial.

- [8] On behalf of the defendants, Mr. Butcher submits that under the Rule, the applicant must show an inability to pay fees without undue hardship, and must have a "reasonable basis" for the proposed appeal. (Citing *Shoolestani v. Ichikawa* 2018 BCCA 11, aff'd 2018 BCCA 361, where the Court framed the test as "whether there is a 'reasonable basis' for the appeal or whether the appeal has merit." (At para. 17.)) In Mr. Butcher's submission, the application materials do not support either test.
- [9] On the subject of Mr. W's financial circumstances, Mr. Butcher notes that in exhibit F to his affidavit sworn October 14, 2020 in this matter, Mr. W. described himself as "Producer & Director - TakingBackJustice.com Reality Television" and "CEO - Military.Steel.com". Social media materials appended to an affidavit of a legal assistant to Mr. Butcher describe Mr. W. as a "venture capitalist" and founder and president of "Military Steel Corp." in Denver Colorado, and of "Securitized Ventures and Mentoropolis Inc." Whether these companies generate income for Mr. W. is unclear.
- [10] Mr. W. also told Groberman J.A. in chambers on November 4, 2020 that he believed he would be in a financial position to order transcripts "sometime in December" if "certain things come in by then". His employment disclosure form describes employment income of \$500 per month and "other income" of \$1,500 per month. No reference is made to the source of this income. It does appear from Forth J.'s reasons that Mr. W. did have a business which provided services to the film industry, but his current medical records indicate he is no longer able to work full time. He appears to own some properties of little value in New Brunswick.
- [11] On the topic of the merits of the proposed appeal, Mr. Butcher notes that the threshold with respect to merits is low, such that the applicant need only establish that the appeal is not bound to fail or is "arguable". I note that in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)* 2014 SCC 59, the Court stated that the purpose of Rules such as R. 56 is to "waive the fees for people who cannot, by reason of their financial situation, bring non-frivolous or non-vexatious litigation to court." (At para. 48.) Nevertheless, subparagraph (a) of R. 56(2) remains in place, suggesting that if the appeal "lacks merit" but is not frivolous or vexatious, the test may still be met. Subsequent decisions have formulated the test as "bound to fail" or as having "no prospect of success": see *Walker v. Manufacturers Life Insurance Company* 2015 BCCA 143; *M.K. v. British Columbia (Attorney General)* 2019 BCCA 161; *N.E.T. v. British Columbia* 2018 BCCA 22.
- [12] As I have said, Mr. W. has acknowledged that he received a negative "merits assessment" from a Vancouver lawyer concerning the prospect of his proposed appeal. I have read the trial judge's reasons and see nothing to suggest that the trial judge assessed Mr. W.'s credibility in a manner that was unfair in light of his health difficulties. Such difficulties are unlikely to excuse the kind of inconsistencies noted by the judge between the objective evidence on the one hand and his testimony and arguments on the other. (Mr. W acted on his own behalf at trial.) However, it is because of the very fact-intensive nature of credibility assessment that I am not able to determine whether the appeal is bound to fail. At this point,

I can only say the standard of review is a high one for factual matters, especially for credibility findings, and that success would seem extremely unlikely.

- [13] Returning to the question of Mr. W.'s financial status, however, I am not persuaded that Mr. W. is in fact indigent. He receives \$2,000 per month in income from unnamed sources and seems to have connections with one or more U.S. companies. I am not satisfied he cannot afford to pay court fees without undue hardship.
- [14] In these circumstances, the financial test has not, in my opinion, been met. I therefore dismiss the application for an order under R. 56. "The Honourable Madam Justice Newbury"

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Prepared on 28 October 2026 · Esheria