
CANADA / JUDGMENT

MacPhee v. Kao

2009 BCSC 785

COURT

Supreme Court of British Columbia

DECIDED

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2009 BCSC 785 MacPhee v. Kao

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

MacPhee v. Kao,

2009 BCSC 785

Date: 20090512

Docket: M94350

Registry: New Westminster

Between:

Christina MacPhee

Plaintiff

And

Jui Yun Kao and Jean Fraser Cox

Defendants

Before: The Honourable Justice MacKenzie

Oral Reasons for Judgment

Counsel for the Plaintiff:

R. McMullan

Counsel for the Defendant, Jui Yun Kao:

A. Stone

Counsel for the Defendant, Jean Fraser Cox:

M. Hall

Place and Date of Hearing:

New Westminster, B.C.

May 12, 2009

Place and Date of Judgment:

New Westminster, B.C.

May 12, 2009

- [1] THE COURT: This is a personal injury action for damages resulting from a motor vehicle accident. Liability was resolved today by a determination under Rule 18A of the Rules of Court. I found the defendant Cox solely liable for the chain reaction rear-end collision that occurred on October 17th, 2003, on the Fraser Highway at the intersection of 96th Avenue. The action was dismissed against the defendant Kao with costs.
- [2] The collision occurred while the plaintiff was stopped at a red light. Ms. Kao was stopped behind the plaintiff. The defendant Cox first rear-ended the defendant Kao, who then rear-ended the plaintiff, and finally, the plaintiff rear-ended the car in front of her.
- [3] There are two issues at this hearing: (1) should the defendant Cox pay the costs of the defendant Kao directly? (2) should Cox pay special costs?
- [4] First, the plaintiff submits the defendant Cox ought to be ordered to pay directly the costs of the defendant Kao. This is called a Sanderson order after the case of *Sanderson v. Blyth Theatre Co.*, [1903] 2 K.B. 533 (C.A.). The law as to Sanderson and Bullock orders has been codified in Rule 57(18).
- [5] It is not disputed by the defendant Kao that it was reasonable for the plaintiff to join Kao as a defendant in this action so that the matter could be thoroughly investigated and resolved. The threshold question of whether it was reasonable for the plaintiff to join the defendant Kao as a defendant is answered in the affirmative because the plaintiff had no direct knowledge or evidence to give about what happened behind her. That is, she could not say who hit whom or when, because it could have been Kao who rear-ended the plaintiff first, causing the defendant Cox to hit Kao instead of vice versa, which is what occurred. Once the threshold question is answered affirmatively, the trial judge then exercises his or her discretion.

- [6] I observe that the issues arose between the plaintiff and the defendant Kao directly as a result of the negligence of the defendant Cox. The actions of Cox made the litigation necessary. Therefore I exercise my discretion to find the plaintiff is entitled to a Sanderson order under Rule 57(18) because it was reasonable for her to have commenced the action against both defendants and, on the basis of the evidence, Cox was clearly liable. As the responsible tortfeasor, Cox ought to pay the costs directly of the defendant Kao.
- [7] The effect of the Sanderson order is that the court will nominate the unsuccessful defendant, Cox, as the only person to whom the successful defendant is entitled to look for payment of its costs.
- [8] Second, the plaintiff submits that special costs ought to be awarded against the defendant Cox because Cox failed to admit liability in accordance with the plaintiff's notice to admit dated October 6th, 2006.
- [9] The plaintiff relies on *Yarrow v. Marsh*, 2002 BCSC 1196, [2002] B.C.T.C. 1196, for the principle that awarding special costs discourages frivolous claims or defences, and abusive proceedings, and encourages prompt and early settlements. The plaintiff submits it was unreasonable and abusive for Cox not to admit liability for the collision and to allege that the negligence of the plaintiff caused the collision when there was no reasonable basis for such an allegation.
- [10] The defendant Cox responds that she did not see what occurred in front of Kao as Kao was directly in front of her. Therefore, Cox says she could not admit liability. The plaintiff replies that it is unnecessary for a defendant to personally have witnessed all aspects of a collision to admit liability. Instead, it is enough for Cox to know that there was no evidence to contradict a finding against her of liability.
- [11] The plaintiff says there was no legal justification for Cox to deny liability and to allege negligence against the plaintiff. It only resulted in extra burden and financial costs for the plaintiff.
- [12] Alternatively, the plaintiff seeks an order for increased costs against the defendant Cox pursuant to s. 2(4.1) of Appendix B ("Party and Party Costs"). The plaintiff says one factor to consider is whether there are unusual circumstances or whether there would be an unjust result if an order for increased costs were not made in the particular circumstances of the case. Counsel relies on *Gary Young Agencies Ltd. v. McComber (c.o.b. Lyall McComber Trucking)*, 2008 BCSC 143, and *Monenco Ltd. v. Commonwealth Insurance Company*, 1999 BCCA 133, 64 B.C.L.R. (3d) 307.
- [13] The plaintiff says that in the circumstances, she has been put to unnecessary expense, so the conduct of Cox is deserving of rebuke. Therefore, an order for increased costs under s. 2(4.1) of Appendix B is appropriate.

- [14] The plaintiff says Cox had all the evidence available to properly assess liability for the collision and to determine whether she had a meritorious defence to her liability for the collision. Cox said she had to conduct the examination for discovery first, but the plaintiff says Cox knew after the examination for discovery of Kao what the evidence was regarding the chain of collisions.
- [15] Furthermore, the plaintiff says Cox never took out an appointment to examine Kao for discovery because she knew what Kao would say, as they had the same insurer. Therefore, Cox's counsel did not need to examine Kao for discovery. Cox knew Kao had a meritorious defence and that she, Cox, was solely liable.
- [16] The plaintiff concedes this particular case involves a milder form of misconduct as referred to in the caselaw, but maintains that it is reprehensible in all the circumstances. The plaintiff says that this court in similar cases has awarded special costs. The plaintiff submits that by the time the notice to admit was made and the examination for discovery of Kao was conducted in October 2006, Cox should have admitted liability.
- [17] Counsel also relies on *Rossa v. Mackie*, [1999] B.C.J. No. 61 (S.C.).
- [18] I conclude that neither special costs nor increased costs pursuant to s. 2(4.1) of Appendix B are appropriate in this matter. I exercise my discretion in all the circumstances not to award special costs or increased costs pursuant to s. 2(4.1).
- [19] The leading case on special costs is *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242, 119 D.L.R. (4th) 740 (C.A.). Ironically, both the plaintiff and the defendant Cox rely on *Garcia* where Lambert J.A. for the court said at para. 17:

Having regard to the terminology adopted by Madam Justice McLachlin in *Young v. Young*, to the terminology adopted by Mr. Justice Cumming in *Fullerton v. Matsqui* (District) and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in *Leung v. Leung* in awarding special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous but could only be categorized as one of the "milder forms of misconduct" which could simply be said to be "deserving of reproof or rebuke," it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word "reprehensible" is a word of wide meaning. It encompasses scandalous or outrageous conduct, but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all-encompassing expression of the applicable standard for the award of special costs.

- [20] Lambert J.A. further said at para. 23:

However, the fact that an action or an appeal "has little merit" is not in itself a reason for awarding special costs. See the reasons of Madam Justice McLachlin for the majority in the Supreme Court of Canada on the question of costs in *Young v. Young* at page 28. Something more is required, such as improper allegations of fraud or an improper motive for bringing the proceedings or improper conduct of the proceedings themselves, before the conduct becomes sufficiently reprehensible to require an award of special costs.

- [21] Lambert J.A. listed (at para. 28) four factors, no single one of which would necessarily have been sufficient in itself for an order of special costs, but the combination of which supported the view that the conduct of the appellant before him was reprehensible. It was deserving of reproof in the form of an award of special costs. One factor was that the appeal had no reasonable prospect of success.
- [22] In this case, the main factor, and the only one I can identify in particular, is that the action or the position of the defendant Cox had no reasonable prospect of success. I find that is insufficient here to support an award for special costs, or for the alternatively sought increased costs.
- [23] The plaintiff's claim against Cox would inevitably be successful solely against Cox. There was no reasonable possibility of a finding of contributory negligence by the plaintiff or any negligence by Kao. The plaintiff's action was essentially undisputed. Nonetheless, I am not satisfied that this is an appropriate case for special costs. Cox essentially took no issue at this hearing with respect to the finding that she was solely liable. But even considering milder forms of reprehensible conduct, I cannot find that Cox's failure to make an earlier admission of sole liability to be sufficiently deserving of rebuke to attract special costs or an alternative award of increased costs.
- [24] Costs will follow the event on Scale B, but there will be an order under Rule 57(18) that the defendant Cox pay Scale B costs directly to the defendant Kao.

"The Honourable Madam Justice MacKenzie"

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