

CANADA / JUDGMENT

Malak v. Hanna

2020 BCCA 6

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 6 Malak v. Hanna COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Malak v. Hanna, 2020 BCCA 6 Date: 20200107 Dockets: CA44856; CA44858 Docket: CA44856 Between: Raoul Malak, Ansan Traffic Group Ltd., Ansan Industries Ltd. d.b.a. Ansan Traffic Control, Lanetec Traffic Control Inc., Western Traffic Ltd. d.b.a. Flaggirls Traffic Control, and Island Traffic Services Ltd. Respondents (Plaintiffs) And Philip Keith Jackman, Valley Traffic Systems Inc., and Trevor Paine Appellants (Defendants) And Remon Hanna Respondent (Defendant) Docket: CA44858 Between: Raoul Malak, Ansan Traffic Group Ltd., Ansan Industries Ltd. d.b.a. Ansan Traffic Control, Lanetec Traffic Control Inc., Western Traffic Ltd. d.b.a. Flaggirls Traffic Control, and Island Traffic Services Ltd. Respondents (Plaintiffs) And Remon Hanna Appellant (Defendant) Before: The Honourable Mr. Justice Frankel The Honourable Mr. Justice Goepel The Honourable Madam Justice Griffin Supplementary Reasons to Malak v. Hanna, 2019 BCCA 106. Counsel for the Appellants, P.K. Jackman, Valley Traffic Systems Inc., and T. Paine T.J. Delaney Counsel for the Appellant, R. Hanna: D.W. Burnett, Q.C. Counsel for the Respondents: R.A. McConchie Written Submissions Received: November 6, 20, 26, and 29, 2019 Place and Date of Judgment: Vancouver, British Columbia January 7, 2020 Supplementary Reasons of the Court Summary: Application with respect to costs. Four appellants were found jointly and severally liable for defamation. Three of them appealed together and the fourth appealed separately. The appeals, which raised different issues, were heard together and allowed in part. The three appellants succeeded on most of their issues while the remaining appellant had very limited success. A new trial was ordered on limited issues. Held: As the three appellants were substantially successful they were entitled to costs on their appeal. It was not appropriate to make the fourth appellant responsible for those costs by means of a Sanderson order or a Bullock order. Supplementary Reasons for Judgment of the Court:

- [1] In reasons for judgment indexed as Malak v. Hanna, 2019 BCCA 106, we dealt with two appeals brought by four appellants from a trial in which they were found jointly and severally liable with respect to numerous publications of defamatory statements. The trial judge found those appellants had engaged in a campaign of vilification against the respondents, Raoul Malak and his companies. The first appeal was brought by Philip Keith Jackman, Trevor Paine, and Valley Traffic Systems Inc. ("VTS") (CA44856). Mr. Jackman owns VTS and Mr. Paine is its vice-president. The second appeal was brought by Remon Hanna

(CA44858). The appeals were heard together. Both were allowed in part.

- [2] These reasons concern the issue of costs in CA44856. For convenience we will refer to the respondents in that appeal collectively as "Mr. Malak".
- [3] Messrs. Jackman and Paine and VTS take the position they are entitled to costs on their appeal. Mr. Malak takes the following alternative positions:
- (a) as success was divided, the parties should bear their own costs;
 - (b) as a new trial was ordered on the basis of the adequacy of the trial judge's reasons, the parties should bear their own costs;
 - (c) if Messrs. Jackman and Paine and VTS are entitled to costs, then costs should be apportioned on a percentage-of-success basis and set off;
 - (d) if Messrs. Jackman and Paine and VTS are entitled to costs, then a Sanderson order should be made against Mr. Hanna requiring him to pay those costs (see *Sanderson v. Blyth Theatre Co.*, [1903] 2 K.B. 533 (C.A.)); and
 - (e) if Messrs. Jackman and Paine and VTS are entitled to costs from Mr. Malak, then a Bullock order should be made against Mr. Hanna allowing Mr. Malak to recover those costs as a disbursement in CA44858 (see *Bullock v. London General Omnibus Co.*, [1907] 1 K.B. 264 (C.A.)).
- [4] In our reasons allowing the appeals in part, we: (a) set aside all the liability findings against Mr. Paine and VTS, and all but one of the liability findings against Mr. Jackman; and (b) ordered a new trial limited to whether VTS is vicariously liable for Mr. Hanna's actions and whether Mr. Jackman and Mr. Paine are liable for those actions on the basis they participated with Mr. Hanna in a common design.
- [5] We consider this outcome to constitute substantial success by Mr. Jackman, Mr. Paine, and VTS. It is well-established that a party that achieves substantial success on appeal is entitled to costs and that substantial success does not require success of all issues: *Doucette v. McInnes*, 2012 BCCA 235 at para. 19, 322 B.C.A.C. 170; *Stein v. Stein*, 2007 BCCA 187 at para. 8, 68 B.C.L.R. (4th) 104; *Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority*, 2018 BCCA 440 at paras. 4-6, 18 B.C.L.R. (6th) 375.
- [6] In support of his submission that the parties should bear their own costs, Mr. Malak cites *Ciolfi v. Galley*, 2011 BCCA 106 at para. 34, 302 B.C.A.C. 15. Ms. Ciolfi was injured in several motor vehicle accidents and the damages actions she commenced were tried together. This Court allowed the defendants' appeals and ordered a new trial on the ground that the trial judge erred in not giving the jury an even-handed summary of the evidence or adequate instructions. The Court further held that the "fairest course" was to order the parties to bear their own costs of the appeal. However, as pointed out in *Harder v. Poettcker*, 2017 BCCA 107 at para. 8, 96 B.C.L.R. (5th) 242, the result in *Ciolfi* was that the parties were returned to "square one". That is not the result of the appeal in the present matter.

- [7] As to a Sanderson or Bullock order, we would not exercise our discretion to make Mr. Hanna responsible for the costs awarded against Mr. Malak in CA44856. This is because Mr. Hanna did nothing to warrant his having to pay those costs: see *Grassi v. WIC Radio Ltd.*, 2001 BCCA 376 at paras. 33, 89 B.C.L.R. (3d) 198; *Moore v. Wienecke*, 2008 BCCA 162 at paras. 44-50, (2008), 290 D.L.R. (4th) 509. Of note is that the two appeals raised different issues. The only common issues were the challenges to the findings of common design and vicarious liability. However, in that regard, Mr. Hanna did no more than adopt the arguments advanced by Messrs. Jackman and Paine and VTS.
- [8] In the result, we order costs in favour of Messrs. Jackman and Paine and VTS in CA44856. In addition, we order that Mr. Hanna is entitled to set off his costs relating to this application against the costs ordered against him in CA44858. "The Honourable Mr. Justice Frankel" "The Honourable Mr. Justice Goepel" "The Honourable Madam Justice Griffin"

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