

CANADA / JUDGMENT

McLaren v. Rice

2010 BCSC 354

COURT

Supreme Court of British Columbia

DECIDED

2 February 2010

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2010 BCSC 354 McLaren v. Rice IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: McLaren v. Rice, 2010 BCSC 354 Date: 20100202 Docket: M063770 Registry: Vancouver Between: Matthew Robert Joseph McLaren Plaintiff And: Jacob John Rice, Michael John Rice, and Hilltop Garden Farm Ltd. Defendants Before: The Honourable Mr. Justice Brooke Oral Reasons for Judgment In Chambers Counsel for Plaintiff: R. ter Borg Counsel for Defendants: K. Chong Place and Date of Trial/Hearing: Vancouver, B.C. January 28, 2010 Place and Date of Judgment: Vancouver, B.C. February 2, 2010

- [1] THE COURT: The plaintiff in this action seeks double costs from the commencement of trial on November 24, 2008, and his taxable costs from the commencement of the action to that date.
- [2] The issues of liability and quantum had been separated with liability tried first commencing November 21, 2008. When the trial was called, an issue arose as to whether the seatbelt defence would form part of the liability trial or, in the circumstances, be heard at some later date, perhaps in association with the assessment of damages.
- [3] The defendant relied upon an expert opinion that was delivered to the plaintiff at the commencement of trial to which the plaintiff had not obtained an expert opinion in answer. In the result, I ordered that the trial of liability proceed with the seatbelt defence issue to be tried later in December or January as the circumstances required, and I seized myself of both aspects of the trial, that is, liability and the assessment of damages.
- [4] Judgment was given on liability on October 26, 2009, in favour of the plaintiff binding the defendants jointly and severally liable and awarding costs at Scale B. The plaintiff now seeks double costs pursuant to Rule 37B and relies upon the offer to settle dated November 14, 2008, which was delivered to counsel for the defendants the same day.
- [5] The offer, addressed to the defendants and the defendants' solicitors, says this (as read in): The plaintiff, Matthew R.J. McLaren, offers to settle the liability trial in this proceeding on the following terms: that the defendant is 99 percent responsible for the motor vehicle accident of February 26, 2005, in which the plaintiff was a passenger in the vehicle owned and operated by the defendants and costs in accordance with Rule 37B. The plaintiff

reserves the right to bring this offer to the attention of the court or consideration in relation to costs after the court has rendered judgment on all other issues in this proceeding relating to liability for the accident.

- [6] And that is the extent of the offer to settle which is prefaced with the style of cause and signed by counsel for the plaintiff.
- [7] Despite the prescribed formulation in Rule 37B, 1(c)(3) being added to with the words "relating to liability in this proceeding", I am satisfied that the plaintiff has complied with the definition of offer to settle contained in Rule 37B(1) and the issue is properly before me. On the trial of the quantum issue, it seems to me that Rule 37B may again be invoked. The two aspects of the trial are separate and discrete.
- [8] The plaintiff says that the court is given a discretion to award double costs pursuant to Rule 37B(5)(b), and having regard to the considerations set out in Rule 37(B)(6), such an order should be made. The defendant says firstly that the offer is ambiguous in that the offer refers to "the defendant" in the singular being 99 percent responsible for the motor vehicle accident. I find there is no merit to that submission; when the whole of the offer is set out, it clearly distinguishes between the defendant driver and the defendant owners. The defendants also say that the offer was not one that "ought reasonably to have been accepted, either on the date that the offer to settle was delivered or on any later date".
- [9] The defendants rely on the fact that the plaintiff had not delivered his rebuttal report to the defendants' expert's report on the seatbelt defence raised by the defendants until after the trial commenced. However, that submission, it seems to me, relies upon the fact that it was only because the defendants' disclosure of their own report was not delivered until November 24, 2008, the first day of trial, despite that expert report being dated some two months earlier on September 24, 2008. To give effect to the defendants' submission would, it seems to me, reward the defendants for their own failure to deliver their expert report in compliance with Rule 40A. The defendants cannot now say that they did not have a reasonable opportunity to consider the offer because they did not have the defendants' expert report on the seatbelt defence because they did not have that report as a result of their own default.
- [10] In the result, the plaintiff will have costs at Scale B until November 24, 2008, pursuant and -- rather to -- until November 24, 2008, and thereafter double costs with disbursements throughout in the amount actually incurred. Brooke J.

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