
CANADA / JUDGMENT

McPhail v. Ross

2019 BCSC 896

COURT

Supreme Court of British Columbia

DECIDED

18 April 2019

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2019 BCSC 896 McPhail v. Ross

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McPhail v. Ross,

2019 BCSC 896

Date: 20190418

Docket: S-149600

Registry: Vancouver

Between:

Cory Michael McPhail

Plaintiff

And:

Kyle Ross

Defendant

Before: The Honourable Madam Justice Adair

Oral Reasons for Judgment on Costs

In Chambers

Counsel for the Plaintiff

appearing by teleconference:

A.K. Aggarwal

Counsel for the Defendant:

F. Troen

Place and Date of Hearing:

Vancouver, B.C.

April 17, 2019

Place and Date of Judgment:

Vancouver, B.C.

April 18, 2019

1. Introduction

- [1] THE COURT: On January 9, 2019, I issued Reasons for Judgment (indexed at 2019 BCSC 21) in this personal injury action where liability had been admitted. In brief, the plaintiff, Mr. McPhail, sought damages of over \$6 million. I awarded Mr. McPhail general damages of \$35,000 and special damages of \$2,475. No damages were awarded under any other head, although they were claimed by Mr. McPhail. I awarded costs on Scale B to Mr. McPhail as the successful party at trial, subject to further submissions on costs.
- [2] Mr. McPhail has filed a notice of appeal.
- [3] I have now received submissions on costs. In accordance with my directions, the defendant filed written submissions on March 26, 2019, and Mr. McPhail filed written submissions on April 8, 2019. I also had oral submissions in a brief hearing yesterday.
- [4] The defendant delivered three offers to settle dated (respectively) March 27, 2017 (the "March Offer"), May 28, 2018 (the "May Offer") and September 19, 2018 (the "September Offer"). The defendant seeks an order, pursuant to Rule 9-1(5)(d), that Mr. McPhail recover costs up to the date of the March Offer and the defendant be awarded costs thereafter. In the alternative, he seeks similar orders based on the May Offer and the September Offer. (I will refer to all three offers collectively as the "Offers.")
- [5] Mr. McPhail says that this is not a case where the court should exercise its discretion to depart from the usual rule - that Mr. McPhail, as the successful party, is entitled to his costs - in the light of the Offers. Mr. McPhail says that depriving him of his costs or awarding costs to the defendant is inappropriate, because it was reasonable for him not to have accepted any of the Offers in the circumstances. Among other things, Mr. McPhail says that, especially as a self-represented litigant, he could not have predicted that his credibility would be so critical to the outcome of his case. He says further that the impact of an adverse costs award on his financial circumstances and on the amount of the award made at trial would be grievous. He says that, as the successful party at trial, he should recover his costs on Scale B. Alternatively, if some effect is to be given to any of the Offers, he says that he

should have his costs on Scale B up to September 19, 2018, and each party should bear his own costs thereafter.

2. The Offers to Settle

[6] In the March Offer, the defendant offered to settle as follows (in relevant part):

The Defendant, Kyle Ross (the "Defendant"), offers to settle this action in its entirety on terms that upon acceptance of this offer to settle:

- a. the Plaintiff will be entitled to payment by the Defendant of Thirty Seven Thousand Five Hundred and Fifty Dollars (\$37,550.00), (the "Settlement Payment"); and
- b. the parties will be entitled to costs in accordance with this offer to settle (the "Settlement Costs").

The Settlement Payment (a) is offered after taking into account Part 7 benefits paid or payable . . . ; (b) is offered after taking into account any advances paid to date; (c) includes court order interest; and (d) excludes the Settlement Costs.

On acceptance of this offer, the parties agree that subject to the terms and conditions of Appendix A:

1. The Plaintiff is entitled to his costs of the action at Scale B and necessary and reasonable disbursements to the date of delivery of this offer . . . and
2. The Defendant is entitled to his costs of the action at Scale B and necessary and reasonable disbursements from the date of delivery of this offer . . .

...

This offer to settle is open for acceptance at any time before 4:00 PM, Pacific Standard Time, on the last business day before the commencement of the first day of trial . . .

[7] In the May Offer, the defendant offered to settle on the following terms (in relevant part):

The Defendant, Kyle Ross . . . offers to settle this action in its entirety on terms that upon acceptance of this offer to settle:

- a. the Plaintiff will be entitled to payment by the Defendant of seventy five thousand Dollars (\$75,000.00), (the "Settlement Payment"); and
- b. the parties will be entitled to costs in accordance with this offer to settle (the "Settlement Costs").

The remaining terms were substantially identical to the March Offer. The May Offer was open for acceptance until September 19, 2018, when the September Offer was made.

[8] In the September Offer, the defendant offered to settle on the following terms (in relevant part):

The Defendant, Kyle Ross . . . offers to settle this action in its entirety on terms that upon acceptance of this offer to settle:

- a. the Plaintiff will be entitled to payment by the Defendant of one hundred thousand Dollars (\$100,000.00), (the "Settlement Payment"); and
- b. the parties will be entitled to costs in accordance with this offer to settle (the "Settlement Costs").

The remaining terms were substantially identical to the March Offer. The September Offer was open for acceptance until 4:00 p.m. on September 21, 2018.

- [9] All Offers were stated to be "Without prejudice except as to costs." All included some additional terms (essentially related to mechanics) set out in an attached Appendix A. None of the Offers contained any explanation to support the conclusion that the Offer was reasonable and ought to be accepted. All of the Offers reminded Mr. McPhail that counsel for the defendant did not represent his interests and strongly recommended that Mr. McPhail obtain independent legal advice. Each of the Offers suggested some places that Mr. McPhail might wish to go to for legal advice, including the Justice Access Centre, the BCCBA Lawyer Referral Service and the Legal Services Society.
- [10] Counsel for the defendant has submitted a draft bill of costs in relation to each of the Offers.
- [11] If the court were to give effect to the March Offer and order that the defendant recover costs from and after the date of that Offer, costs (including disbursements of \$42,151.25 and taxes) would be \$70,733.65.
- [12] If the court were to give effect to the May Offer, costs (including disbursements of \$37,732.98 and taxes) would be \$62,249.78.
- [13] If the court were to give effect to the September Offer, costs (including disbursements of \$24,894.90 and taxes) would be \$45,719.70.
3. Brief procedural background
- [14] I am going to set out some additional brief procedural background.
- [15] Mr. McPhail's notice of civil claim was filed on December 12, 2014. The document was prepared and signed by Mr. McPhail. The statement of facts in Part 1 was a single paragraph and asserted that Mr. McPhail was "the victim of a collision on December 12, 2012," where his car was "destroyed." He asserted that he suffered disability, pain and suffering, disruption to personal relationships, and his current and future earnings were affected. He asserted that the defendant was at fault. In Part 2 (Relief), he sought general and special damages.
- [16] The response to civil claim was filed in January 2016. The defendant admitted that the accident on December 12, 2012 was caused by his fault. The defendant pleaded in addition that Mr. McPhail suffered no injury, loss, damage or expense as a result of the accident. The

defendant also pleaded that any injury, loss, damage or expense was not caused as a result of the accident, and that his negligence was not the proximate cause of any injury, loss, damage or expense. The defendant also pleaded that Mr. McPhail had failed to mitigate his damages.

[17] The defendant filed a notice of trial on October 12, 2017.

[18] Mr. McPhail was examined for discovery on January 23, 2018.

[19] On June 28, 2018, counsel for the defendant delivered copies of the expert reports of Dr. Stewart, Dr. Hummel and Dr. Lari to Mr. McPhail.

[20] A trial management conference was held on August 17, 2018. The defendant had filed his trial brief on July 26, 2018. He stated that causation of Mr. McPhail's various complaints would be in issue at trial and that all heads of damages would be in issue. Witnesses, including defence experts, were listed. Mr. McPhail did not file a trial brief, but one he had prepared was available at the trial management conference. He did not list any witnesses, although he indicated that he would be offering expert evidence from Dr. Edamura at trial. Both trial briefs indicated that a mediation was scheduled before the date set for trial, and a mediation was in fact held.

4. Basic principles regarding costs and offers to settle

[21] Pursuant to Rule 14-1(9), costs in a proceeding must be awarded to the successful party, unless the court otherwise orders. However, the fact that a party has been successful at trial does not necessarily mean that the trial judge must award costs in that party's favour, since the rule empowers the court to "otherwise order." One of the reasons that the court may "otherwise order" is a failure to accept an offer to settle under Rule 9-1.

[22] The court may consider an offer to settle when exercising the court's discretion in relation to costs: see Rule 9-1(4). The available options are set out in Rule 9-1(5), which provides in relevant part:

(5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:

...

(d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle.

[23] Rule 9-1(6) provides:

(6) In making an order under subrule (5), the court may consider the following:

- (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
 - (b) the relationship between the terms of settlement offered and the final judgment of the court;
 - (c) the relative financial circumstances of the parties;
 - (d) any other factor the court considers appropriate.
- [24] The purposes for which costs rules exist include: to encourage conduct that reduces the duration and expense of litigation, and to discourage conduct that has the opposite effect; encouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases; and to have a winnowing function in the litigation process by requiring litigants to make a careful assessment of the strength or lack thereof of their cases at the commencement and throughout the course of the litigation, and by discouraging the continuance of doubtful cases or defences. See *Hartshorne v. Hartshorne*, 2011 BCCA 29, at para. 25.
- [25] Whether an offer to settle is one that should reasonably have been accepted is not to be assessed with the benefit of hindsight by reference to the award ultimately made, but under the circumstances that existed when the offer was open for acceptance. Reasonableness is to be assessed by considering factors such as the timing of the offer, whether it had some relationship to the claim (as opposed to being simply a nuisance offer), whether it could be easily evaluated, and whether some rationale for the offer was provided. See *Hartshorne*, at para. 27. This factor is considered from the perspective of the person receiving the offer. It has both a subjective and an objective component. The court is entitled to take into account the reasons why a party declined to accept an offer to settle. The court must consider whether those reasons are objectively reasonable.
- [26] Here, Mr. McPhail provided no explanation of his thinking or reasons for not accepting any of the Offers. Although Mr. Aggarwal made submissions to the effect that, for example, Mr. McPhail should not reasonably have been expected to have appreciated that his credibility would be a significant issue in the case, and that he would have been encouraged about the merits of his case based on the contents of the defence expert reports, Mr. McPhail himself is silent.
- [27] Moreover, I disagree with Mr. Aggarwal's submission with respect to the possible effect of delivery of the defendant's expert reports on Mr. McPhail's thinking, and that Mr. McPhail should have been encouraged. Dr. Stewart and Dr. Hummel essentially confirmed that, indeed, Mr. McPhail had sustained soft tissue injuries. This was not seriously disputed. But, on a fair reading, the defendant's expert reports provided no support for the proposition that Mr. McPhail had suffered devastating, significant and long-lasting injuries, or that the injuries he had sustained had or would impair his ability to earn income, limit his functional capacity, or limit his ability to return to his pre-accident level of activity. Rather than

encouraging Mr. McPhail, based on the defendant's expert reports, Mr. McPhail ought to have appreciated the significant weaknesses in his claim.

- [28] There is no requirement that an offer contain some rationale or explanation, although an explanation may be needed in some cases, depending on the circumstances and nature of the case. See *Paskall v. Scheithauer*, 2014 BCCA 26, at para. 84.
- [29] The second factor that may be considered under Rule 9-1(6) - the result at trial - is an independent factor: see *Hartshorne*, at para. 30. This factor examines the actual results of the trial, and weighs in favour of rewarding the party who made an offer the terms of which were equal to or better than the results at trial. The weight placed on this factor is within the discretion of the trial judge.
- [30] In the light of the purposes for which the costs rules exist, it is appropriate, in my view, to consider the Offers when exercising my discretion in relation to costs.

5. The Rule 9-1(6) factors

- [31] I turn then to the factors under Rule 9-1(6).
- [32] As I noted above, none of the Offers contained any discussion of how or why the defendant arrived at the amount that was being offered. Apart from what one might infer from the amount of the offer, the Offers gave little insight into the defendant's views on the strengths and weaknesses of Mr. McPhail's claims. Not surprisingly, there was a strong recommendation that Mr. McPhail see about getting legal advice.
- [33] This was not a complex case. Rather, it was an assessment of the plaintiff's damages caused by the defendant's negligence, where liability had been admitted.
- [34] However, in my view, both the March Offer and the May Offer required some explanation of the defendant's perspective of the weaknesses in Mr. McPhail's case and some rationale for the Offer. Whether Mr. McPhail would have been prepared to take seriously anything the defendant said, and modify in any meaningful way his view of the value of his case, is unknown. However, in my view, the lack of any explanation means that neither of these Offers were ones that ought reasonably to have been accepted.
- [35] I take a different view with respect to the September Offer. At \$100,000, it was a meaningful offer. It offered \$25,000 more than the May Offer and reduced Mr. McPhail's exposure to costs on acceptance. Thus, the amount offered was significant (although it represented only a small percentage of the dollar amounts Mr. McPhail sought in closing submissions at trial). It had a rational relationship to the case that was reflected in Mr. McPhail's trial brief, and the absence from that case of evidence that would support any significant award (if any award at all) for loss of earning capacity and cost of future care.

- [36] In addition, by this time, the parties had been through mediation. I think it inconceivable that the weaknesses in Mr. McPhail's case, and the risks of proceeding to trial, would not have been fully explored in that context. The parties had also attended a trial management conference in August, where issues concerning witnesses, and whether Mr. McPhail was planning on calling other witnesses to support his case, would very likely have been discussed. Causation had clearly been raised as an issue in the defendant's trial brief.
- [37] The idea that credibility would be an important issue in a case involving soft tissue injuries is not an obscure or esoteric notion that would and could be known only by practising lawyers, experienced in personal injury claims. That type of information is readily available through the many, many personal injury judgments published on the Court's website.
- [38] Mr. McPhail is intelligent and well educated, and he demonstrated a capacity to do legal research when it was required (as illustrated, for example, by the list of cases he produced prior to closing submissions). Between when the defence expert reports were delivered and the September Offer, Mr. McPhail had ample opportunity to educate himself about the potential weaknesses in his case and get some legal advice or assistance (either using the resources mentioned in the Offers or other resources available to self-represented litigants).
- [39] As I noted above, one of the purposes of the costs rules is to require litigants - including self-represented litigants - to make a careful assessment of the strength or lack thereof of their cases. A litigant cannot avoid the consequences of the costs rules by making no careful assessment, or maintaining unrealistic views of what the litigant can achieve by going to trial. There was no reasonable basis for a belief on Mr. McPhail's part that he could expect to receive at trial more than the amount in the September Offer.
- [40] In my view, unlike the earlier Offers, the September Offer was made in a context where the offer did not require additional explanation. Although the Offer was open for acceptance only for a short time, there was sufficient time in advance of the trial for Mr. McPhail to consider it. The Offer was straightforward and could be easily evaluated. At the time the September Offer was made, Mr. McPhail (although a self-represented litigant) was obliged to take a very hard look at his case before embarking on what was scheduled to be a 10-day trial. In my opinion, the September Offer was one that ought reasonably to have been accepted.
- [41] This factor weighs in favour of the defendant with respect to the September Offer. However, that is not the end of the analysis.
- [42] With respect to the relationship between the terms of the settlement offered and the final judgment of the court, this factor weighs in favour of the defendant. At trial, Mr. McPhail recovered substantially less than the September Offer. He would clearly have been better off by accepting that Offer. Indeed, Mr. McPhail recovered substantially less than the May Offer.

- [43] I turn then to the third factor, the relative financial circumstances of the parties. Based on the evidence at trial, Mr. McPhail was earning only a very modest income and, indeed, had been homeless since he gave up his apartment in 2015. An affidavit sworn by Mr. McPhail and filed on April 17, 2019 shows that his situation, if anything, has gotten worse in that he was laid off from work in December 2018.
- [44] Mr. Ross was defended by his insurer. However, there is no suggestion that the insurer used superior financial resources in any oppressive or untoward manner. Indeed, Mr. McPhail relied on the resources available to the defendant to make copies of the very lengthy list of authorities he presented for closing submissions. In that respect, his conduct could be described as that of someone who considered he had little or nothing financially at stake in terms of costs.
- [45] On that basis, I find this factor largely neutral.
- [46] Finally, I turn to other factors.
- [47] Mr. Aggarwal argued that Mr. McPhail, because he was a man of modest means, was required to represent himself. However, there is no evidence that he was so required. Many individuals of very modest means find legal representation for MVA claims where liability has been admitted. Mr. McPhail made a choice to represent himself. He must bear at least some of the consequences for that choice.
- [48] All of the Offers contained terms whereby, if an offer was accepted, Mr. McPhail would recover costs up to the date of the offer, and the defendant would recover costs thereafter. Thus, the terms of the Offers should have alerted Mr. McPhail that he faced a potential liability for the defendant's costs, even if he accepted any of the Offers. On the other hand, the potential scope of this liability was completely unquantified, making it difficult for Mr. McPhail to assess. If I give effect to the September Offer, for example, Mr. McPhail would still be entitled to recover some of his costs. Of all of the Offers, and because of its timing, the September Offer is the most favourable for Mr. McPhail in terms of costs, both with respect to costs recoverable by him and costs recoverable by the defendant.
- [49] As I noted above, counsel for the defendant has prepared draft bills of costs, based on each of the Offers. Giving effect to either the March Offer or the May Offer would eliminate the judgment in favour of Mr. McPhail and leave him with a significant liability for the defendant's costs, which he is unable to pay. Even giving effect to the September Offer (and after a set-off for Mr. McPhail's costs to September 19, 2018) would likely leave Mr. McPhail with very little, if anything, from his award at trial.
- [50] However, as the court pointed out in *Dempsey v. Oh*, 2011 BCSC 627, at para. 19, it is not the court's function to ensure that a plaintiff makes a net recovery from an action when the party has ignored a reasonable offer. That would defeat the purpose of the Rule and not accord with common sense.

- [51] Giving at least some effect to the September Offer would be consistent with the purposes underlying the costs rules. By the time the September Offer was made, the parties had gone through a trial management conference and a mediation. Mr. McPhail was in a position to make an honest and reasoned assessment of his case. Based on the evidence he was planning to present, the opinions expressed in the defence expert reports and the law that applied, and viewed objectively, there was no reasonable basis for Mr. McPhail to expect he could recover damages in the amounts that he was seeking, or even in the amount of the September Offer. There were serious weaknesses in Mr. McPhail's case, and his success depended virtually exclusively on the credibility and reliability of his evidence, which was going to stand alone. The weaknesses were borne out by the result at trial. Had the September Offer been accepted, an eight-day trial would have been avoided.
- [52] However, there are two further factors to consider.
- [53] First, in Mr. Aggarwal's submission, the award of damages at trial would allow Mr. McPhail to become a more functioning member of society, whereas the costs orders requested by the defendant would further marginalize him and be severely prejudicial, although Mr. Troen submits that the effect of a costs award against Mr. McPhail is largely speculative.
- [54] Second, there is the evidence that Mr. McPhail suffers from mental health issues. Dr. Lari made a psychiatric diagnosis of Mr. McPhail ("Unspecified Trauma and Stressor Related Disorder") at the time Mr. McPhail was assessed a year ago. Dr. Stewart (in his capacity as a medical doctor) also commented about Mr. McPhail's mental health issues in his report, although he was not qualified to express an opinion outside his field of neurology. He recommended psychiatric evaluation and treatment, which he described as essential.
- [55] Although Mr. McPhail must accept responsibility for his decisions, including his decision to represent himself, I am reluctant to conclude that his mental health issues had no impact on how he responded to the Offers.

6. Conclusion

- [56] In the unique circumstances of this case, and because I consider it necessary to give some recognition to the September Offer, which was an offer that ought reasonably to have been accepted, I conclude that Mr. McPhail should have his costs up to and including September 19, 2018, and that the defendant have his costs, including taxes and disbursements for court hearing fees and copying, but exclusive of other disbursements, from and after that date.
- [57] Costs payable to Mr. McPhail can be set off against costs payable by Mr. McPhail.
- [58] That concludes my ruling.

"ADAIR J."

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