

CANADA / JUDGMENT

Mitchell v. Fonseca

2020 BCSC 395

COURT

Supreme Court of British Columbia

DECIDED

17 March 2020

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2020 BCSC 395 Mitchell v. Fonseca IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Mitchell v. Fonseca, 2020 BCSC 395 Date: 20200317 Docket: M155920 Registry: Vancouver Between: Peter Scott Mitchell Plaintiff And Sean Andrew Fonseca, Neville Fonseca, Gregory Michael Prowse and Ka Fan Tang Defendants

- and - Docket: M170702 Registry: Vancouver Between: Peter Scott Mitchell Plaintiff And Wendy James Steeves Defendant Before: The Honourable Mr. Justice Mayer Reasons for Judgment Re: costs Counsel for the Plaintiff: M.T. Cleary D.S. Sall Counsel for the Defendants: C. Boulton C. Dheensaw Place and Date of Hearing: Vancouver, B.C. February 14, 2020 Place and Date of Judgment: Vancouver, B.C. March 17, 2020

Introduction

- [1] On February 14, 2020 the parties appeared before me to speak to the issue of costs arising from a 13 day jury trial that commenced on August 19, 2019.
- [2] In the underlying actions liability was admitted and damages was the only issue at trial. The plaintiff advanced a claim for past and future loss of income, past and future care expenses and non-pecuniary damages he alleged were suffered as a result of three separate motor vehicle accidents which occurred on February 28, 2014, April 17, 2014 and February 15, 2016 (collectively, the accidents).
- [3] At the conclusion of the trial the jury awarded the plaintiff damages arising from the accidents in the global sum of \$100,000, broken down as follows:
 - a) non-pecuniary damages: \$6,600;
 - b) past loss of income: \$89,500;
 - c) loss of future income: nil;
 - d) cost of future care \$1,300; and
 - e) special damages: \$2,600. (the "jury award")

- [4] The plaintiff seeks costs pursuant to Rule 14-1(9) of the Supreme Court Civil Rules. The defendants seek an order pursuant to Rule 9-1 that they be awarded costs and disbursements arising seven days after they served an offer to settle (the "Offer") which was for an amount greater than the jury award, and/or an order that the plaintiff be deprived of his costs arising for the same period.
- [5] The defendants delivered the Offer on August 6, 2013. Accordingly, what is at issue are costs arising after August 13, 2019. Law and Argument
- [6] Rule 14-1(9) requires that the successful party in a trial is awarded their costs - unless the court orders otherwise.
- [7] Rule 9-1(4) permits the court to consider an offer to settle when exercising its discretion in relation to costs.
- [8] Rule 9-1(5)(a) permits the court to deprive a plaintiff of any or all costs including any or all disbursements, to which the plaintiff would otherwise be entitled in respect of all or some of the steps taken in a proceeding, after the date of delivery or service of an offer to settle.
- [9] Rule 9-1(5)(d) permits the court to award all or some of a defendant's costs in respect of all or some of the steps taken in a proceeding arising after the date of delivery or service of an offer to settle by a defendant, where the judgment awarded to the plaintiff is no greater than the amount of the defendant's offer.
- [10] Pursuant to Rule 9-1(6), when making an order under Rule 9-1(5) the court may consider the following factors:
- a) whether the offer to settle was one that ought reasonably to have been accepted, either when it was made or on any later date;
 - b) the relationship between the terms of the settlement offered and the final judgment of the court;
 - c) the relative financial circumstances of the parties; and
 - d) any other factor the court considers appropriate.
- [11] The dominant and overarching objective of Rule 9-1 is to promote reasonable settlements, to attach some consequence or penalty for the failure of a party to accept a reasonable settlement, and to reward a party who makes a reasonable settlement offer: See *Gonzales v. Voskakis*, 2013 BCSC 675 at para. 13; *Warren v. Morgan*, 2015 BCSC 1168 at para. 24.
- [12] A plaintiff who rejects a reasonable offer to settle should usually face some sanction in costs. To do otherwise would undermine the importance of certainty and consequences in the application of Rule 9-1: See *C.P. v. RBC Life Insurance Company*, 2015 BCCA 30 at para. 95.

- [13] The reasonableness of a plaintiff's decision not to accept an offer must be assessed without reference to the award which was made at trial but rather under the circumstances which existed when an offer was open for acceptance. See *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27.
- [14] The issue is not whether an offer is reasonable but whether it was unreasonable to refuse it. Even where it was not unreasonable to refuse an offer this does not necessarily immunize a party from the consequences of a reasonable offer to settle: See *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26 at paras. 30 and 31.
- [15] Factors going to reasonableness of a plaintiff's decision not to accept a settlement offer include whether the offer had some relationship to the claim (as opposed to simply being a nuisance offer), whether it could be easily evaluated, and whether some rationale for the offer was provided: See *Hartshorne* at para. 27.
- [16] In considering whether an offer ought reasonably to have been accepted this Court has paid particular attention to whether a plaintiff's case was heavily dependent on their own credibility, particularly with respect to expert medical evidence that depends on the plaintiff's account of their alleged injuries and disabilities: See *Dennis v. Fothergill*, 2014 BCSC 452 at paras. 26 to 29; *Warren*, supra at paras. 36 to 39; *Lockett v. Chahal*, 2017 BCSC 1983 at paras. 21 to 26; *Gill v. McChesney*, 2018 BCSC 1378 at paras. 42 to 47.

Analysis

- [17] As set out above the defendants offered to settle the plaintiff's claims for \$110,000 shortly before the start of trial. After the thirteen day of trial the jury awarded \$10,000 less than the defendants had offered.
- [18] The question for me to decide is whether I should exercise my discretion to vary the requirement that the plaintiff, as the successful party at trial, receive his costs in light of the fact that he received a judgement for less than the Offer. Was it unreasonable for the plaintiff to reject the defendants offer?
- [19] The defendants' submissions focus on whether their offer was one that ought reasonably to have been accepted by the plaintiff - the factor set out under Rule 9-1(6)(a). They submit, in summary, that the plaintiff would have been aware of the following at the time that the Offer was made:
- a) That the defendants' experts had expressed a different opinion than the plaintiff's regarding the plaintiff's injuries; and
 - b) That the plaintiff's case rested entirely on his own credibility and that he either knew or should have known that his credibility had significant weaknesses.

- [20] The fact that the defendants' experts expressed a different view than the plaintiff's experts, is in my view a neutral factor in determining whether it was unreasonable for the plaintiff to reject the defendants' offer. In a personal injury case it is not unusual for experts to differ on issues of causation, diagnosis and prognosis.
- [21] With respect to credibility, in their submission the defendants list a number of pieces of evidence which they say demonstrate that the plaintiff's credibility had significant weaknesses. In addition, the defendants refer to the jury award which they contend indicates that the jury made a clear adverse finding regarding the plaintiff's credibility. The defendants' primary contention is, in essence, that the plaintiff should have known that a jury would not find him to be a credible plaintiff and therefore it was unreasonable for him not to accept the defendants' offer.
- [22] I have reviewed the defendants' list of what they describe as weaknesses in the plaintiff's evidence. This list includes, for example, the plaintiff's evidence that his car seat was broken in one of the accidents (which is relevant to his credibility regarding the severity of the accident), evidence regarding the plaintiff's pre and post accident activities and purported exaggerated or false reports of symptoms to medical practitioners. In my view much of the evidence referred to the defendants which they say clearly demonstrates a lack of credibility, although shown to be incomplete or arguably wrong at trial, did not demonstrate that the plaintiff was generally untruthful or unreliable.
- [23] Of course it is impossible to know what determinations the jury made with respect to the plaintiff's credibility on various issues. I do not consider it appropriate to speculate why the jury made awards for the amounts set out under the various heads of damages. This would in my view constitute applying an inappropriate hindsight analysis to an assessment of whether it was unreasonable for the plaintiff to reject the defendants' offer.
- [24] In this case the defendants' offer to settle for \$110,000 was made in the context of a claim for primarily soft tissue injuries resulting from the accidents, of varying severity. With respect to the strengths of the plaintiff's case, in my view the available evidence at the time this offer was made indicated that at a minimum, the plaintiff had suffered soft tissue injuries including an injury which at least diminished his ability to continue working in his previous job as an auto painter. With respect to the weaknesses of his case, the impact of this diminished ability on the plaintiff's future loss of income earning capacity was questionable given that the plaintiff was able to secure other comparably remunerative work.
- [25] The plaintiff contends that the range of non-pecuniary damages awards in comparable cases is between \$65,000 and \$85,000. He refers to the awards made in *Bulatovic v. Siebert*, 2013 BCSC 240, *Clark v. Kouba*, 2012 BCSC 1607, *McConvey v. Hart*, 2013 BCSC 1058 and *Smith v. Neil*, 2015 BCSC 9.

- [26] In addition the plaintiff concedes that his case for future loss of earning capacity was more difficult but submits that given that he had suffered a loss of capacity to work as an auto painter that it is reasonable for him to expect an award for something under this head of damages.
- [27] I am conscious of the factors set out in Hartshorne in evaluating the reasonableness of the plaintiff's decision not to accept the defendants' settlement offer. Although I would not describe the defendants' offer as a nuisance settlement offer it was not so high that it should have been jumped at by the plaintiff. In my view it was not unreasonable for the plaintiff to anticipate an award for non-pecuniary damages in the range of \$65-85,000 or some award for loss of future income earning capacity on the loss of capital asset approach. It was not in my view unreasonable for the plaintiff to consider that these potential awards combined with the relatively more certain potential awards for past wage loss and special damages could reasonably exceed \$110,000.
- [28] In summary, I do not find that it was unreasonable for the plaintiff to reject the defendants' offer to settle for \$110,000. What was the relationship between the Offer and the jury award?
- [29] In this case the jury awarded 9% less than the Offer. This is not a significant difference. In my view this factor does not favour the exercise of my discretion to deny the plaintiff costs arising after the date of the Offer. What was the impact the relative financial circumstances of the parties?
- [30] In this case there is no evidence that the defendants' insurer ICBC used its financial advantage in the litigation. Accordingly, this factor is not a material consideration. Are there any other factors which should be taken into consideration?
- [31] In my view, assessing whether a plaintiff's decision to reject a settlement offer is more nuanced in the context of a jury trial. The plaintiff did not make the decision to select a jury and therefore, when rejecting the defendants' offer, willingly takes the chance that a jury award would not be comparable to his assessment of a potential damages award. In this case the jury notice was served by the defendants.
- [32] Although hindsight cannot be applied in determining whether a rejection of an offer was unreasonable I note that in this case the jury awarded \$6,600 for non-pecuniary damages. This is a low award relative to some judge-alone trial decisions involving comparable injuries. Juries do not have the guidance of precedent in assessing non-pecuniary damages. I mention this as it demonstrates the additional complexities for any party in evaluating the reasonableness of an offer in the context of an upcoming jury trial.
- [33] In my view, in the context of a jury trial a party should be given more latitude in forecasting a potential range of damages. This factor favours preserving the plaintiff's entitlement to damages for the entire proceeding.

Conclusion:

[34] In consideration of the factors set out in Rule 9-1(6) I find that it would not be appropriate to deny, and I so award, the plaintiff costs of the entire proceeding. "Mayer, J."

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