

CANADA / JUDGMENT

Monks v. Mohammed

2015 BCSC 2308

COURT

Supreme Court of British Columbia

DECIDED

9 December 2015

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2015 BCSC 2308 Monks v. Mohammed IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Monks v. Mohammed, 2015 BCSC 2308 Date: 20151209 Docket: M146771 Registry:

Vancouver Between: Frederick Peter Monks Plaintiff And Gulasia Mohammed Defendant

Corrected Judgment: the text of this judgment was corrected at Pages 1 and 19 on December 16,

2015 Before: Master Scarth Reasons for Judgment Counsel for the Plaintiff: E.C. Girard Counsel

for the Defendant: J. Wong Place and Date of Hearing: Vancouver, B.C. October 23, 2015 Place and

Date of Judgment: Vancouver, B.C. December 9, 2015 I. INTRODUCTION

- [1] On May 9, 2013, the plaintiff, Frederick Peter Monks, was a passenger in a car driven by Leanne Monks which collided in an intersection with a car driven by the defendant, Gulasia Mohammed.
- [2] On October 10, 2014, the plaintiff filed a notice of civil claim claiming damages for personal injury, including damages for loss of earnings, past and prospective, and loss of income earning capacity and opportunity to earn income.
- [3] On October 31, 2014, defence counsel was retained. On November 3, 2014 defence counsel filed a response to civil claim admitting liability for the accident. The instructions upon which the response was based were set out in a "suit report" dated October 30, 2014 prepared by Stephen Leach, an ICBC adjuster.
- [4] On November 6, 2014, defence counsel received a letter dated November 4, 2014 from ICBC signed on behalf of Mr. Leach, giving instructions to file a response denying liability and to issue a notice of fast track.
- [5] On November 7, 2014, defence counsel attempted to contact plaintiff's counsel by telephone, and also sent an email advising that the admission of liability "may be" in error and asking that counsel contact defence counsel. No response was received from plaintiff's counsel.
- [6] A notice of fast track action was filed by the defendant on November 12, 2014.
- [7] In early 2015, Mr. Leach died.

- [8] In February 2015, defence counsel contacted plaintiff's counsel to seek consent to an amendment of the response to civil claim withdrawing the admission of liability. Also in that month, Ms. Mohammed filed a response to civil claim in the related action commenced by Ms. Monk which denies liability and pleads inevitable accident.
- [9] In July 2015 the defendant set down an application for leave to amend the response to withdraw the admission of liability. The application was adjourned in order that the parties could comply with the fast track requirement to attend a case planning conference. The conference was held on September 2, 2015. No orders were made.
- [10] This application was filed on September 17, 2015. It seeks leave to file an amended response denying liability and pleading inevitable accident.
- [11] The pleadings in the action are closed. The parties have each delivered lists of documents. No examinations for discovery have been held, and no trial date has been set. II. Discussion
- [12] Rule 7-7(5) of the Supreme Court Civil Rules provides that an admission made in a pleading may not be withdrawn "except by consent or with leave of the court." The order granting leave is a discretionary one. The overriding principle is whether, in the circumstances, the court is satisfied that it is in the interests of justice to allow the admission to be withdrawn. Admissions of fact are not to be set aside lightly. The test is whether there is a triable issue which, in the interests of justice, should be determined on the merits and not disposed of by an admission of fact. In applying that test, the court is to take all the circumstances into account including:
1. that the admission has been made inadvertently, hastily or without knowledge of the facts;
 2. that the fact admitted was not within the knowledge of the party making the admission;
 3. that the fact admitted is not true;
 4. that the fact admitted is one of mixed fact and law;
 5. that the withdrawal of the admission would not prejudice a party; and
 6. that there has been no delay in applying to withdraw the admission. See *Norlympia Seafoods Ltd. v. Dale & Co.* (1982), 141 D.L.R. (3d) 733 (B.C.C.A.); *Munster & Sons Development Ltd. v. Shaw*, 2005 BCCA 564, para. 10; *Lam v. University of British Columbia*, 2012 BCSC 670, paras. 33 and 34.
- [13] The notice of application does not set out the legal basis for the defendant's application, other than to cite the relevant rules. In oral submissions, the defendant took the position that there is a triable issue, specifically the defence of inevitable accident based on the defendant's statement that she blacked out as she went into the intersection. The defendant submits that the admission was made hastily by defence counsel, the response being filed on the second business day after the suit report was received. She submits that the admission was made in error by counsel for the defence based on the suit report. The suit

report states "admit" next to "Liability", but previous notes in the adjuster's file state that liability should be denied. She submits that the admission is one of mixed fact and law, and that there is no prejudice to the plaintiff arising from the withdrawal of the admission, other than the withdrawal itself.

- [14] The plaintiff opposes the application. He submits that there is no evidence that the admission was made in error. Rather, the plaintiff submits, the evidence relied on by the defence supports a conclusion that the response was filed based on instructions set out in the suit report. There is no affidavit from Mr. Leach, who prepared the suit report, as to the fact that those instructions were provided in error. The plaintiff submits that the fact that a second contradictory set of instructions was received shortly afterwards does not satisfy the requirement in the case law that the admission be inadvertent. The plaintiff points to the reimbursement of the plaintiff's deductible by ICBC in June 2013 as supporting the admission of fault by the defendant. The plaintiff submits that therefore the defendant has failed to satisfy the onus upon her to show that the admission was made in error, or inadvertently. The plaintiff submits further that the passage of time since the admission was made is lengthy and that witnesses' memories may be been affected, thus prejudicing the plaintiff in making out his case.
- [15] The absence of proof of inadvertence or undue haste was a factor considered by the Court in *Norlympia*. The Court of Appeal concluded that this was a "secondary" matter, and that such proof was not essential in order that an admission can be withdrawn "if in fact in all the circumstances of the case it is found that there is a triable issue which ought to be tried in the interests of justice and not left to an admission of fact": at para. 16.
- [16] Here, because of the death of Mr. Leach, we will never know why he completed the suit report as he did. The entry of the word "admit" next to "Liability" on the computer-generated report was consistent with the description of the accident set out in the suit report ("plntf w/ b on 96 ave when dfndnt n/b on 130 st ran red lt and collided with plntf") but it was inconsistent with the earlier file notes which state that liability should be denied, and with the instruction letter of November 4, 2014 which is worded as though it is the first communication of instructions to defence counsel. Medical evidence which referenced the defendant's report that she had "blacked out" as she went into the intersection was available to Mr. Leach. Unlike *Miller v. Norris*, 2013 BCSC 552, the evidence does not support a conclusion that the defence of inevitable accident had been investigated and rejected by the handling adjuster as "not going to go anywhere": *Miller*, paras. 9 and 35. In my view, the defence has made out that there is a triable issue as to liability.
- [17] While the defendant delayed in bringing the application seeking leave to withdraw the admission, her counsel contacted plaintiff's counsel immediately after receiving the letter of November 4, 2014, seeking consent to an amendment of the response. To date there has been little or no progress in the action and it is fair to conclude that the plaintiff is not prejudiced by the withdrawal other than by having to prove liability.

- [18] Taking all the circumstances into account, it is my view that the interests of justice require that the court grant leave to amend the response to withdraw the admission and to plead inevitable accident.
- [19] While the defendant has been successful on her application, the notice of application is not in proper form, and accordingly, there will be no order for costs: Dupre v. Patterson, 2013 BCSC 1561, paras. 45 to 56. Master S. Scarth
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