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CANADA / JUDGMENT

## Musgrove v. Elliot

2014 BCSC 40

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COURT

Supreme Court of British Columbia

DECIDED

13 January 2014

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2014 BCSC 40 Musgrove v. Elliot

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Musgrove v. Elliot,

2014 BCSC 40

Date: 20140113

Docket: 10-3570

Registry: Victoria

Between:

Donald Jason Musgrove

Plaintiff

And:

Katrina Elliot

Defendant

Docket: 10-3569

Registry: Victoria

Between:

Donald Jason Musgrove

Plaintiff

And:

Maggie Macay

Defendant

Before: The Honourable Mr. Justice Johnston

Reasons for Judgment

on Costs

Counsel for the Plaintiff:

D. Rivers

Counsel for the Defendants:

H.M. Jaeb

Place and Date of Submissions

from Defendant:

Victoria, B.C.

November 14, 2013

and December 2, 2013

Place and Date of Submissions

from Plaintiff:

November 22, 2013

Place and Date of Judgment:

Victoria, B.C.

**January 13, 2014**

- [1] The plaintiff became entitled to his costs of two actions which were heard at the same time and which arose out of two motor vehicle accidents, all as provided in a decision indexed at 2013 BCSC 1707.
- [2] The defendants in each of the actions argue that the plaintiff's costs should be assessed on the basis that both actions were subject to Rule 15-1 (Fast Track Litigation), that the costs should be allowed in the first action at \$11,000 under Rule 15-1(15)(c) for a trial lasting more than two days, and that the court should exercise its discretion to reduce the lump sum costs recoverable in the second action to a suggested \$5,500.

[3] The plaintiff argues that neither of his actions ever fell under Rule 15-1 as they did not meet the criteria set out in sub-rule (1) in that he did not concede that either action was limited to \$100,000, he did not consent to the application of the rule, and the trial took nine days, plus written submissions.

[4] Rule 15-1 reads:

When rule applies

- (1) Subject to subrule (4) and unless the court otherwise orders, this rule applies to an action if
  - (a) the only claims in the action are for one or more of money, real property, a builder's lien and personal property and the total of the following amounts is \$100,000 or less, exclusive of interest and costs:
    - (i) the amount of any money claimed in the action by the plaintiff for pecuniary loss;
    - (ii) the amount of any money to be claimed in the action by the plaintiff for non-pecuniary loss;
  - (b) the trial of the action can be completed within 3 days,
  - (c) the parties to the action consent, or
  - (d) the court, on its own motion or on the application of any party, so orders.
- [5] The subject of each action was a motor vehicle accident, the first of which occurred October 16, 2008; the second, on November 3, 2008. The plaintiff brought two actions by notices of civil claim on September 20, 2010.
- [6] Approximately three months later, the defendant, in each of the actions, filed a notice of fast track action in Form 61, on December 16, 2010, in the Macay action, and on December 29, 2010, in the Elliot action. The defendants thus asserted that the rule applied to each action, which a defendant is entitled to do, under sub-rule (2)(a).
- [7] Since receiving the notice of fast track action in each of the actions, the plaintiff has never filed a pleading that has been endorsed, "Subject to Rule 15-1," as would be required by sub-rule (2)(b).
- [8] On the other hand, the plaintiff does not appear to have ever objected to the defendants' assertion that both matters were suitable for fast track treatment.
- [9] The defendants have not been consistent in ensuring that all of their filed documents in each of the actions bore the endorsement required by sub-rule (2)(b).
- [10] None of the parties has sought a court order: the defendants to confirm their view that the actions were appropriately proceeding under Rule 15-1, the plaintiff, under Rule 15-1(6) for an order that Rule 15-1 ceased to apply.

- [11] In some respects the parties have conducted both actions in ways consistent with a shared belief that the actions were subject to Rule 15-1.
- [12] The parties attended a case planning conference on June 28, 2012, before Master Bouck whose notes of the conference indicate that the actions were both fast track actions, to be tried at the same time, and that neither party wished to remove the action from fast track. The learned Master also noted that both parties were in agreement that the trials could be completed in three days.
- [13] It appears that the two actions were ordered heard together by consent of both parties and that both parties agreed that both actions could be heard in three days, as that was the initial time reserved for both trials in October 2012.
- [14] The parties have acted as though Rule 15-1 governed their discoveries, by confining the examination of the plaintiff to two hours on each action, and making a special provision for an additional two hour discovery of the plaintiff which was not used, as it turned out.
- [15] The first trial date was adjourned at a trial management conference and the parties were directed by the trial management judge to seek a five day trial for both actions. There is no suggestion that the parties or the trial management judge presiding at the first trial management conference turned their minds to the application of Rule 15-1 or any impact on the application of the rule flowing from an expansion of the trial time from three to five days.
- [16] There was a subsequent trial management conference in January 2013 where, again, it does not appear that the applicability of Rule 15-1 was raised.
- [17] In *Narain v. Gill*, 2012 BCSC 1468, Meiklem J. said at para. 17:
- the simple filing of a notice of fast track action in form 61 does not turn any action into a fast track action; rather, any party may file such notice "if this rule applies to an action." [my emphasis]. It is Rule 15-1(1) that defines when the rule applies
- [18] That the criteria for fast track application under Rule 15-1(1) are disjunctive was established by Master Bouck in *Hemani v. Hillard*, 2011 BCSC 1381.
- [19] With respect to the plaintiff's argument that he never overtly agreed that his claims did not exceed the \$100,000 money limit, that he never delivered a document acknowledging that his actions were subject to Rule 15-1 and through the endorsement required by the rule, I find that the plaintiff acquiesced in the application of Rule 15-1 to these actions by participating in his own examination for discovery on the basis that it was limited to two hours in each of the two actions (as allowed in Rule 15-1(11)(a)), by agreeing to an expansion to a further two hours to accommodate discovery based on further document production (Rule 15-1(11)(e)), and, most important, by the position taken before Master Bouck at the case planning conference in June 2012.

- [20] At a minimum, when a party is served with a notice in Form 61, that party should be expected to turn their mind to whether they agree that the action should proceed under the fast track regime, and, if they do not agree, to say so reasonably promptly and not lie in the weeds to see how things turn out with respect to costs.
- [21] The plaintiff's acquiescence in these circumstances amounts to consent under Rule 15-1(1)(c).
- [22] As I will repeat later, in my view the trial in these two actions should have concluded in six days, including final submissions of counsel: that they did not can be attributed to a combination of court scheduling problems on one day and, primarily, a lack of focus by the parties. That the two actions were set by agreement for five days, after an initially agreed combined estimate of three days, satisfies the requirement of Rule 15-1(1)(b), that is, that each of the actions could have been heard, at least according to the parties, in three days or less.
- [23] I conclude that Rule 15-1 applies to both actions.
- [24] The defendants seek to invoke the discretion of the court to reduce the lump sum costs, otherwise recoverable, on the second action - \$11,000 - because of "efficiencies" achieved as a result of hearing the two matters at the same time.
- [25] While there were likely some such efficiencies, there were also complications from running two actions at the same time, as the plaintiff was required to deal with the circumstances of the second accident and the impact of any injuries suffered in the second accident on injuries suffered in the first accident. The time spent on examining the plaintiff for discovery was double what would have been allowed if there had been only one action and many of the pleadings were necessarily separate as between the two actions.
- [26] Two actions were necessary to deal with two accidents. The defendants in each of the actions have availed themselves of the costs certainty provided by Rule 15-1 by serving notice in Form 61 in each action. I see no reason, in the circumstances of these cases, to reduce the costs otherwise available to the successful plaintiff in each of the two actions.
- [27] The plaintiff seeks an increase in the costs allowed under Rule 15-1 pointing to many of the same arguments he advanced in support of his argument that the rule did not apply.
- [28] To increase the plaintiff's costs in part because he never overtly acknowledged, through endorsement on pleadings filed by him, the applicability of Rule 15-1 to either action would be to reward the plaintiff for lying the weeds on the matter, in my view.
- [29] That the plaintiff was examined for discovery for four hours in total is in keeping with the availability of two hours for each of the two actions. No authority was tendered to establish that by ordering two fast track actions to be heard at the same time, one might reduce the discovery time otherwise available if no such order had been made.

- [30] The plaintiff argues that no trial date was obtained within four months of service of the two Form 61s. Rule 15-1(13) is permissive and does not require a party to seek a trial date within four months.
- [31] The plaintiff's principle argument seems to be that the cost award should reflect the time actually taken for the trials; as earlier indicated, it is my view that these trials could and should have been completed in six days, including final submissions. As dominus litus, the plaintiff was in the best position to ensure that the trials proceeded efficiently. I am not persuaded to expand the costs available for trials lasting more than two days beyond the \$11,000 set out in Rule 15-1(15)(c).
- [32] The plaintiff shall therefore recover \$11,000 plus disbursements in the Macay action and \$11,000 plus disbursements in the Elliott action.

"R.T.C. Johnston, J."

The Honourable Mr. Justice Johnston

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