
CANADA / JUDGMENT

Niloufari v. Movahedi

2014 BCSC 680

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Supreme Court of British Columbia

DECIDED

21 March 2014

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2014 BCSC 680 Niloufari v. Movahedi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Niloufari v. Movahedi,

2014 BCSC 680

Date: 20140321

Docket: M094546

Registry: Vancouver

Between:

Ebrahim Niloufari

Plaintiff

And

Mahnoush Fathi Movahedi and

Ziaallah Hosseinzadeh-Fardsis

Defendants

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

Plaintiff appearing on his own behalf:

Ebrahim Niloufari

Counsel for the Defendants:

Judith Bowers, Q.C.

Place and Date of Trial/Hearing:

Vancouver, B.C.

March 19-21, 2014

Place and Date of Judgment:

Vancouver, B.C.

March 21, 2014

THE COURT:

Introduction

- [1] The plaintiff, Ebrahim Niloufari, brings this action for recovery of injuries arising from a motor vehicle collision.
- [2] The accident occurred in the mid-afternoon of December 5, 2007. By the accounts of all involved, the day was sunny and dry. The collision occurred on Beresford Street, located in the City of Burnaby. Beresford Street runs more or less east and west. Cross streets running more or less north and south are McKay and Cassie Avenues with the former being further to the east along Beresford Street. There are no marked lanes on Beresford Street, including any centre lane. Cars are allowed to park on Beresford Street on the south side, but not the north.
- [3] At the time of the accident, Mr. Niloufari was in his red 1995 Dodge Neon. The other vehicle involved in the collision was a 1996 Dodge Caravan driven by the defendant Mahnoush Fathi Movahedi. This vehicle was owned by the defendant, Ziaallah Hosseinzadeh-Fardsis.
- [4] At the outset, it was the intention of the parties to address both liability and damages in what was to be a short three-day trial. However, various preliminary issues arose concerning certain expert medical evidence intended to be adduced by Mr. Niloufari, which issues were not resolved. After submissions from the parties as to the best way to proceed, I ruled that the trial would proceed on liability issues only, with the damages issues to be addressed, if necessary.

Evidence and Submissions

Mr. Niloufari

- [5] At the time of the accident, Mr. Niloufari lived in the large apartment building located on the block bordered by Beresford Street and Cassie and McKay Avenues. The exit and entrance to the underground parking lot to the apartment building is in the middle of that block on Beresford Street and faces north as you exit. There is no stop sign at the exit.

- [6] Mr. Niloufari was in his red 1995 Dodge Neon and exiting from the parking garage in order to go shopping. The exit begins below grade level and rises to the level of a sidewalk and then the street. Immediately to the right of the exit are a telephone pole and a large tree. More importantly, there are usually numerous cars parked on Beresford Street facing east and immediately to the right of the exit.
- [7] Mr. Niloufari says that he is a cautious driver and takes pains to stop and look for pedestrians and other vehicles prior to exiting the parking lot. Mr. Niloufari's previous occupation was as a taxi driver, and he describes himself as a "professional driver".
- [8] On this occasion, he says that he stopped two times before exiting the parking lot. He says that he stopped for pedestrians and, not seeing any, then pulled forward to stop again. At this point, Mr. Niloufari says that he turned right onto Beresford Street and just as he finished his turn, he saw Ms. Movahedi's vehicle coming towards him. He then says that Ms. Movahedi was in his lane of travel and that in order to avoid a head-on collision, she swerved back into her lane. He says that notwithstanding these manoeuvres, she was unable to swerve completely back and his front end hit the rear of Ms. Movahedi's vehicle.
- [9] The front driver's side of Mr. Niloufari's vehicle was damaged. An estimate of the damage to his vehicle was \$1,117.

Ms. Movahedi

- [10] Ms. Movahedi was living in Burnaby at the time of the accident. She had stayed overnight at a friend's place in the area. She had picked up her mother from the SkyTrain station and was on her way home at the time of the accident.
- [11] Ms. Movahedi is, like Mr. Niloufari, very familiar with the area and in particular Beresford Street. She is also familiar with the particular apartment block on Beresford Street where Mr. Niloufari lived and the exit from the parking garage. She specifically recalls that cars are typically parked along Beresford Street to the east of the exit, and she specifically recalls that a large SUV was usually parked immediately to the right of the parking exit. Indeed, photos of the accident scene on January 2, 2008, show that same SUV parked just where Ms. Movahedi had observed it.
- [12] Ms. Movahedi was travelling westbound on Beresford Street at about 40 kilometres an hour. Her evidence was that she was travelling on the right side of the street. While passing the cars parked on the south side of Beresford Street, and just before the exit, she says that she first observed Mr. Niloufari's vehicle while it was stopped in the exit from the parking garage. She says that just after Mr. Niloufari's vehicle passed out of her direct line of vision, her vehicle was hit and her vehicle was pushed to the far curb.

- [13] Ms. Movahedi stopped her car just a short distance away. She says she was shocked to get hit. Her mother got out of the car and began a rather spirited discussion with Mr. Niloufari about the accident. Ms. Movahedi joined them and stopped the argument. She and Mr. Niloufari then exchanged information and both drove away in their vehicles. No police or emergency vehicles were called.
- [14] Ms. Movahedi describes that her vehicle was damaged from the driver's door back to the wheel well on the driver's side. There was approximately \$2,000 worth of damage and since the value of the vehicle did not justify fixing it, it was written off.
- [15] Ms. Movahedi and Mr. Niloufari had subsequent discussions regarding the repair of the vehicles, in terms of whether claims would be made to ICBC. In the end, Ms. Movahedi and her husband decided that the claims should be processed via the "legal route".

Discussion

- [16] Mr. Niloufari bears the onus of proving that Ms. Movahedi was negligent and that her negligence was the sole or a contributing cause of the accident.
- [17] The relevant statutory provisions from the Motor Vehicle Act, R.S.B.C. 1996, c. 318, are as follows:

Careless driving prohibited

144 (1) A person must not drive a motor vehicle on a highway

- (a) without due care and attention,
- (b) without reasonable consideration for other persons using the highway, or
- (c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.

Emerging from alleys

176 (2) The driver of a vehicle about to enter or cross a highway from an alley, lane, driveway, building or private road must yield the right of way to traffic approaching on the highway so closely that it constitutes an immediate hazard.

- [18] In addition, Mr. Niloufari relies on ss. 150 and 154 of the Motor Vehicle Act, which provide that a driver of a vehicle must confine the course of the vehicle to the right-hand half of the roadway if the roadway is of sufficient width and it is practical to do so, except under certain conditions which are not relevant here. A driver must also specifically confine the course of the vehicle to the right-hand half of the roadway when meeting a moving vehicle.
- [19] In this case, both drivers have presented starkly different versions of the events. Accordingly, I must determine the credibility and reliability of the evidence of each of them.

- [20] Mr. Niloufari acted on his own behalf and I have given some consideration to the presentation of his evidence by reason of that fact. However, it was apparent to me that his recollection of the events in question was questionable. In many instances and on critical issues, he stated quite often that he thought something was the case or believed it to be so, and he was therefore equivocal in his evidence to some degree.
- [21] Regarding where Ms. Movahedi's vehicle was when he first saw it, Mr. Niloufari said on discovery that he "might" have seen it before the accident, and then said that he saw it either just after the intersection at McKay Avenue or at the intersection. On cross-examination, he said that he saw Ms. Movahedi's vehicle when he was at his first stop while coming out of the parking lot and that it was beyond the McKay Avenue intersection. It is about five car lengths to the intersection. At one point he even stated that he could not remember if he had seen Ms. Movahedi's vehicle at the time of his second stop.
- [22] On the matter of an obstruction from a vehicle parked just to the right of the exit, Mr. Niloufari denied in cross-examination that there was any obstruction, but on discovery he had indicated that he simply could not remember any obstruction by a parked car.
- [23] Mr. Niloufari's explanation for how he could possibly have completed his turn onto the street, such that he would essentially meet Ms. Movahedi head on, makes little sense given the overall circumstances. Mr. Niloufari suggests that after the initial observation of Ms. Movahedi's vehicle, he waited some time and then proceeded slowly or cautiously into the street. Yet, even by his evidence, he could only have assumed after his first observation that Ms. Movahedi's vehicle would be coming along very shortly. The timing of her arrival in these circumstances is such that it would have been virtually impossible for him to complete his turn so as to be facing her for some time, after the point of his exit.
- [24] He then strangely asserts that even though Beresford Street can accommodate two lanes of travel, even with the parked cars, he would normally be cautious if another vehicle was approaching and would wait until the car had passed. Yet clearly he did no such thing on December 5, 2007.
- [25] In addition, by the time he pulled out of the parking lot, he was already aware that a vehicle was approaching and he acknowledged in his discovery that he knew that Ms. Movahedi was continuing westbound on Beresford Street. It is difficult, as a matter of common sense, to imagine that as he pulled out and his sight line improved to the east, he would not have observed Ms. Movahedi's vehicle so as to appreciate that she was continuing along Beresford Street and, even by his evidence, on the left-hand side of the road. If, as he alleges, he was proceeding slowly and cautiously, he would have had more than sufficient time to stop and observe this vehicle further. Yet Mr. Niloufari contended that he had completed his turn and was fully in his lane of travel, until he suddenly realized that Ms. Movahedi was heading directly toward him.

- [26] Mr. Niloufari gave no credible evidence about his reaction to what must have been grave concern about a potential head-on collision. He equivocally stated that he applied his brakes, although he suggested at discovery that his braking was more likely to have occurred after he was struck. He did not honk his horn. He did not say that he tried to take any other evasive actions or, if he did not, why not.
- [27] Evidence at the trial also confirmed that Mr. Niloufari was taking significant medication for a previous accident in 2006, including heavy painkillers and sleeping pills. There was no direct evidence that Mr. Niloufari's driving skills were affected by this medication, but it certainly raises the possibility that they were.
- [28] In these circumstances, I consider that Mr. Niloufari's evidence is far from credible or reliable. I do not suggest at all that Mr. Niloufari has intended to intentionally mislead the court, as I consider that he has attempted to do his best to give his evidence. However, I conclude that he has succumbed to the not unusual human trait of reconstructing events to suit what now might be perceived to have been a better scenario for him.
- [29] To the contrary, Ms. Movahedi's evidence was given in a clear and straightforward manner. She quite convincingly says that she was travelling along the middle of Beresford Street toward the right side, oblivious to Mr. Niloufari's presence, until she observed his vehicle stopped in the parking lot exit. She continued along and immediately thereafter felt her vehicle being struck on the side and rear on the driver's side.
- [30] Notwithstanding Mr. Niloufari's contentions to the contrary, I conclude that Ms. Movahedi's statements, discovery evidence and testimony throughout the proceeding have been consistent, particularly as to where she was located when she was hit by Mr. Niloufari's vehicle.
- [31] She gave a statement to ICBC on December 14, 2007, just days after the accident. In that statement, Ms. Movahedi states that she was shocked because she:
- knew there were cars behind me and as I had passed the red Neon it was at a complete stop.
- [32] During her testimony, she clarified that she meant to say that there were no cars behind her. This clarification makes perfect sense in the context of her statement, in that she was "shocked" because she couldn't figure out what had hit her. I accept her explanation on the point. Despite Mr. Niloufari's assertion to the contrary, her evidence was also consistent as to where she ended up parking her car after the collision, although in my view this has little relevance for the purpose of determining fault for the accident.
- [33] Ms. Movahedi was not shaken on cross-examination as to the key facts regarding how the collision occurred.
- [34] Mr. Niloufari argues that Ms. Movahedi was at fault for driving at excessive speed along Beresford Street. Her uncontradicted evidence on the point was that she was driving at 40 kilometres an hour. No evidence was adduced as to the speed limit. Mr. Niloufari relies on

certain ICBC documents which refer to there being no "low velocity impact" and an email commenting that the damage was "beyond lvi criteria", with "lvi" presumably being "low velocity impact". In my view, this evidence is hardly reliable since the authors of these documents were not called to give evidence on what was meant by the term "lvi" in the context of this accident, and on what basis that term was ascribed to the accident. Even accepting that it was not a "low velocity impact" collision, as one might presume, that is not determinative as to the issue of whether Ms. Movahedi was driving at an excessive speed.

- [35] Mr. Niloufari also alleges that Ms. Movahedi admitted fault at the scene. He said that she said, "sorry for what happened, my husband will take care of it." She denies that she made any admission of fault at the scene. I accept Ms. Movahedi's evidence on this point. Even if these or similar words were used, it would be a normal human reaction to apologize generally for such an unfortunate event. Such a general apology is not necessarily consistent with an admission of fault, nor is the comment about her husband "taking care" of anything conclusive, even if such words were used.
- [36] The manner in which both vehicles were damaged is also entirely consistent with Ms. Movahedi's version of events. Ms. Movahedi's vehicle was struck from the driver's door along her side to the back wheel well. Mr. Niloufari's vehicle was damaged only on the driver's side front at the corner. As her counsel suggested, if Mr. Niloufari's version was accepted, one would perhaps, but not necessarily, have expected to see damage consistent with a broadsiding of the vehicles, rather than the specific damage on his front corner alone.
- [37] I find the following facts:
- a) When Mr. Niloufari began to exit the parking lot, he stopped twice. At the first stop, he saw Ms. Movahedi's vehicle travelling west on Beresford Street, just beyond the McKay Avenue intersection to the east.
 - b) Mr. Niloufari appreciated that the vehicle was continuing west along Beresford Street toward him and the exit.
 - c) Mr. Niloufari's vision to the east was somewhat obscured by the parked cars along Beresford Street, including a large SUV immediately to his right.
 - d) Ms. Movahedi was proceeding west along the right side of Beresford Street at 40 kilometres an hour and she did not see Mr. Niloufari's vehicle until she was almost beside the parking lot's exit. At that point, Mr. Niloufari's car was stopped at the exit.
 - e) At that moment, Mr. Niloufari proceeded into Beresford Street, making a wide turn to the right, so as to get past the parked cars, and in doing so, his front driver's side struck the side of Ms. Movahedi's vehicle as she was continuing to pass by the exit.

- [38] In particular, I accept Ms. Movahedi's evidence that she was proceeding along Beresford Street in a normal manner and she was not aware of Mr. Niloufari's vehicle until just before the parking lot exit, when she observed that his car was stopped. There is no evidence upon which I can find that Ms. Movahedi was driving without due care and attention and/or that she was driving at an excessive speed.
- [39] Pursuant to the Motor Vehicle Act, s. 176(2), Ms. Movahedi was the dominant driver having the right of way, and Mr. Niloufari, as the driver approaching the "highway" (as the term is used in the Motor Vehicle Act) from a driveway, was required to yield the right of way to her vehicle if her vehicle constituted an "immediate hazard": see *Ahamed v. Ross International Motors Ltd.*, [1994] B.C.J. No. 402 at para. 21 (S.C.); *White v. Craig*, 2013 BCSC 845 at paras. 27-28.
- [40] As with the more general burden of proof, Mr. Niloufari bears the onus of proving that it was safe for him to enter into Beresford Street and that Ms. Movahedi's vehicle was not an immediate hazard: *Kerr v. Hall*, 2013 BCSC 2347 at paras. 14-15, 20.
- [41] On the issue of "immediate hazard", the defendants have referred me to various authorities: *Ahamed* at para. 22; *Aymont v. Capp*, 2010 BCSC 1011 at para. 52. Both cases relied on statements from the British Columbia Court of Appeal in *Keen v. Stene* (1964), 44 D.L.R. (2d) 350 at 359 (B.C.C.A.) and *Raie v. Thorpe* (1963), 43 W.W.R. 405 at 410 (B.C.C.A.). Those appeal cases stand for the proposition that if an approaching car is so close so as to require the driver of the approaching car to take some sudden or violent action to avoid threat of a collision, if the servient driver fails to yield the right of way, that approaching car is an "immediate hazard".
- [42] In this case, Ms. Movahedi was entitled to assume that Mr. Niloufari would yield to her. I find that Mr. Niloufari proceeded to exit the parking lot without ensuring that there was no oncoming traffic that might constitute an immediate hazard. I also find that when he exited the parking lot, he made such a wide turn that the front side of his vehicle went into the path of travel of Ms. Movahedi's vehicle, such that her vehicle was struck. I think it more likely than not that Mr. Niloufari simply assumed, incorrectly, that he had sufficient time to enter the street before Ms. Movahedi's vehicle came by. The fact that the collision occurred is conclusive evidence that his assumption was wrong.
- [43] In these circumstances, Ms. Movahedi did absolutely nothing to contribute to the accident as she was continuing along Beresford Street without any knowledge whatsoever that Mr. Niloufari would act as he did. She was entitled to assume that Mr. Niloufari would remain stopped and allow her vehicle to pass by, unless he could have safely turned into the street without passing into her lane of travel. He did no such thing, and when he did turn into the street, her vehicle clearly was an immediate hazard by reason of the fact that the collision occurred.

[44] I would add that I have considered the two cases relied on by Mr. Niloufari, being *Spiering v. Trevor*, 2012 BCSC 1653 and *Power v. Orth*, [1995] B.C.J. No. 1011 (S.C.). Neither of those decisions was of assistance to me in deciding this issue.

[45] Accordingly, Mr. Niloufari has not established any negligence on the part of Ms. Movahedi that caused or contributed to the accident. To the contrary, I find that the sole cause of the accident was the negligence of Mr. Niloufari in failing to safely enter the street and yield the right of way, as he was statutorily required to do. I find that it was Mr. Niloufari who was acting in breach of his statutory obligations as contained in ss. 144 and 176(2) of the Motor Vehicle Act.

[46] Accordingly, the action is dismissed.

[SUBMISSIONS ON COSTS]

[47] THE COURT: In my reasons earlier today, I dismissed the action brought by Mr. Niloufari on the basis that he had failed to prove negligence against the defendants. The remaining matter relates to costs.

[48] Counsel for the defendants has referred me to the fact that this is what is commonly called "fast track litigation" under Rule 15-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009. The hearing of this trial comprised two days commencing Wednesday and Thursday of this week and continued this morning for the purpose of delivery of my reasons for judgment.

[49] In the circumstances, the defendants seek costs pursuant to Rule 15-1(15)(b):

Costs

(15) Unless the court otherwise orders or the parties consent, and subject to Rule 14-1 (10), the amount of costs, exclusive of disbursements, to which a party to a fast track action is entitled is as follows:

(b) if the time spent on the hearing of the trial is 2 days or less but more than one day, \$9,500;

[50] I have given Mr. Niloufari an opportunity to consider the matter. I do not know specifically what efforts he has made, but he has had an opportunity to look at Rule 15-1 and make submissions to the contrary if he sees fit. He does not seek to do that.

[51] The disposition of this matter, in accordance with my reasons, would normally result in costs being awarded to the successful defendants and I see no circumstances here that would justify departing from that result, notwithstanding my jurisdiction to do so under Rule 15-1(15).

[52] Accordingly, there will be an order that Mr. Niloufari pay costs of this proceeding in the amount of \$9,500, plus disbursements to be assessed in the usual fashion.

"Fitzpatrick J."

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