
CANADA / JUDGMENT

Nixon v. Pickton

2015 BCSC 1700

COURT

Supreme Court of British Columbia

DECIDED

28 August 2015

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2015 BCSC 1700 Nixon v. Pickton

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nixon v. Pickton,

2015 BCSC 1700

Date: 20150828

Docket: S138553

Registry: Vancouver

Between:

Fiarra Nixon

Plaintiff

And

David Pickton

Defendant

Before: The Honourable Mr. Justice Macintosh

Oral Reasons for Judgment Addressing Costs

Counsel for the Plaintiff:

Jason B. Gratl

Counsel for the Defendant:

Andrew P. Morrison

Place and Date of Hearing:

Vancouver, B.C.

August 27, 2015

Place and Date of Judgment:

Vancouver, B.C.

August 28, 2015

Issues

- [1] Following a trial with a jury, in June of this year, both parties now seek costs.
- [2] Ms. Nixon seeks costs throughout. She would be asking for special costs, based on her complaints about Mr. Pickton's pleading, but her counsel advises that his fee arrangements with her would make a special costs award disadvantageous to her financially. So Ms. Nixon, instead, asks that I find the Pickton pleading to be deserving of punishment, and that I use such finding to set off and negate any adverse consequence to her from not accepting Mr. Pickton's offer to settle.
- [3] Mr. Pickton argues that Ms. Nixon was not successful at trial, and therefore is not entitled to any costs. Because of his offer to settle, he seeks costs from her for the steps taken after his offer was made.

Who Was Successful?

- [4] Supreme Court Rule 14-1(9) provides that the costs of a proceeding must be awarded to the successful party, unless the court otherwise orders.
- [5] When he was a member of this Court, Goepel J. wrote the following in *Paul v. Pumple*, 2013 BCSC 1844 at paras. 14-16:
 - [14] The starting point in any cost award is Rule 16-1(7). Pursuant to that Rule costs must be awarded to the successful party unless the court otherwise orders. Success has been equated to substantial success: *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 (C.A.) at 185; *MacLean v. Mio*, 2011 BCSC 148 at paras. 17-31. In *Fotheringham v. Fotheringham*, 2001 BCSC 1321, 13 C.P.C. (5th) 302 [Fotheringham], Bouck J. at para. 45 held that as a rule of thumb, substantial success occurs when the prevailing party succeeds on 75% of the matters in dispute, considered globally.
 - [15] In *Fotheringham*, Bouck J. suggested at para. 46 a four-step inquiry to determine substantial success in cases involving multiple individual issues:
 - 1. First, by focusing on the "matters in dispute" at the trial. These may or may not include "issues" explicitly mentioned in the pleadings.

2. Second, by assessing the weight or importance of those "matters" to the parties.
3. Third, by doing a global determination with respect to all the matters in dispute and determining which party "substantially succeeded," overall and therefore won the event.
4. Fourth, where one party "substantially succeeded," a consideration of whether there are reasons to "otherwise order" that the winning party be deprived of his or her costs and each side then bear their own costs.

[16] Ms. Paul submits that her offer to settle should be considered in determining substantial success. I do not agree. That submission is contrary to numerous authorities that have held that offers to settle should not be considered in determining substantial success: *P.G. v. D.D.G.*, 2002 BCSC 1582 [P.G.]; *Dykman v. Dykman*, 2011 BCSC 1169; and *MacNutt v. MacNutt*, 2013 BCSC 1159).

Goepel J. above was referring to this Court's Family Rule 16-1(7), which is the same for the purposes of this hearing as Supreme Court Rule 14-1(9), which I referred to in para. 4 above.

[6] Goepel J.A., as a member of our Court of Appeal, addressed costs again when he wrote for a three-member division in *Loft v. Nat*, 2014 BCCA 108. There, he said the following at paras. 46-51:

[46] Pursuant to Rule 14-1(9), costs in a proceeding must be awarded to the successful party unless the court otherwise orders. At its most basic level the successful party is the plaintiff who establishes liability under a cause of action and obtains a remedy, or a defendant who obtains a dismissal of the plaintiff's case: *Service Corporation International (Canada) Ltd. (Graham Funeral Ltd.) v. Nunes-Pottinger Funeral Services & Crematorium Ltd.*, 2012 BCSC 1588, 42 C.P.C. (7th) 416.

[47] In this proceeding Mr. Loft was awarded damages for injuries he had suffered in the motor vehicle accident. The respondents had denied liability until shortly before trial. Although the damage award was far less than sought, Mr. Loft was the successful party. The fact that he obtained a judgment in an amount less than the amount sought is not, by itself, a proper reason for depriving him of costs: *3464920 Canada Inc. v. Strother*, 2010 BCCA 328, 320 D.L.R. (4th) 637.

[48] The trial judge's stated reason for awarding costs to the respondents was that the respondents had been largely successful in all areas of the claim. With respect, that decision is wrong in principle and cannot stand. I note that on the hearing of the appeal the respondents did not suggest otherwise.

[49] The fact that a party has been successful at trial does not however necessarily mean that the trial judge must award costs in its favour. The rule empowers the court to otherwise order. The court may make a contrary order for many reasons. One example is misconduct in the course of the litigation: *Brown v. Lowe*, 2002 BCCA 7, 97 B.C.L.R. (3d) 246. Another is a failure to accept an offer to settle under Rule 9-1. A third arises when the court rules against

the successful party on one or more issues that took a discrete amount of time at trial. In such a case the judge may award costs in respect to those issues to the other party under Rule 14-1(15): *Lee v. Jarvie*, 2013 BCCA 515. Such an order is not a regular part of litigation and should be confined to relatively rare cases: *Sutherland v. Canada (Attorney General)*, 2008 BCCA 27, 77 B.C.L.R. (4th) 142; *Lewis v. Lehigh Northwest Cement Limited*, 2009 BCCA 424, 97 B.C.L.R. (4th) 256. Whether a judge will order otherwise in any particular case will be dependent upon the circumstances of that individual action.

- [50] Costs are very much a matter of the trial judge's discretion. In the circumstances of this case, the basis upon which that discretion was exercised was in error. That said, the trial judge remains in the best position to determine the proper costs order and to what extent, if any, the offer to settle that was made in this case should impact on costs. On the hearing of the appeal both parties suggested that if the costs appeal was allowed, costs should be referred back to the trial judge.
- [51] I would allow the costs appeal and refer the matter of costs back to the trial judge for a further determination.
- [7] Pursuant to that reference by the Court of Appeal, the trial judge in *Loft* addressed costs again at 2015 BCSC 198. He relied on *Fotheringham* and on *Gold*, which cases were cited above in *Paul*, and he also relied on *Paul* itself. He concluded that neither party had achieved substantial success and, as a result, neither party was awarded costs.
- [8] As seen in the quotation above, the Court of Appeal in *Loft* defined success "at its most basic level" to include a plaintiff who establishes liability under a cause of action and obtains a remedy. I read that passage as reducing the degree of success a party must achieve in order to qualify for a costs award under 14-1(9). Something below the "substantial success" level appears to be contemplated. Rule 14-1(9) itself makes success a prerequisite for obtaining costs without defining what constitutes success. This Court, in the cases I have mentioned earlier, has repeatedly defined success to require substantial success, which has been approximated to 75% success. What the Court of Appeal says in *Loft*, in my respectful view, is simply that a claimant can achieve the success called for under the rule without showing something in the range of 75% success. I am not presuming here to substitute a new percentage, a new fraction, for defining success, but I do say that success, the first requirement under the costs rule, has to be examined in every case in which costs are claimed. As the Court of Appeal said in *Loft*, in essence, success at its most basic level for a plaintiff is simply proving liability plus obtaining \$1 in damages, where damages are a necessary element of the claim. But every case presents its own circumstances, and success cannot be determined until all those circumstances are examined. The Court of Appeal was not intending to say otherwise, as I read its analysis.

- [9] All that said, I may be placing too restricted an interpretation on what the Court of Appeal said. It may be that once theoretical success is achieved, by which in this case I mean the Plaintiff obtaining a verdict on liability and some damages, the analysis should move from parsing what is meant by success to whether the Court should make a costs order against the Plaintiff, notwithstanding her success. In other words, should the Court "otherwise order", to track the language of Rule 14-1(9).
- [10] In my view, the result in this case should be the same under Rule 14-1(9), whether the concept of success is scrutinized or instead the Court's residual discretion is employed after the Plaintiff's success is acknowledged.
- [11] On a success analysis, I am of the view that Ms. Nixon did not succeed in any meaningful sense of that word. She was seeking over \$1 million. She received \$45,000. For future lost income and cost of future care, she received nothing. For past loss of income from 1991 to the present, she received \$20,000. Ms. Nixon appeared to me as a witness who was not dishonest, but as a witness whose memory, and therefore credibility, were ravaged by the exceptionally difficult life she has faced. Frankly, on any rational assessment, her dealings with Mr. Pickton in 1991 were only a small event by comparison with the miseries she faced in many other parts of her troubled life. She therefore at trial had an insurmountable task of proving causation for her claim, and the jury, rightly in my view, largely rejected her claim.
- [12] Mr. Pickton's testimony was that he only slapped Ms. Nixon with an open hand on her buttocks when she was fully clothed. We cannot know the jury's reasoning, but I note that the jury asked, toward the end of its deliberations, whether Mr. Pickton could be found liable for the sexual assault of Ms. Nixon if he had only touched her, to which I responded, with the agreement of both counsel, in the affirmative.
- [13] My view of the trial at its conclusion, and today, is that Ms. Nixon was not successful. She sought in excess of one million dollars, claiming that Mr. Pickton ruined her life. The jury rejected that case.
- [14] As I said earlier, I may be wrong in my reading of the Court of Appeal in Loft, and it may be that Ms. Nixon's level of success was adequate to satisfy the first part of Rule 14-1(9). She established liability and she received some damages. I do note here, however, parenthetically, that liability for sexual assault was not really in issue. Mr. Pickton had admitted before trial his conviction for sexual assault arising from the same incident that gave rise to this lawsuit.

The Offer to Settle

- [15] The dominant fact against Ms. Nixon in my exercise of the residual discretion under Rule 14-1(9) is that she refused an offer to settle which she ought reasonably to have accepted.

- [16] Ms. Nixon at one stage offered to settle the case for \$150,000. Mr. Pickton initially counter-offered at \$15,000. However, on May 14, 2015, Mr. Pickton, through his counsel, presented an offer in writing to settle for \$50,000 plus taxable costs and disbursements. The letter contained a reasoned assessment of the merits of the case and the difficulties Ms. Nixon faced in her claim. The letter warranted careful consideration.
- [17] About 90 minutes after the offer was sent, counsel for Ms. Nixon replied in writing that the offer had been considered and rejected. Nothing more was said.
- [18] By the time of Mr. Pickton's second offer, that is the offer for \$50,000, counsel for Ms. Nixon had all the information necessary in order to properly advise his client about the merits of the offer. Ms. Nixon was able to make her own assessment. That assessment needs to be examined here both from her perspective and objectively.
- [19] I have considered Ms. Nixon's rationale for rejecting the offer, as contained in her affidavit of August 7, 2015. She complains that Mr. Pickton had pleaded he was never convicted of sexually assaulting Ms. Nixon. That was true, in that his initial pleading contained what amounted to a general denial of her claims, including the claim that he had been convicted. But the affidavit neglects to point out that Mr. Pickton, by the time of the offer, had admitted his conviction in the course of this lawsuit. Most points Ms. Nixon's affidavit contains are unrelated to reasonably rejecting or accepting the offer to settle. She deposes that she thought she had "a decent chance" of persuading a jury to award more than \$50,000, but I say, with respect, that statement does not reveal any reasonable assessment.
- [20] The leading authorities addressing offers to settle under Rule 9-1 were cited to me, including what I believe is the most recent one, *C.P. v. RBC Life Insurance Company*, 2015 BCCA 30. I do not see any aspect of those authorities to be in issue on the facts here. They unequivocally support the validity of Mr. Pickton's offer to settle, and the conclusion that either Ms. Nixon ought reasonably to have accepted it, or face consequences in costs for electing not to accept it.

Disposition

- [21] In case I have misinterpreted the Court of Appeal in *Loft*, with the result that I have erred in concluding that Ms. Nixon did not succeed in her case, I am assuming that she did reach an adequate level of success to satisfy the first part of Rule 14-1(9). Accordingly, I am awarding Ms. Nixon costs to the date of the offer to settle, and her rejection of the offer, May 14, 2015.
- [22] However, in my view, Ms. Nixon should have accepted the offer to settle, and will not have costs after May 14, 2015.
- [23] It is common ground that the current law precludes Mr. Pickton recovering double costs after his offer was rejected. The question is whether he gets ordinary costs from that time. I have decided that he will not. As seen above, I have based my other conclusions on the assumption that the Court of Appeal in *Loft* has now set a low bar for success for purposes of

costs analyses. On that basis, Ms. Nixon was the successful party at trial. If that is right, it would be wrong, in my view, to award any portion of the trial costs to Mr. Pickton as the unsuccessful party.

Mr. Pickton's Pleading

[24] I noted early in these reasons Ms. Nixon's complaint against Mr. Pickton's response to civil claim and her related argument that his pleading should inform the costs analysis as though special costs were in issue. I do not accept that submission. To be sure, neither the original response to civil claim, nor the amended version, filed at the start of the trial, were elegant pleadings. The first version denied Mr. Pickton's conviction for sexually assaulting Ms. Nixon, at least in the general denial. The second version admitted the conviction, which Mr. Pickton had already admitted in this proceeding within weeks of filing his first response. Beyond that, the pleading set out positions Mr. Pickton was entitled to advance. I add that it is impossible to know, regarding much of his pleading, whether the jury accepted or rejected the allegations it contained. A court should be slow to punish a party in costs for pleading what the party reasonably believed would be established at trial. Ms. Nixon never sought particulars of the allegations she complains of, or moved to strike them as being vexatious or otherwise unsupportable.

Expert Witness Disbursements

[25] Mr. Pickton asks me to deny Ms. Nixon her disbursement for the report of a chartered accountant which was filed on her behalf. The report cost approximately \$11,000. I will allow Ms. Nixon to recover one-half of the cost of that report. The accountant constructed a model for wage recovery claimed by Ms. Nixon from 1991 to the present and until her likely retirement age. That was a reasonably-incurred expense for allowing her wage-loss claim to proceed. The shortcoming in the report was that it included a letter from counsel asking the accountant to make numerous factual assumptions which were unsupportable on the evidence. However, even without those factual assumptions, the wage recovery model the accountant constructed was useful. For that reason, half of the disbursement cost for his report will be recoverable.

Summary

[26] Ms. Nixon will recover her costs to the time of the offer to settle. Mr. Pickton will pay only half of the bill for the expert report of the accountant. Costs of this application are to Mr. Pickton.

"MACINTOSH J."

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Prepared on 28 October 2026 · Esheria