

CANADA / JUDGMENT

Patterson v. Solymosi

2020 BCSC 948

COURT

Supreme Court of British Columbia

DECIDED

1 June 2020

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2020 BCSC 948 Patterson v. Solymosi IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Patterson v. Solymosi, 2020 BCSC 948 Date: 20200601 Docket: M169028 Registry: Vancouver Between: Sofia Patterson Plaintiff And George Solymosi Defendant Before: The Honourable Mr. Justice Skolrood Oral Reasons for Judgment Re Costs (In Chambers) Counsel for the Plaintiff: A.E. Maragos B. Troy Counsel for the Defendant: D.S. Gray Date of Written Submissions: May 21, 2020 Place and Date of Judgment: Vancouver, B.C. June 1, 2020

- [1] THE COURT: On September 6, 2019, I issued reasons for judgment in this personal injury action, now indexed at 2019 BCSC 1508, following a nine-day trial that was heard from April 29 to May 9, 2019. The plaintiff was awarded total damages of \$251,482.08, comprising:
- a) non-pecuniary damages - \$95,000;
 - b) past wage loss - \$21,000;
 - c) loss of future earning capacity - \$100,000;
 - d) cost of future care - \$28,486; and
 - e) special damages - \$6,996.08.
- [2] The plaintiff now seeks an order for double costs as a consequence of an offer to settle made on April 24, 2019, in the amount of \$150,000 plus costs and disbursements. The defendant had previously served an offer to settle on April 17, 2019, in the amount of \$36,882.
- [3] Given the restricted operations of the court during the COVID-19 pandemic, the parties agreed to deal with costs by way of written submissions.
- [4] Offers a settle are governed by Rule 9-1. Rule 9-1(5) sets out the options available to the court where an offer to settle has been made, including in subparagraph (b): award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle.
- [5] Rule 9-1(6) identifies a number of factors that the court may consider when making a costs award in the face of an offer to settle, including:

- a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
 - b) the relationship between the terms of 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.
- [6] The purposes of costs awards were summarized by the Court of Appeal in *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282. Those purposes include: · deterring frivolous actions or defences; · encouraging conduct that reduces the duration and expense of litigation and discouraging conduct that has the opposite effect; · encouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases; and · to have a winnowing function in the litigation process by requiring litigants to make a careful assessment of the strength or lack thereof of their cases at the commencement and throughout the course of the litigation and by discouraging the continuance of doubtful cases or defences.
- [7] While the rules and the cases interpreting them are instructive, ultimately the issue of costs is in the discretion of the trial judge.
- [8] I will now consider the factors set out in Rule 9-1(6) in turn.
- [9] The first factor is: was the plaintiff's offer one that ought reasonably to have been accepted? The plaintiff submits that this was a reasonably straightforward personal injury action. The principal issues in dispute at trial were causation of the plaintiff's hip injury and the impact on her earning capacity. At the time the plaintiff made her offer to settle, the pleadings were closed, numerous documents had been exchanged, the plaintiff had been examined for discovery and expert reports had been served. The plaintiff submits that the defendant was in a position to evaluate her offer and that the offer was clearly within the range of possible outcomes.
- [10] The defendant notes that the plaintiff's offer to settle, which was served on April 24, 2019, had an expiry date of 4:00 p.m. on April 26, 2019, the Friday before the scheduled Monday start of trial. Accordingly, the defendant had less than two and a half days to consider the offer. The defendant submits that this was not sufficient time, particularly given ICBC's administrative procedures governing settlement of claims. According to ICBC's claim specialist who had conduct of this claim, those procedures can take up to a week. The defendant notes as well that the plaintiff produced further documents dealing with her wage loss claim after the plaintiff's offer to settle was delivered.
- [11] I am satisfied that the defendant had sufficient time to analyze and consider the plaintiff's offer to settle and that the offer was one that ought reasonably to have been accepted.

- [12] While some documents were produced by the plaintiff after the date of her offer, the evidentiary record supporting her claims was largely complete. Of particular note, there was considerable medical evidence addressing what the parties knew to be a central issue, namely the plaintiff's hip condition. Further, ICBC's representative, Mr. Della-Coletta, deposes that for some time he had been trying to get an offer to settle from the plaintiff's counsel. It is fair to assume that he wanted such an offer as he was in a position to evaluate it. In fact, attached as Exhibit A to Mr. Della-Coletta's affidavit are file notes dated April 17, 2019, in which a range of \$40,000-\$100,000 for non-pecuniary damages is identified.
- [13] The defendant had sufficient knowledge and information about the plaintiff's claim to enable him to make his own offer to settle on April 17, 2019. I pause to note that it is difficult to see how the approximately \$37,000 offered bore any reasonable relationship to the evidence or to the defendant's likely prospects at trial. While it is not directly relevant to the issue currently before me, I do not consider the defendant's offer to have been a meaningful good-faith attempt to achieve a settlement.
- [14] ICBC's internal administrative procedures do not provide an excuse for the defendant's failure to evaluate the plaintiff's offer in a timely manner. Mr. Della-Coletta's evidence is at best vague about how or why these procedures impeded ICBC's ability to evaluate the offer, and in any event as I have touched upon, it is clear that ICBC was in fact in a position to assess the claim.
- [15] In summary, on the first factor, the plaintiff's offer to settle was one that the defendant ought reasonably to have accepted.
- [16] The second factor is the relationship between the terms of settlement offered and the final judgment of the court. The authorities caution against relying on hindsight to assess the reasonableness of an offer. See, for example, *Smagh v. Bumbrah*, 2009 BCSC 623. Nonetheless, the relationship between the offer and the final result is a relevant factor. Here the plaintiff's offer of \$150,000 was approximately \$100,000 less than what she was awarded at trial, a factor that favours the plaintiff.
- [17] The third factor is the relative financial circumstances of the parties. Numerous authorities have held that the obvious financial disparity between ICBC, a large insurer, and an individual litigant is not a factor that supports an award of increased costs to the individual. See *Bailey v. Jang*, 2008 BCSC 1372, at paragraphs 32 to 34; and *Smagh*, at paragraphs 15 to 20. Further, this is not a case in which the insurer's financial might was used in a manner to prejudice the plaintiff. This factor is therefore neutral.
- [18] The fourth factor is any other factor that the court considers appropriate, and in my view, there are no other factors or considerations that inform the analysis in this case.
- [19] In summary, I am satisfied that the offer to settle made by the plaintiff on April 24, 2019, in the amount of \$150,000 was reasonable and is one that the defendant ought to have accepted. Given that it was something of a short-fuse offer, however, a reasonable time for

the defendant to consider the offer would have been until April 26, 2019, the day the offer expired. The plaintiff will therefore have her ordinary costs and disbursements through April 26, 2019, and she will be entitled to double costs thereafter through until the end of trial.

[20] The plaintiff is also entitled to her ordinary costs of this application. "Skolrood J."

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