

CANADA / JUDGMENT

Pearlman v. Critchley

2012 BCSC 170

COURT

Supreme Court of British Columbia

DECIDED

2 February 2012

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2012 BCSC 170 Pearlman v. Critchley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pearlman v. Critchley,

2012 BCSC 170

Date: 20120202

Docket: 128649

Registry: New Westminster

Between:

David Pearlman

Plaintiff

And

Vince Critchley, G. Hocoluk, Quinlan Abrioux, Insurance Corporation of British Columbia ICBC), Atlantic Trading Company Ltd., Rebecca Lee Spense, Dr. Mal (Malcolm) Cofman, Dr. Burton Goldstein, Scott Stephens, Owen Bird Law Corporation, American Commerce Insurance Company

Defendants

Before: The Honourable Madam Justice Gropper

Reasons for Judgment

Appearing on his own behalf:

David Pearlman

Appearing for the Defendants,

Scott Stephens, Owen Bird and

American Commerce Insurance Company

James Carpick

Scott Stephens

Place and Date of Hearing:

New Westminster, B.C.

January 13, 2012

and

Vancouver, B.C.

January 31, 2012

Place and Date of Judgment:

Vancouver, B.C.

February 2, 2012

Introduction

- [1] The defendants American Commerce Insurance Company (ACIC), Owen Bird Law Corporation (OBLC) and Scott Stephens have two applications. They apply for summary judgment. Specifically, they ask the Court to strike Mr. Pearlman's writ of summons and statement of claim and dismiss his action against them pursuant to Rules 9-5 and 9-6 of the Rules of Court. They also apply for a vexatious litigant order that Mr. Pearlman be enjoined from commencing any further legal proceedings in this court without first obtaining leave of a Justice under s.18 of the Supreme Court Act.
- [2] Mr. Pearlman's action against these defendants arises from his claim for injuries he alleges he suffered in a motor vehicle accident on November 24, 2004 and these defendants' conduct in the course of the litigation commenced by Mr. Pearlman in relation to that accident and those alleged injuries.
- [3] Mr. Pearlman has commenced several proceedings in this court arising out of the November 2004 accident. They are:
- a) A tort action against the other driver and the corporate owner of the other vehicle (David Pearlman v. Atlantic Trading Company Ltd. and Rebecca Lee Spence, B.C.S.C., New Westminster Registry, Action No. M101344);

- b) An action against Mr. Pearlman's B.C. insurer, ICBC, and the individual ICBC claims examiner assigned to the file alleging, inter alia, fraud, bad faith and negligence (David Pearlman v. The Insurance Corporation of British Columbia/ICBC and Kelly Winn, B.C.S.C., Vancouver Registry, Action No. S064665);
 - c) An action against Mr. Pearlman's U.S. insurer, American Commerce Insurance Company and two of its individual employees alleging, inter alia, fraud, bad faith and negligence (David Pearlman v. American Commerce Insurance Company, Betsy Morrisette and Julie Deley-Shimer, B.C.S.C., New Westminster Registry, Action No. S103347).
 - d) An action against Mr. Pearlman's doctor alleging, inter alia, fraud, defamation and medical malpractice (David Pearlman v. Dr. Stan Lubin, B.C.S.C., Vancouver Registry, Action No. S064108);
 - e) An application for indigency status in respect to an action against the law firm and individual lawyer Mr. Pearlman briefly retained alleging, inter alia, fraud, bad faith, deceit, misrepresentation and negligence (David Pearlman v. Stephens & Holman and Michael P. Apperly, B.C.S.C., New Westminster Registry, Action No. S102068); and
 - f) The present action against the law firms and individual lawyers retained to act on behalf of the defendants in the tort and insurance actions, together with an expert witness and another of Mr. Pearlman's doctors.
- [4] Mr. Justice Low summarized the procedural history of the actions and their related appellate proceedings in *Pearlman v. Insurance Corporation of British Columbia*, 2010 BCCA 362 at paras. 8-16:
- [8] It appears that all the litigation initiated by Mr. Pearlman stems from the motor vehicle accident. His tort action against Atlantic Trading and Ms. Spence went to trial and a jury rejected the claim. That result spawned more litigation. Mr. Pearlman sued ICBC and Ms. Winn, an adjuster, over the obtaining of the medical report from his family doctor, Dr. Lubin.
- [9] The defendants in the ICBC action sought its summary resolution on a R. 18A application. They were substantially successful. The balance of the claim went to a jury trial but the trial judge dismissed the claim on a no evidence motion.
- [10] Mr. Pearlman brought an action against Dr. Lubin in connection with, as I understand it, the release of the medical report. A trial court judge dismissed that action.
- [11] Finally, Mr. Pearlman sued American Commerce Insurance Company ("ACIC"), I believe on a disability insurance policy for benefits to which he claimed he was due as a result of the motor vehicle accident. ACIC was unsuccessful in a R. 18A application but, on appeal, this court dismissed the action with costs.

- [12] Mr. Pearlman has appealed all the orders made against him. There are three separate appeals in the ICBC action - from the order made on the R. 18A application, from dismissal of the action on the no evidence motion and from dismissal of his appeal of the Registrar's taxation of costs (one of the two appeals now before me).
- [13] There are two separate appeals in the tort action - from dismissal of the claim and from dismissal of his appeal of the Registrar's taxation of costs (the other appeal now before me).
- [14] There is an appeal of the dismissal of the action against Dr. Lubin.
- [15] In each of the six appeals brought by Mr. Pearlman, the court has refused him indigency status and has ordered that he post security for costs. He has not posted security on any of the appeals and about \$66,000 in trial costs remain unpaid. Two of the appeals have been dismissed in chambers.
- [16] Mr. Pearlman was unsuccessful in review applications he brought in four of the appeals with respect to the indigency status and security for costs orders. I made similar orders in the two costs appeals in my oral reasons for judgment.
- [5] Mr. Justice Low granted a vexatious litigant order against Mr. Pearlman in respect to any future proceedings at the Court of Appeal at paras. 17-20:
- [17] The common thread throughout the reasons in this Court has been that Mr. Pearlman's appeals lack merit. It is apparent that he is prepared persistently to litigate and appeal any and every aspect of this matter and bring appeals that are vexatious.
- [18] This is made starkly clear in an action Mr. Pearlman began in Supreme Court on 25 June 2010. Counsel has provided the writ of summons and statement of claim filed in that action. The defendants are ICBC, Atlantic Trading, Ms. Spence, the law firm that has represented Atlantic Trading and ICBC in the two actions involving them as well as two members of that law firm; ACIC and the law firm representing that company as well as a member of that law firm; and two dentists who provided reports in connection with certain dental injuries Mr. Pearlman claimed he suffered in the motor vehicle accident. The claim is for general, special, exemplary, punitive and aggravated damages but it is difficult to discern from the statement of claim what causes of action are being alleged. Whether this action can be dealt with on a summary basis is a matter solely for the trial court, but although its wording is rambling, it appears to me that the statement of claim repeats much of what has already been litigated.
- [19] Mr. Pearlman has put a number of litigants to considerable expense in defending the various actions he has brought and in responding to his appeals. He claims to be unable to pay the costs orders against him in the trial court or to post security for costs in any of the six appeals in which security has been ordered. It would be unfair to those he has sued and continues to sue to permit him to bring further appeals on these or related matters without leave.

[20] There will be an order that Mr. Pearlman will not bring an appeal from any final order made in the action he commenced on 25 June 2010 in the Supreme Court of British Columbia, or from any final order made in any other action in that court brought against any person and arising out of, or directly or indirectly connected to, the motor vehicle accident of 25 November 2004 without first obtaining leave of a justice of this court.

[6] In the case before me, Mr. Pearlman claims against these defendants as follows:

- 1) Mr. Stephens provided selective materials to Dr. Goldstein;
- 2) Mr. Stephens fraudulently obtained Dr. Goldstein's expert report;
- 3) Mr. Stephens fraudulently concealed parts of Dr. Goldstein's report;
- 4) These defendants violated Mr. Pearlman's right to privacy pursuant to the Privacy Act, by wrongfully obtaining his dental records from Dr. Cofman and providing Dr. Goldstein's expert reports to counsel for the defendants in the other actions as commenced by Mr. Pearlman;
- 5) ACIC is vicariously liable for the conduct of OBLIC and Mr. Stephens;
- 6) ACIC redacted evidence from its reports; and
- 7) Mr. Stephens fraudulently concealed a statement made by Rebecca Lee Spence, the defendant in the 2004 motor vehicle accident tort claim.

Striking Pleadings and Summary Judgment

[7] Rule 9-5 provides the court with the authority to strike out a party's pleadings. Rule 9-5(1) and (2) state as follows:

Scandalous, frivolous or vexatious matters

- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
 - (a) it discloses no reasonable claim or defence, as the case may be,
 - (b) it is unnecessary, scandalous, frivolous or vexatious,
 - (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
 - (d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

Admissibility of evidence

- (2) No evidence is admissible on an application under subrule (1) (a).

- [8] The test under Rule 9-5(1)(a) is whether, assuming the facts as stated in the Notice of Civil Claim can be proved, it is "plain and obvious" that the claim is certain to fail: *Dempsey et al. v. Envision Credit Union et al.*, 2006 BCSC 750 at para. 7. Evidence is not admissible under this sub-rule.
- [9] As for Rule 9-5(1)(b), (c) and (d), Madam Justice Garson reviewed the applicable jurisprudence in *Dempsey* at para. 17:
- [17] In summary, a pleading will be struck out if:
- (a) the pleadings are unintelligible, confusing and difficult to understand ...;
 - (b) the pleadings do not establish a cause of action and do not advance a claim known in law ...;
 - (c) the pleadings are without substance in that they are groundless, fanciful and trifle with the Court's time ...[;]
 - (d) the pleadings are not bona fides, are oppressive and are designed to cause the Defendants anxiety, trouble and expense ...;
 - (e) the action is brought for an improper purpose, particularly the harassment and oppression of the Defendants ...

[Citations omitted.]

- [10] In *Morriss v. Cuttler*, 2010 BCSC 1288, I found that the plaintiff's claim disclosed no reasonable cause of action, was vexatious and constituted an abuse of the court's process. In that case, the plaintiff had brought three actions claiming that he had an interest in land pursuant to an option agreement. The third action added an allegation to the effect that the defendants in actions number one and two and their counsel conspired to defraud him of his interest in the land. I concluded at paras. 27, 28 and 30:
- [27] Mr. Morriss persists in pursuing his claim to the property in spite of my explicit findings that he does not have an option to purchase the property, there was no "extension" of the option, and Prism is a bona fide purchaser for value of the property. It cannot be assumed that the facts alleged in the statement of claim in action no. 3 are true and can be proven. They are not true, and cannot be proven.
- [28] There is no purpose in Mr. Morriss relitigating this matter and his attempt to do so is an abuse of the court's process. His claims in action no. 3, like those in actions no. 1 and 2, involve the same defendants, the same property and are based on the same nonexistent option. Unique to action no. 3, is Mr. Morriss' claim of a conspiracy among the defendants, including the lawyer defendants, to fraudulently deprive or cheat him of his interest in the land pursuant to the security agreement (the option). As I have found, Mr. Morriss did not have an interest in the property and therefore his allegation that he has been fraudulently deprived or cheated out of his interest cannot stand.

...

- [30] Mr. Morriss' pleadings and claims in action no. 3 cannot stand. They disclose no reasonable claim. The essence of Mr. Morriss' position continues to be that an option exists in his favour provided to him by Mr. Festing in respect of the property. There is no option. That is sufficient to dispose of Mr. Morriss' action. The fact that Mr. Morriss has commenced three actions against the Festing defendants and the Prism defendants, and has added their counsel in action no. 3 amply demonstrates that this action is unnecessary scandalous frivolous and vexatious. Finally, Mr. Morriss' repeated claims, based on facts that I have explicitly rejected, is an abuse of process.
- [11] Like Mr. Morriss, Mr. Pearlman's actions are based on a faulty premise, which is that he suffered injuries in the November 2004 accident. The court has already determined that he did not suffer injuries in that accident. Because the premise is unfounded, these defendants could not have caused Mr. Pearlman not to receive damages for the injuries he alleged he suffered in the November 2004 motor vehicle accident, fraudulently or otherwise.
- [12] Referring to the Dempsey criteria, Mr. Pearlman's pleadings do not establish a cause of action and do not advance a claim known in law. They are groundless.
- [13] Furthermore, the pleadings are not bona fides, they are oppressive and are designed to cause the defendants anxiety, trouble and expense. The action is brought for an improper purpose, particularly the harassment and oppression of the defendants.
- [14] Mr. Pearlman's claims cannot be sustained.
- [15] A party can apply to the court for summary judgment under Rule 9-6. Rule 9-6(4) and (5) provide:

Application by answering party

- (4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.

Power of court

- (5) On hearing an application under subrule ... (4), the court,
- (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
- [16] The test under Rule 9-6 is whether there is a bona fide triable issue: *Pitt v. Holt*, 2007 BCSC 1555 at para. 10. Some weighing of the evidence is permitted: *Southeast Toyota Distributors Inc. v. Branch*, [1997] B.C.J. No. 1426 (QL) at para. 61 (S.C.).

- [17] Mr. Pearlman's statement of claim does not refer to the existence of a duty of care owed to him by any of the defendants.
- [18] In regard to the actions against Mr. Stephens and OBLC, the legal authorities are clear that a lawyer or law firm does not owe a duty of care to anyone other than his or her client: *Holland v. Douglas*, 2010 BCSC 96 at para. 64 aff'd 2010 BCCA 345. Mr. Pearlman has no claim against Mr. Stephens or OBLC. That being the case, there is no basis for a claim that ACIC is vicariously liable for the conduct of Mr. Stephens and OBLC.
- [19] Furthermore, Mr. Pearlman's action against ACIC has been dismissed: See *Pearlman v. American Commerce Insurance Company*, 2009 BCCA 78. His application for leave to appeal was denied by the Supreme Court of Canada: See [2009] S.C.C.A. No. 134.
- [20] There is also no basis for an allegation of fraud of any sort against these defendants. There is, therefore, no bona fide triable issue in either negligence or fraud.
- [21] In addition to the allegations of negligence and fraud, however, Mr. Pearlman also claims that his rights under the Privacy Act have been breached by these defendants.
- [22] The Privacy Act, R.S.B.C. 1996, c. 373, s. 1 provides:

Violation of privacy actionable

- 1 (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.
- (2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.

...

- [23] Section 2(2) provides:

Exceptions

...

- (2) An act or conduct is not a violation of privacy if any of the following applies:

...

- (c) the act or conduct was authorized or required under a law in force in British Columbia, by a court or by any process of a court

- [24] Mr. Pearlman sued for injuries he allegedly sustained in the November 2004 accident. Having done so, Mr. Pearlman has no expectation of privacy in regard to documents relevant to the matters in issue. He was obliged to produce all such documents and they were justly relied upon by the defendants to the action regarding the November 2004 accident.

- [25] Moreover, Mr. Pearlman's specific arguments relating to these defendants have no merit. There was a court order to produce Dr. Malcolm Cofman's records. No privacy issues could arise, therefore, from these defendants obtaining copies. ACIC obtained the report from Dr. Burton Goldstein in his position as an expert for the defence. Consequently, that report is not Mr. Pearlman's document. There has been no breach of Mr. Pearlman's privacy, nor could there be.
- [26] Mr. Pearlman's writ of summons and statement of claim do not disclose a cause of action or raise a bona fide triable issue.
- [27] In light of the above, Mr. Pearlman's writ of summons and statement of claim are struck and the action against these defendants is dismissed.

Vexatious Litigant

- [28] These defendants seek an order that David Pearlman, or anyone on his behalf, not commence any further legal proceedings in this court without leave.

- [29] Section 18 of the Supreme Court Act, R.S.B.C. 1996, c. 443 provides:

18 If, on application by any person, the court is satisfied that a person has habitually, persistently and without reasonable grounds, instituted vexatious legal proceedings in the Supreme Court or in the Provincial Court against the same or different persons, the court may, after hearing that person or giving him or her an opportunity to be heard, order that a legal proceeding must not, without leave of the court, be instituted by that person in any court.

- [30] The purpose of s. 18 of the Supreme Court Act was stated in *S.(M.) v. S. (P.I.)* (1998), 60 B.C.L.R. (3d) 232 at para. 13 (B.C.C.A.):

Section 18 of the Supreme Court Act has been in the Act for a great many years. The section gives the court the needed ability to control its own process. It enables the court to put in place an order to prevent a citizen or citizens from being subjected to an endless blizzard of litigation. A great number of court applications have been filed by this appellant over a course of several years. In my judgment, the history disclosed here afforded an ample foundation for the conclusions reached and the order made by the learned judge of first instance. It is obviously of the utmost importance that there be unfettered access to the courts by citizens but I should think that a corollary of that is that continuing abuse of this most valuable and deeply enshrined democratic right should be dealt with decisively to preserve the rights of all. There is a right to invoke the jurisdiction of the Supreme Court but it is not a right that is without limit. In my opinion, s. 18 of the Supreme Court Act affords to judges of the Supreme Court the authority to order in proper cases that a persistent litigant must seek leave before being able to launch court proceedings. It is a necessary power to ensure the proper administration of justice.

- [31] The court noted that a section 18 order does not prevent a person from gaining access to the courts. The litigant is entitled to apply for leave to do so, to allow a Justice of this Court to determine that it has a proper basis: at para. 14.
- [32] Some of the factors to be considered when the court entertains an application to enjoin a person from bringing legal proceedings without leave are described in *Houweling Nurseries Ltd. v. Houweling*, 2005 BCCA 8 at para. 9 (citing *Re Lang Michener et al. AND Fabian et al.* (1987), 37 D.L.R. (4th) 685 (Ont. H. Ct. J.)). The court in *Re Lang Michener* outlined the factors at length at 691 as follows :
- (a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;
 - (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
 - (c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
 - (d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
 - (e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;
 - (f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;
 - (g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.
- [33] These defendants refer to the court proceedings which Mr. Pearlman has commenced in this court arising from the November 2004 motor vehicle accident. There are other actions. Mr. Pearlman's action in respect of his second motor vehicle accident of February 9, 2007 was heard by Madam Justice Kloegman in September, 2011. Her Reasons for Judgment are indexed at 2011 BCSC 1696.

- [34] These defendants also refer to actions that have been commenced by or on behalf of Mr. Pearlman since 1975, including those before the Manitoba Queen's Bench, the Manitoba Court of Appeal, the Tax Court, the Federal Court of Appeal and the Supreme Court of Canada. They have provided 42 reported decisions. Mr. Pearlman was the plaintiff in all but three. These defendants reviewed the entire list and referred to judicial findings in each.
- [35] I note, as stated above, that Mr. Justice Low ordered that Mr. Pearlman not bring any appeal from any final order in any action in the Supreme Court of British Columbia brought against any person arising out of, or directly or indirectly connected to, the motor vehicle accident of November 2004 without first obtaining leave of a Justice of the Court. That may have been the order which was sought by the applicant.
- [36] At the conclusion of the hearing on January 13, 2012, Mr. Pearlman advised me that he intends to bring a claim in respect his third motor vehicle accident in December 2010. He said he intended to file other claims as well, including against Mr. Vince Critchley who represented the defendant, and Dr. Hawk, a medical doctor who gave evidence on behalf of the defence in the action before Kloegman, J. He suggested he might be filing other claims as well. Despite Mr. Pearlman's strenuous objection, I ordered that until my reasons for judgment were published on this matter, he had to provide counsel for these defendants 14 days notice of his intention to bring any other legal proceedings in order that they could advise me if any further legal proceedings or claims were filed during the course of my deliberations. I did not enjoin Mr. Pearlman from filing any claim.
- [37] I was advised by trial scheduling on January 20, 2012, that these defendants wished to adduce further evidence. I allowed these defendants to provide short notice of a hearing on January 31, 2012 to Mr. Pearlman at his address for service by regular mail. Because of the pending application by these defendants, I did not issue reasons before the hearing on January 31, 2012.
- [38] On January 31, 2012, I allowed these defendants' application to adduce further evidence. The evidence is a letter dated January 13, 2012, from Mr. Pearlman to Messrs. Carpick and Stephens, advising that he intends to file further claims, including further claims against ICBC, Mr. Stephens, Mr. Carpick, and OBLIC.
- [39] In applying some of the factors from *Re Lang Michener and Houweling Nurseries*, I conclude that:
- a) Mr. Pearlman's numerous actions and appeals have been found to lack merit repeatedly. He cannot reasonably expect to obtain relief. Mr. Pearlman's repeated actions are for an improper purpose as he is aware that each assertion of his rights has been rejected;
 - b) Mr. Pearlman has "rolled forward" the grounds and issues of previous actions into subsequent actions. He has brought actions against lawyers who have acted against him in earlier proceedings;

- c) Mr. Pearlman has not paid any of the costs which have been awarded against him in the unsuccessful proceedings; and
 - d) Mr. Pearlman has persistently taken unsuccessful appeals to the Court of Appeal and to the Supreme Court of Canada.
- [40] Mr. Pearlman has not demonstrated any self restraint in pursuing his various actions, despite being unsuccessful at every level of court. He persists in pursuing the actions he has already filed. He intends to file more actions. He has perverted access to justice. It is time for this court to regulate its process. Mr. Pearlman has abused his right to bring claims in this court. He is not prohibited from filing legal proceedings; however, he must do so with the leave of a Justice of this Court. This requirement ensures that before he involves others in litigation, he convinces a Justice of the Court that it is appropriate to do so.
- [41] I decline to rely on Mr. Pearlman's litigation history in courts outside of British Columbia. He has demonstrated that he is a vexatious litigant in British Columbia, without referring to his previous litigation history in Manitoba.
- [42] I find that Mr. Pearlman is a vexatious litigant and order that neither he nor anyone on his behalf commence any further legal proceedings, including applications for indigent status, in this court without obtaining leave of Justice of the Court.

Special Costs

- [43] Mr. Pearlman maintains that he cannot afford to pay costs. This, however, is not determinative of whether special costs ought to be ordered. Special costs are at the discretion of the court. They are awarded in cases where the conduct of one of the parties is "reprehensible".
- [44] As Mr. Justice Low noted in his decision, Mr. Pearlman has "put a number of litigants to considerable expense in defending the various actions that he has brought and in responding to his appeals": at para. 19.
- [45] I find that Mr. Pearlman's pursuit of unmeritorious claims and his accusations of conspiracy and fraud without any foundation are sufficient to justify an award of special costs. Mr. Pearlman must be aware that his persistence in bringing vexatious litigation has significant consequences.

Summary

- [46] Mr. Pearlman's writ of summons and statement of claim are struck and his action is dismissed against these defendants.
- [47] Neither Mr. Pearlman nor anyone on his behalf shall commence any further legal proceedings in this court without obtaining leave of a Justice of the Court.
- [48] These defendants are entitled to special costs.

[49] I dispense with Mr. Pearlman's endorsement on the order.

"Gropper J."

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Prepared on 29 October 2026 · Esheria