

CANADA / JUDGMENT

Picciano v. Picciano

2024 BCSC 2070

COURT

Supreme Court of British Columbia

DECIDED

13 November 2024

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2024 BCSC 2070 Picciano v. Picciano

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Picciano v. Picciano,

2024 BCSC 2070

Date: 20241113

Docket: E201759

Registry: Vancouver

Between:

Dennis Lucio Picciano

Claimant

And

Holly Elise Picciano also known as Holly Elise Hougham

Respondent

Before: The Honourable Justice K. Loo

Reasons for Judgment

Appearing on his own behalf:

D.L. Picciano

Counsel for the Respondent:

A. Ouellet

Place and Date of Hearing:

Vancouver, B.C.

November 6, 2024

Place and Date of Judgment:

Vancouver, B.C.

November 13, 2024

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Introduction

- [1] This is an application in the context of a contentious family dispute for the production of part of the file maintained by the claimant's former counsel on the claimant's behalf.
- [2] This application arises because the claimant, in an affidavit, made certain statements and disclosed correspondence between himself and his former counsel.
- [3] The issues before this Court are whether, by his actions, the claimant waived solicitor-client privilege and, if so, to what extent.

Factual background

- [4] Submissions were made by both parties in the course of this hearing regarding the conduct of the other, but for the most part those submissions were not helpful to the determination of this application.
- [5] In this section, I will briefly set out the facts relevant to the application before this Court.
- [6] The parties were married in July 2013 and were divorced pursuant to an order of this Court made in May 2021. They have one child together - Luca, born in February 2014.
- [7] In September 2023, the respondent filed a notice of application seeking various orders involving, among other things, parenting, conduct orders, orders relating to a parenting coordinator, and document disclosure.

- [8] The parties and their counsel attended a hearing before Justice Murray on October 24, 2023, at which Justice Murray made various orders, including an order that the claimant shall pay the costs of the application to the respondent within 30 days.
- [9] Between October 24, 2023, and January 12, 2024, there was written communication between respondent's counsel and claimant's counsel regarding the terms of the October order, when that order would be signed by the claimant's lawyer, and when the costs award would be paid by the claimant.
- [10] A draft form of order was sent by respondent's counsel to claimant's counsel on October 30, 2023. Respondent's counsel followed up regarding the signing of the order on November 21, 2023, and again on December 1, 2023.
- [11] On December 4, 2023, claimant's counsel responded, stating that he was in the process of drafting a response to the draft order and promising it by the end of the next day. By December 6, 2023, respondent's counsel had not received the comments promised by claimant's counsel, and followed up again.
- [12] On December 12, 2023, respondent's counsel served claimant's counsel with a bill of costs and advised that they intended to submit their draft order for entry the next day.
- [13] On December 13, 2023, claimant's counsel provided for the first time a substantive critique of the draft order prepared by respondent's counsel. In that critique, claimant's counsel took the position that Justice Murray had not ordered the costs to be paid within 30 days.
- [14] Further correspondence between claimant's counsel and respondent's counsel ensued. On January 12, 2024, claimant's counsel agreed that a hearing before Justice Murray could be scheduled on February 12, 2024, to settle her October order.
- [15] In that same email, claimant's counsel advised respondent's counsel that they "have recommended that Mr. Picciano pay the previously circulated draft bill of costs."
- [16] None of the email correspondence between counsel from October 24, 2023, to January 12, 2024, shows that it was copied to the claimant.
- [17] On January 16, 2024, the claimant wrote directly to respondent's counsel, stating:
- I was unaware about the discussions you were having with [claimant's counsel] about the Order wording and costs deadline until just yesterday. Please let me know how to pay and I will do so immediately. I will be self representing from this point on.
- [18] On January 18, 2024, the claimant again wrote directly to respondent's counsel, stating:
- Please send me the invoice and preferred method of payment. I would like to clear up this issue as soon as possible. Again, I was not aware of the request to go back in front of the judge until just last weekend. If I had known earlier, I would have handled this differently.

[19] A hearing was ultimately scheduled for February 12, 2024, before Justice Murray to settle her October order. On February 6, 2024, in support of positions that he intended to take at the February 12 hearing, the claimant swore an affidavit which included email correspondence between him and his former counsel. In the body of that affidavit, the claimant deposed:

I was only made aware of [the communications between counsel regarding the wording of the October order and the timing of the costs payment] on January 12, 2024;

[20] He further deposed:

On November 10th and Nov 29th, I had emailed Mr. Schmidt [his former counsel] to enquire about my responsibilities regarding payment and the Order and I received no response until January 12, 2024.

[21] To his affidavit, the claimant exhibited emails between him and his former counsel, including those emails referred to, dated November 10, 2023, and November 29, 2023. The email dated November 10, 2023, stated in part:

Hi Peter, So what happens now, what Order gets registered then?

[22] The email dated November 29, 2023, was addressed to claimant's counsel's legal assistant and stated in part:

Can I please understand the status of the Order from the last court day? The wording of which I do not agree with.

[23] Apart from these two emails, there were no emails disclosed by the claimant that had been exchanged between him and his former counsel between October 24, 2023 (the date of the hearing before Justice Murray) and January 12, 2024.

Legal authorities and principles

[24] In *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, the Supreme Court of Canada held as follows regarding the importance of solicitor-client privilege:

[34] It is indisputable that solicitor-client privilege is fundamental to the proper functioning of our legal system and a cornerstone of access to justice (*Blood Tribe*, at para. 9). Lawyers have the unique role of providing advice to clients within a complex legal system (*McClure*, at para. 2). Without the assurance of confidentiality, people cannot be expected to speak honestly and candidly with their lawyers, which compromises the quality of the legal advice they receive (see *Smith v. Jones*, [1999] 1 S.C.R. 455, at para. 46). It is therefore in the public interest to protect solicitor-client privilege. For this reason, "privilege is jealously guarded and should only be set aside in the most unusual circumstances" (*Pritchard*, at para. 17).

- [25] On the other hand, there is a well-established body of case law which provides that the Court may find privilege to be waived in certain circumstances. These include circumstances in which there has been a partial disclosure of privileged information or reference in sworn testimony to advice or the lack of advice from a lawyer, and where "fairness and consistency" require waiver to be found.
- [26] In *F.C.A.S. v. C.E.S.*, 2023 BCSC 1098, this Court held:
- [8] It has long been the rule that where privilege is waived, production of all documents relating to the acts contained in the communication will be ordered: see also *Doland (George) Ltd. v. Blackburn, Robson, Coates & Co.*, [1972] 3 All E.R. 959 (Q.B.), cited in *Sopinka et al, The Law of Evidence in Canada* (6th ed.) at p. 1102. The policy reasons for this incursion into the sphere of privilege are fairness and consistency: see *S. & K. Processors Ltd.*, *supra*. A party cannot "cherry-pick" favourable aspects of privileged communications without disclosing the entirety of the communication.
- [9] This prohibition against "cherry-picking" and using privilege as both a "sword and a shield" was further defined in *Pacific Concessions, Inc. v. Weir and Weir*, 2004 BCSC 1682. In that case the defendant sought to rely on email communication between himself and his counsel, which he appended to his affidavit, as evidence to support his position at the summary trial. The plaintiff argued that in appending emails to his affidavit, the defendant waived solicitor-client privilege attaching to his communications with his counsel regarding the subject matter of the action. Justice Kirkpatrick found that solicitor-client privilege had been waived with respect to the email that was appended and any communications passing between the defendants and their solicitor in response to the issues raised in the email.
- [27] The claimant argues that *F.C.A.S.* is distinguishable on the basis that it involved issues of family violence and drug tests, which have not been raised in the case at bar. However, it is clear on the case law that the principles set out above in *F.C.A.S.* are not confined to cases with particular facts.

Application of the legal principles to the facts

- [28] In my view, the claimant waived privilege over the communications between him and his lawyer by:
- a) deposing that he was only made aware of communications between counsel regarding the wording of the October order and the timing of the cost's payment on January 12, 2024;
 - b) deposing that he emailed his former counsel on November 10, 2023, and November 29, 2023, and that he did not receive any responses to those emails until January 12, 2024; and
 - c) exhibiting email correspondence which appears to show that the only communications between him and his lawyer during the period of October 24, 2023, and January 12, 2024, were his emails, not responded to, sent on November 10, 2023, and November 29, 2023.

- [29] This evidence was advanced by the claimant to justify his failure to pay the costs order within 30 days and to explain why he ought not to be faulted for his lawyer's failure to sign the order.
- [30] In my view, the principles set out in F.C.A.S. are directly applicable. By advancing the evidence described above, the claimant has waived privilege. I have concluded that an order ought to be made for the disclosure of parts of the claimant's legal file, as described below. The principles of fairness and consistency require this result, in order to ensure that the claimant has not "cherry-picked" favourable aspects of privileged communications without disclosing the entirety of the communication.

Disposition

- [31] In her oral submissions, counsel for the respondent sought a declaration that the claimant had waived privilege. However, this prayer for relief is not found in the respondent's notice of application, which seeks only an order that "the file of the claimant's former counsel be produced to the extent that it pertains to communications made between the claimant and [counsel] with respect to the drafting, signing and compliance with the Murray Order from the date it was pronounced on October 24, 2023, through to the date of the Claimant waived privilege on or about January 16, 2024."
- [32] I am not prepared to grant an order more expansive than the one sought in the notice of application. Indeed, in my view, the order sought in the notice of application is itself slightly too broad.
- [33] I order that the claimant's file in the possession of his former counsel be produced to the extent that it contains correspondence or notes regarding communications between the claimant and his counsel between October 24, 2023, and January 12, 2024, with respect to the wording and signing of the October order and the payment of the costs order.

Costs

- [34] The claimant asserts that there were no other communications between him and his former counsel between October 24, 2023, and January 12, 2024, other than the two November emails described above. He argues that this application was unnecessary and will be fruitless, and that these facts should have been evident to the respondent from the emails adduced. An email between the claimant and his former lawyer on January 15, 2024, disclosed in his affidavit, reads as follows:

I will pay them anytime, and to be fair I had emailed you twice in November asking what is happening and you did not respond

Moving forward, I did not hear from you for almost two months. I thought you quit.

- [35] In my view, the issue of costs in respect of this application should turn upon whether this application was necessary to uncover documents or communications of substance not previously disclosed by the claimant (in which case costs of the application will be awarded to the respondent at scale B), or whether the application ends up being of no utility as the claimant submits that it will (in which case costs of the application will be awarded to the claimant at scale B).
- [36] Following the production of documents, if any, by the claimant's former counsel, I expect that the parties will be able to agree on the appropriate costs order, based on what I have said above. If they are not able to do so, they have leave to arrange through the registry to make brief submissions.

"The Honourable Justice Loo"

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