

CANADA / JUDGMENT

Prasad v. Ross-Smith

2023 BCSC 1394

COURT

Supreme Court of British Columbia

DECIDED

2 June 2023

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2023 BCSC 1394 Prasad v. Ross-Smith IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Prasad v. Ross-Smith, 2023 BCSC 1394 Date: 20230602 Docket: M196364 Registry: Vancouver Between: Shalini Sangeeta Prasad Plaintiff And Nicholas Roger Ross-Smith and Avtar Singh Rahi Defendants Before: The Honourable Justice Basran Oral Reasons for Judgment on Costs Counsel for the Plaintiff: N. Hartney Counsel for Defendants: S. Murphy Place and Date of Hearing: Vancouver, B.C. May 23, 2023 Place and Date of Judgment: Vancouver B.C. June 2, 2023

- [1] THE COURT: Ms. Prasad, the plaintiff, was involved in a motor vehicle accident on February 19, 2018 in Victoria, BC (the "Accident"). The defendants admitted liability for the Accident.
- [2] The trial of this matter commenced on February 27, 2023 for five days. Ms. Prasad is a care aide. She was 42 years old at the time of trial.
- [3] With the exception of special damages, all heads of damages were in issue at the trial.
- [4] On March 31, 2023, I issued the reasons for judgment indexed as Prasad v. Ross-Smith, 2023 BCSC 513.
- [5] I concluded that Ms. Prasad was entitled to:
- a) Non-pecuniary damages: \$95,000
 - b) Past loss of income-earning capacity: \$1,471
 - c) Cost of future care: \$2,760
 - d) Special damages: \$1,150 Total: \$100,381
- [6] I found that Ms. Prasad was not entitled to damages in respect of future loss of income-earning capacity and loss of housekeeping capacity. Settlement Offers
- [7] On December 8, 2022, the defendants made a formal offer to settle, pursuant to Rule 9-1 of the Supreme Court Civil Rules for \$120,600 plus costs and disbursements. The offer was open for acceptance until 4 p.m. on September 9, 2022.

- [8] Given the error in setting a backdated acceptance deadline, the defendants reissued the same offer on December 10, 2022. Neither this offer nor the December 8, 2022 offer separated the total amount by head of damage. Both were global offers.
- [9] Counsel for Ms. Prasad received both offers by email on the days they were sent. However, neither counsel nor his office have a record of having received the December 10, 2022 offer by fax or physical service. Counsel acknowledges that the offer may have been physically received in his office and misplaced. In any event, the parties agree that it was sent electronically, and received and considered by counsel for the plaintiff on December 10, 2022. In these circumstances, there is no prejudice to Ms. Prasad and I am satisfied that this settlement offer should be considered as having been communicated to Ms. Prasad on that day. Costs Incurred
- [10] The plaintiff's bill of costs totals \$63,292 for this matter. Approximately \$37,914 of this amount is in respect of costs and disbursements incurred after the defendants' offers to settle.
- [11] The defendants estimate that their bill of costs will be between \$20,000 and \$30,000. Expert Reports
- [12] On October 18, 2022, Ms. Prasad attended an independent medical examination, at the request of the defence, conducted by Dr. Paul Chapman, a physiatrist. He produced an expert report dated November 21, 2022.
- [13] On October 19, 2022, Ms. Prasad attended an independent medical examination with Dr. Harpreet Sangha, also a physiatrist. This was arranged by her counsel. Dr. Sangha produced an expert report dated October 23, 2022, in which she discussed Ms. Prasad's work as a care aide: The job demands can be quite arduous and would place strain through the areas that were injured, resulting in increased pain. I consider Ms. Prasad to be at a significant disadvantage. While she has demonstrated that she is able to work, it is not without limitations.
- [14] On November 10, 2022, Ms. Prasad attended a functional capacity evaluation with Ms. Neeru Aggarwal, an occupational therapist. Ms. Aggarwal produced an expert report dated November 29, 2022, in which she noted: Ms. Prasad's positional limitations make it difficult for her to complete her job duties. Her positional limitations are a significant impediment for her to complete her job duties without pain consequences.[]. Ms. Prasad does not fully meet the medium physical strength requirements for health care aide, and she does not meet the physical requirements for this job. []. Testing also indicated that she does not meet the energy requirements for care aides. [] Legal Principles
- [15] A successful party is presumptively entitled to costs: *Parker v. Martin*, 2017 BCSC 1161 at para. 16.

- [16] A trial judge has broad discretion in considering offers to settle. Supreme Court Civil Rules 9-1(5) and (6) provide: Cost options
- (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
- (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
 - (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;
 - (c) award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
 - (d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle. Considerations of court
- (6) In making an order under subrule (5), the court may consider the following:
- (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;
 - (d) any other factor the court considers appropriate.
- [17] The receipt of a settlement offer after the plaintiff had incurred the expense of retaining a medical expert, whose opinion supported her claim that there was a real and substantial possibility of future income loss, is a relevant consideration: Parker at para. 26.
- [18] In Zhao v. Yu, 2015 BCSC 2342, the court held:
- [13] While, in hindsight, the defendants' offer was indeed reasonable, that is not the test. Rule 9-1(5) and 9-1(6) were not intended, in my view, to punish parties merely because the party's assessment of the value of the claim proves incorrect, unless that assessment was based on irrelevant considerations; a clearly inadequate review of the available evidence and the applicable authorities, or was, in view of the facts known at the time, unreasonable.
- [19] Similarly, in Fan (Guardian ad litem of) v. Chana, 2009 BCSC 1497, the court stated, in part:

- [19] [] Courts must, I think, extend some leeway to litigants holding honest but, ultimately, mistaken views of their claims. It is generally better that such expectations be disposed of at law rather than discouraged. []
- [20] Further, in *Currie v. McKinnon*, 2012 BCSC 1165, the court held, in part:
- [20] [], parties should not be unduly deterred from bringing meritorious, but uncertain, claims because of the fear of a punishing costs order. Positions of the Parties
- [21] The defendants seek an order giving effect to their formal offer to settle by awarding costs and disbursements to Ms. Prasad up to and including December 12, 2022 and awarding costs and disbursements for the defendants for all steps in the litigation after this date. They assert that this matter went to trial because Ms. Prasad sought damages for her asserted lack of capacity to work. Having lost on this issue, she should bear the costs of the trial.
- [22] Ms. Prasad asserts that it was not unreasonable for her to have rejected the defendants' offer to settle. Accordingly, as the successful party at trial, she seeks costs of the action at Scale B. Discussion
- [23] In considering Rule 9-1(6)(b), the defendants' offer exceeded the award at trial by \$20,219, approximately 20 percent. I do not consider this factor to be significant in the context of the amount claimed of over \$500,000 in respect of the claim of future loss of income-earning capacity.
- [24] Ms. Prasad is not wealthy. For most of the past two decades, she has supported herself and her family as a single mother. While not determinative, I have taken into account the relative financial circumstances of Ms. Prasad and the defendant insurer.
- [25] Denying Ms. Prasad an award of costs or making an award of costs in favour of the defendants will significantly erode the award of damages with the result that she will be undercompensated for the injuries and losses resulting from the defendants' negligence.
- [26] The parties and the medical experts differed on the extent to which Ms. Prasad's injuries would affect her ability to earn income in the future. While she did not succeed on this issue, and it was certainly a significant part of her claim, it was not unreasonable for her to believe that there was some prospect of success on it. This is because by the time she received the defendants' offer to settle, she had received the expert reports of Dr. Sangha and Ms. Aggarwal, both of whom concluded that her ability to work would be affected by the injuries she sustained in the Accident. Therefore, it was not unreasonable for her to reject the defendants' offer of \$120,600 in light of those opinions.
- [27] As the trial judge who heard all of the evidence in this action, I am satisfied that the defendants' offer was not one that Ms. Prasad ought reasonably to have accepted. This is because she had a reasonable basis on which to pursue her case at trial. Although she did not succeed on this issue, it was not unreasonable for her to pursue this claim or believe that there was some prospect of success, even if there was a risk that she would not succeed.

Disposition

[28] Ms. Prasad is entitled to her costs at Scale B, disbursements, and the costs of this application. The defendants' application is dismissed. "Basran J."

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