

CANADA / JUDGMENT

Reed v. Lokhandwala

2025 BCSC 2723

COURT

Supreme Court of British Columbia

DECIDED

2 April 2025

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2025 BCSC 2723 Reed v. Lokhandwala

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Reed v. Lokhandwala,

2025 BCSC 2723

Date: 20250402

Docket: M161836

Registry: New Westminster

Between:

Mark Dwain Reed

Plaintiff

And

Ali Kaizer Lokhandwala and Muntaseer K. Contractor

Defendants

Before: Associate Judge Vos

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

R.B. McNeney

Counsel for the Defendants:

M. Gulbransen

Place and Date of Hearing:

New Westminster, B.C.

April 2, 2025

Place and Date of Ruling:

New Westminster, B.C.

April 2, 2025

[1] THE COURT: The plaintiff applies for an order that would strike the notice requiring trial by jury filed on behalf of the defendants on March 1, 2024. The defendants oppose the application.

Background

[2] The plaintiff claims damages for personal injuries and losses he sustained as a result of a motorcycle/vehicle accident that occurred on August 3, 2012.

[3] The notice of civil claim was filed on June 11, 2014. The defendants filed their response to civil claim on November 5, 2014.

[4] On April 4, 2016, counsel for the plaintiff filed a notice of trial, scheduling the trial of this action for a five-day hearing starting on October 23, 2017. A notice requiring trial by jury was not filed on behalf of the plaintiff or the defendants with respect to this notice of trial.

[5] A order made by consent of all parties on June 8, 2017 severed the liability issues in the action from the assessment of the quantum of the plaintiff's claims. The order directed that the trial of the liability issues be heard before the quantum trial.

[6] On August 21, 2017 counsel for the defendants filed a trial brief for the trial set for October 23, 2017. That trial brief indicated that the trial was to be heard without a jury.

[7] On October 23, 2017 the parties agreed on a 50/50 division of liability as between the plaintiff and the defendants.

[8] The October 23, 2017 trial date was adjourned by consent of all parties.

[9] A second notice of trial was filed by the plaintiff on January 9, 2024. It scheduled the trial for a 19-day hearing starting on June 16, 2025. Counsel for the defendants has indicated that they received a copy of this notice of trial on February 12, 2024.

- [10] On Friday March 1, 2024 counsel for the defendants sent an unfiled notice requiring trial by jury to counsel for the plaintiff. On March 4, 2024 counsel for the defendants served a registry stamped copy of a notice requiring trial by jury that had been filed on behalf of the defendants on March 1, 2024. March 4, 2024 was the twenty-first day after service of the second notice of trial on February 12, 2024.
- [11] On March 1, 2024 counsel for the plaintiff sent correspondence to counsel for the defendants indicating that the plaintiff took the position that the defendants' March 1, 2024 notice requiring trial by jury was a nullity. Counsel for the plaintiff asked counsel for the defendants to set the jury notice aside and advised that if he did not do so the plaintiff would apply to strike it and would seek costs for that application from the defendants.
- [12] Counsel for the defendants never agreed to set aside the notice requiring trial by jury and has not applied to extend the time to file the notice requiring trial by jury.

Analysis

- [13] In British Columbia, the default mode of trial for civil actions is a judge alone trial: Rule 12-6(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the "Rules"). However, in actions where damages are claimed for personal injuries sustained in a motor vehicle accident, a party to the action can elect to have the trial proceed with a jury. The election is carried out pursuant to Rule 12-6(3). It provides that if a party requires the trial to be heard with a jury, they must file and serve a notice requiring trial by jury within 21 days after being served with the notice of trial. This early deadline for parties to declare if they intend to have the trial proceed with a jury provides time for any changes in strategy or preparation each party may wish to make because the trial would be heard with a jury.
- [14] If a party does not file and serve a notice requiring trial by jury within the 21-day period, but nevertheless wants the trial to proceed with a jury, they can apply under Rule 22-4(2) for an order that would extend the time to file a notice requiring trial by jury.
- [15] In *Chapman-Fluker v. Gustavson*, 2019 BCSC 1022 the court indicated:
- [44] The selection of a jury trial is meant to be made early in the litigation process so as to allow the parties to prepare for trial. This purpose of the deadline remains an important consideration following the change in the Rules. Although a party who has delivered a jury notice in time may opt out of a jury trial by not paying the jury fees, a party not receiving a jury notice is still entitled to rely on its absence to assume, following the expiry of the deadline, that the case will not be a jury trial.
- [16] The court also provided the following historical context:

[27] Prior to 1998, the Rules required litigants to pay the jury fees at the time of delivering the jury notice. In a leading authority decided under the previous Rule, *Hoare v. Firestone* (1989), 42 B.C.L.R. (2d) 237 (C.A.), the Court of Appeal explained the importance of electing trial by jury at an early stage in the proceedings, at page 241:

The learned judge very properly emphasized the importance of the right to elect for jury trial. But on a broad consideration of the rules and authorities which has been possible in these appeal proceedings I have concluded that the election is intended to be made once only, at a particular stage, and for good reason. If the trial may be before judge and jury, rather than judge alone, that is generally an important consideration for both parties in preparation of the case and perhaps, indeed, in the selection of counsel. It is, I think, for these reasons that the rules require the election to be made, once for all, soon after the action is set down, instead of leaving the parties free to elect thereafter on the basis of later developments.

[17] The first notice of trial was filed on April 4, 2016. If any party wished to have the trial proceed with a jury, they would have to file a notice requiring trial by jury and serve that notice on all other parties of record within 21 days of when the first notice of trial was served on them. Here, no party did so.

[18] The defendants argue that once the order to sever the liability issues of the case from the assessment of the quantum of the plaintiff's damages was entered on June 8, 2017, a new round of potential election for trial with a jury was triggered. This argument cannot prevail. The defendants have provided no case authority to support the argument. As discussed above, the leading case authorities indicate that the intention to proceed with a jury must be communicated early, so all parties can plan and prepare for a jury trial.

[19] Counsel for the defendants said they did not bring on a Rule 22-4(2) application because they took the position that the March 1, 2024 notice requiring trial by jury was not a nullity, relying on their argument that the June 8, 2017 consent order allowed a new election for trial with a jury. This is not a viable explanation and is a practice to be discouraged. It unduly delays the determination of whether the notice requiring trial by jury is effective, and, therefore, whether the trial would be with a jury. Conceivably, the defendants could lay in the weeds and wait until shortly before the trial date before addressing whether the contested jury notice was effective. The Rules and the case authorities make it clear that all parties to an action should know early in the litigation cycle whether the trial will heard with a jury. If there is a disagreement between the parties as to whether a notice requiring trial by jury is valid, that issue should be resolved as soon as possible. Here, counsel for the defendants knew that the plaintiff took the position that the defendants' March 1, 2024 notice requiring trial by jury was a nullity and was obliged to bring on an application as soon as possible to address the matter.

[20] The defendants nevertheless argue that their March 1, 2024 notice requiring trial by jury is valid. In order for the defendants' March 1, 2024 notice requiring trial by jury to apply, the defendants would have to obtain an order pursuant to Rule 22-4(2) that would extend the

time for it to be filed. The defendants have not applied for such an order. If they had, the principles the court would apply on the application to extend the time for filing and service of a notice requiring trial by jury are set out at para. 45(3) of *Gill v. Majatovic*, 2016 BCSC 239. A consideration relevant to this application is whether the defendants can establish that they had a clear intention to file and serve a notice requiring trial by jury within the 21 day period but failed to do so because of inadvertence or neglect on the part of the defendants or their lawyer. The defendants' application materials do not establish that they had a clear intention to file a notice requiring trial by jury within the original 21 day period. Indeed, the materials indicate that they did not have an intention to proceed to trial with a jury, as they state in their August 21, 2017 trial brief that the trial was to be heard without a jury. The materials before the court do not justify an order to extend the time for the defendants to file a notice requiring trial by jury such that their March 1, 2024 jury notice will apply to the trial of this action.

- [21] If the defendants wanted the trial of this case to proceed with a jury, they should have filed and served a notice requiring trial by jury within 21 days of when they received the first notice of trial. When the defendants served their March 1, 2024 notice requiring trial by jury they were immediately advised that the plaintiff took the position that the notice was a nullity, because it was filed and served too late. The defendants were asked to set aside that jury notice and were told that if they did not do so the plaintiff would apply to strike it. At that time, the defendants knew that their notice requiring trial by jury was opposed and knew, or should have known, that if they wanted their notice requiring trial by jury to apply, they would have to bring an application pursuant to Rule 22-4(2) to extend the time to file and serve their notice requiring trial by jury. They did not do so.
- [22] The defendants' March 1, 2024 notice requiring trial by jury was filed long after the period when the defendants could elect to have the trial proceed with a jury. It must be, and is, struck.

Result

- [23] The application set out at Part 1, para. 1 of the plaintiff's notice of application filed on March 10, 2025, seeking an order that the notice requiring trial by jury filed by the defendants on March 1, 2024 be struck, is granted.
- [24] The plaintiff seeks costs for this application and asks that those costs be summarily assessed at \$1,000 and payable forthwith. The defendants therefore knew that costs in any event of the case would be sought if the plaintiff succeeded on the application. The application response filed on behalf of the defendants does not adequately address the substantive issues raised by the application. The argument the defendants relied on was frivolous and without merit. The defendants had the option to agree to set aside their notice requiring trial by jury. As they did not do so, the plaintiff had to bring on this application, which was required to clarify whether there was any possibility that the trial might proceed with a jury.

[25] The plaintiff was successful on the application. The plaintiff is awarded costs for this application. Those costs are assessed pursuant to Schedule 3, Item 2 of Appendix B of the Rules at \$550 plus an attribution towards disbursements of \$120. The costs total \$670 and are payable by the defendants to the plaintiff forthwith.

"Associate Judge Vos"

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