

CANADA / JUDGMENT

S.T. v. A.T.

2023 BCSC 1595

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1595 S.T. v. A.T.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.T. v. A.T.,

2023 BCSC 1595

Date: 20230911

Docket: E63593

Registry: New Westminster

Between:

S.T.

Claimant

And

A.T.

Respondent

Before: The Honourable Justice Stephens

Reasons for Judgment Re Costs

Counsel for the Claimant:

S. Bobb

Counsel for the Respondent:

M. Campbell

Written Submissions of the Respondent:

May 29, 2023

Written Submissions of the Claimant:

June 8, 2023

Response Submissions of the Respondent

June 12, 2023

Place and Date of Judgment:

New Westminster, B.C.

September 11, 2023

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Introduction

[1] This is my costs decision following the trial in this family law case reported at 2023 BCSC 875 ("RFJ").

Discussion

- [2] The respondent, A.T., seeks special costs, increased costs, or ordinary tariff costs payable by the claimant, S.T. A.T. seeks an order for special costs to be ordered, "jointly and severable against both the Claimant [S.T.] and his counsel".
- [3] S.T. opposes this relief and seeks instead an order that A.T. pay his costs, or a reduced costs award, including that each party bear their own costs. S.T. further seeks an order that any request for "special costs as against father's [S.T.'s] counsel, and determination of special costs generally" should be brought by a separate notice of application.

A.T.'s Request for Special Costs

- [4] A.T. contends that S.T. and his counsel's litigation conduct was reprehensible. S.T. disputes this and criticizes A.T.'s conduct during trial, contending she makes allegations in her costs submissions that are "careless and reckless, and deserving of rebuke".
- [5] Special costs are awarded for reprehensible conduct in the context of litigation: *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union Local 2009 v. Ghag*, 2023 BCSC 930 at paras. 5-6 [United Steel], citing *Garcia v. Crestbrook Forest Industries Ltd.*, 9 B.C.L.R. (3d) 242 at para. 17, 1994 CanLII 2570 (C.A.).
- [6] Such conduct will likely be found "in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant": *United Steel* at para. 7, citing *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 73(d). In *AM Gold Inc. v. Kaizen Discovery Inc.*, 2022 BCCA 284, Justice Goepel opined that:
- [59] Dishonest testimony alone is not sufficient to warrant an order for special costs. There must be something more egregious in the impugned conduct for it to be considered reprehensible. There is a distinction between evidence that is rejected by the court and evidence that was intended to mislead or was given with an improper motive; only the latter warrants rebuke in the form of an order for special costs
- [7] Special costs decisions are fact driven: *FFS HK Ltd. v. P.T. 25 (Ship)*, 2011 BCSC 1418 at paras. 8-10; *Tanious v. The Empire Life Insurance Company*, 2019 BCCA 329 at paras. 58, 73, leave to appeal to SCC ref'd, 38924 (20 February 2020).
- [8] I do not find that S.T. or his counsel engaged in reprehensible conduct in this litigation warranting an order for special costs.
- [9] Both parties did not conduct the trial perfectly. A.T. disclosed some documents during the trial. She introduced and entered certain medical records as an exhibit at trial during her re-examination. These documents had not been listed in A.T.'s amended list of documents dated April 11, 2023 .
- [10] A.T. also alleged a theory of why S.T. had made allegations against A.T., which was not put to S.T. in cross examination: RFJ at para. 116.
- [11] Some of A.T.'s arguments relate to S.T.'s conduct not in the litigation, but in the events that give rise to the family law action. Special costs are awarded as a means of penalizing a party's conduct in the litigation, not the pre-litigation period: *Smithies Holdings Inc. v. RCV Holdings*, 2017 BCCA 177 at para. 128-134; *Sperring v. Shutiak*, 2023 BCCA 54 at paras. 122, 132, referring to *Sebok v. Babits*, 2022 BCCA 2 at para. 5; see also *United Steel* at paras. 5-8.

- [12] A.T. contends that S.T. made late objections and produced documents late. She also complains that S.T. took positions to exclude evidence, which were ultimately ruled on by the Court, but I do not find that doing so was an attempt to mislead the Court or otherwise a type of conduct deserving of rebuke.
- [13] A.T. further argues that S.T. and his counsel attempted to withhold relevant evidence from the Court, including A.T.'s hair follicle tests, the s. 211 report, and material that instructed Dr. Owega.
- [14] S.T. did make an objection to the admissibility of the hair follicle tests. I do not find S.T.'s objection to the admission of the hair follicle tests, which required a ruling at trial, constitutes misconduct. Further, S.T. did ultimately produce correspondence that had been sent by S.T.'s counsel to Dr. Owega, and it was ultimately marked as an exhibit at trial.
- [15] A.T. is also critical of S.T. obtaining Dr. Owega's affidavit and the manner in which S.T.'s counsel did so. But, S.T. ultimately did not seek to tender that affidavit as opinion evidence (RFJ at para. 43), and I do not find that the manner of S.T. counsel's obtaining that affidavit to be so egregious or reprehensible to attract an award of special costs.
- [16] Nor did S.T. try to have Dr. Krywaniuk's s. 211 report struck as A.T. alleges. S.T. did take the position Dr. Krywaniuk's report should be used with caution--a position ultimately not accepted by the Court (RFJ at para. 38)--but taking such a position does not itself justify an award of special or increased costs.
- [17] I further do not find S.T. engaged in document tampering, or deliberately attempted to deceive the Court.
- [18] The Court is concerned that S.T. did not pay his share of Dr. Krywaniuk's final instalment of expert fees. Nevertheless, I do not find this conduct alone should lead to an award of special costs. A.T. relies on *Devathasan v. Devathasan*, 2019 BCSC 661, 2020 BCCA 209 (appeal abandoned) in this regard. However, I find the constellation of circumstances and reprehensible conduct referred to in *Devathasan* at para. 386 that led to an award of special costs are not present in the case before me. I note that the allocation of payment of Dr. Krywaniuk's expert fees was expressly addressed in para. 190 of the RFJ.
- [19] I do not find S.T. engaged in malicious conduct in the litigation of the sort described in *Nesbitt v. Neufeld*, 2011 BCCA 529 at paras. 4, 19.
- [20] In short, I do not find that S.T. engaged in reprehensible conduct or misconduct in the litigation that should attract special costs.

A.T.'s Request for Increased Costs

- [21] For similar reasons, no award of increased costs should be made in A.T.'s favour.

- [22] A.T. alternatively seeks increased costs (costs on a scale reflecting more than ordinary difficulty), alleging S.T. misled the Court by failing to provide full and proper disclosure, failing to provide information in a cooperative manner, or engaging in other conduct that increased the difficulty of the case. She relies on *McIsaac v. David*, 2020 BCSC 1741 at para. 33, as well as *Kopp v. Kopp*, 2012 BCCA 140, which states:
- [90] In other family law cases in which costs have been awarded on a scale reflecting more than ordinary difficulty, the evidence has shown deceit (*Ahenkora v. Ahenkora*, [1999] B.C.J. No. 1770 (QL) (S.C.), appeal dismissed 2000 BCCA 85), disregard for court orders, procedure or process that lengthened the trial and made it more difficult (*Xu v. Leung*, 2001 BCCA 163); misleading the court by failing to provide full and proper disclosure (*Friedl v. Friedl*, 2010 BCSC 139); or failure to provide information in a cooperative manner or other conduct which increased the difficulty of the case (*Dhalla v. Dhalla*, 2002 BCSC 984; *McPhail v. McPhail*, 2001 BCCA 250). None of these factors is present here.
- [23] I do not find S.T. attempted to mislead the Court by failing to provide full disclosure; nor has A.T. demonstrated that S.T. engaged in conduct so as to increase the difficulty at trial warranting an order of increased costs.
- [24] I do not find that S.T. attempted to frustrate the Court's procedures as A.T. alleges.
- [25] I do not find that S.T. engaged in conduct which made the trial sufficiently more difficult such as to merit an award of increased costs: e.g. *C.Y.J. v R.J.*, 2023 BCSC 140 at paras 13-16.
- [26] I decline to award increased costs to A.T. in this case.
- A.T.'s Request for Ordinary Costs / S.T.'s Request that Each Party Bear Their Own Costs
- [27] Each of A.T. and S.T. sought ordinary costs in their favour.
- [28] The general rule is that costs of a family law case must be awarded to the successful party unless the court otherwise orders: Supreme Court Family Rules, Rule 16-1(7). The onus is on the party who seeks to displace the usual rule that costs follow the event: *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282 at para. 75, citing *Grassi v. WIC Radio Ltd.*, 2001 BCCA 376 at para. 24.
- [29] Where there are multiple causes of action, the more flexible "substantial success" test is usually more appropriate. The Court of Appeal in *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2017 BCCA 346 at paras. 91-92 [*Sze Hang*], quotes *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45, leave to appeal to CA ref'd, 2002 BCCA 454, which describes "substantial success" as about 75% or better; and states that "the principles in *Fotheringham* may be applicable in any case in which there are multiple causes of action": *Sze Hang* at para. 92. This approach is well-suited to the present case where several claims were advanced: *Litt v. Gill*, 2016 BCCA 288 at para. 53.

- [30] I find that A.T. was the successful party and achieved more than 75% success at trial. She was successful on the matter of S.T.'s proposed relocation of the children (RFJ at paras. 149-153), child support (para. 169), some but not all aspects of property and debt division (paras. 182-183, 185), and spousal support (para. 187). Taking the nature of these issues into consideration, I measure A.T.'s success at greater than 75%. She is therefore entitled to ordinary costs.
- [31] I do not accept S.T.'s submission that in custody cases, there should be no successful party: *D.M.C. v. A.J.C.*, 2022 BCSC 1209 at paras. 9-13. *A.M. v. G.M.*, 2019 BCSC 684, relied on by S.T., states the court's consideration in this regard is contextual and that "a court must consider the specific circumstances of the child and parents in question": para. 53. In *A.M.*, the Court did make an order for costs in favour of the mother: para. 59. I find there can be a successful party for costs purposes where, as here, parenting time and child relocation are the main issues (RFJ at para. 1), and in this case, that party is A.T.
- [32] Nor do I accept S.T.'s submission that A.T.'s conduct in the litigation should cause her to not receive an award of costs. I am not satisfied that A.T.'s counsel interfered with Dr. Krywaniuk's work. Further, A.T.'s conduct disclosing late certain documents does not rise to a level to negate A.T.'s entitlement to an award of ordinary costs.

A.T.'s Request for Special Costs Jointly and Severably Against S.T. and his Counsel

- [33] An order for special costs against counsel is an extraordinary measure and attracts "a particularly stringent" threshold: *Wallace v. Pichichero*, 2021 BCSC 2347 at para. 21, citing *Walsh v. Muirhead*, 2020 BCCA 225 at para. 32. I find no conduct on behalf of S.T.'s counsel that rises to a level of misconduct justifying an award against counsel personally.
- [34] I therefore dismiss this request for relief in A.T.'s costs submissions.

Payment of s. 211 Expert Fees

- [35] I am concerned that S.T. did not pay his final share of the expert fees. S.T. in his costs submissions does not deny that he did not pay this amount.
- [36] However, at para. 190 of the RFJ, I found costs of the s. 211 report should be shared equally. Thus, A.T.'s request that she be repaid the fees she provided to the expert to cover S.T.'s share, in the amount of \$6,387.00, has, in my view, already been captured in the order set out in the RFJ at para. 190. In addition, paragraph 190 of the RFJ also stated that the cost of "the expert's attendance at court shall be equally allocated between the parties".

Conclusion and Orders

- [37] For these reasons, A.T. is awarded costs of this family law case payable by S.T., assessed on the basis of ordinary difficulty.

- [38] A.T. provided a bill of costs with her submissions. I do not assess costs payable in this proceeding, pursuant to my disposition as to costs. If the parties cannot agree on the assessment of the amount of costs flowing from my costs order, it may be referred to the Registrar for assessment in accordance with Supreme Court Family Rule 16-1, including 16-1(3).
- [39] It is unnecessary to consider S.T.'s relief sought that on the issues "of special costs as against father's counsel, and determination of special costs generally, either party may bring a notice of application under the Rules and set for hearing at a date to be agreed", since I have dismissed A.T.'s claims in this regard. Therefore, the relief sought by S.T., which sought leave for a party to bring a separate application for such relief is not granted.
- [40] In the final paragraph of A.T.'s costs submissions, A.T. asks the Court to change one aspect of its family property and debt division order with respect to the RV. I decline A.T.'s request to reopen this matter to this extent to consider making a different order about the RV than made in my initial RFJ. To the extent the A.T. sought in her costs submissions, without expressly so stating, to reopen the trial in order to do so, that request is denied.

"Stephens J."

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