

CANADA / JUDGMENT

Sielsky v. Monaghan

2020 BCCA 346

COURT

British Columbia Court of Appeal

DECIDED

27 November 2020

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2020 BCCA 346 Sielsky v. Monaghan

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Sielsky v. Monaghan,

2020 BCCA 346

Date: 20201127

Docket: CA46107

Between:

Terrence Lee Sielsky

Respondent

(Plaintiff)

And

Daniel Monaghan

Appellant

(Defendant)

Before:

The Honourable Mr. Justice Butler

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated

April 26, 2019 (Sielsky v. Monaghan, Vancouver Docket M161812).

Oral Reasons for Judgment

Counsel for the Appellant

(via teleconference):

A. Mersey Q.C.

E.J. Segal

Counsel for the Respondent

(via teleconference):

A. Sayn-Wittgenstein

K. Gurlay

Place and Date of Hearing:

Vancouver, British Columbia

November 26, 2020

Place and Date of Judgment:

Vancouver, British Columbia

November 27, 2020

Summary:

The appellant applies to extend the time for filing the appeal record, transcripts, appeal book, and his factum. The appeal was commenced on May 23, 2019. It concerns a single issue; the quantum of non-pecuniary damages awarded to the respondent. During the lengthy delay, the parties have been involved in settlement discussions and have proceeded to arbitration to resolve their dispute regarding UMP benefits. The respondent has consistently advised the appellant that he would not agree to an extension of time. Held: Application dismissed. The respondent has been prejudiced by the inordinate delay. The appellant's decision not to bring the application for an extension was intentional and strategic. It would not be in the interests of justice to order the extension of time sought by the appellant.

- [1] BUTLER J.A.: The appellant, Daniel Monaghan, applies for an order pursuant to ss. 10(2)(d) and 10(4) of the Court of Appeal Act, R.S.B.C. 1996, c. 77 and Rule 52 of the Court of Appeal Rules, B.C. Reg. 99/2018 to extend the time for filing the appeal record, transcripts, and appeal book to November 27, 2020, with the factum to follow within 30 days. The circumstances of the application are somewhat unusual. The notice of appeal was filed on May 23, 2019. Shortly after the appeal was commenced, the appellant was put on notice that the respondent would not agree to an extension of time to file the appeal materials. Those materials have not been filed and the respondent has not changed his position; he opposes the application for an extension of time.

Background

- [2] This appeal arises out of a motor vehicle collision that occurred on November 21, 2014. The plaintiff (respondent), Terrence Sielsky, is an RCMP officer. He and a fellow officer followed a Dodge truck driven by the defendant, Mr. Monaghan. After following the truck to a parkade in Surrey, the officers blocked the parkade exit in order to arrest the driver. In response, Mr. Monaghan rammed the two police vehicles in an effort to escape. Both officers were injured and brought actions seeking damages against the appellant. Corporal Sielsky suffered serious injuries in the collision, including concussion, mild traumatic brain injury and psychological injuries, and sought non-pecuniary damages as well as damages for past and future income loss and cost of care.
- [3] Although the appellant is ostensibly Mr. Monaghan, at the time of the accident he was driving a stolen vehicle. As Mr. Monaghan was uninsured, ICBC has had conduct of the defence, and this appeal, pursuant to s. 20(7) of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231.
- [4] The trial proceeded before a jury. The jury awarded \$550,000 for non-pecuniary damages and substantial amounts for past income loss and future loss of earning capacity. The award for non-pecuniary damages was in excess of the limit for the most catastrophic injuries set out in *Ter Neuzen v. Korn*, [1995] 3 S.C.R. 674. The trial judge adjusted the non-pecuniary damage award to \$385,755 (the maximum permitted limit for catastrophic injuries as adjusted for inflation as of March 2019) in an order pronounced on April 26, 2019. It is this order from which the appellant now appeals.
- [5] The notice of appeal was filed and served on May 23, 2019. The sole issue on appeal is the quantum of non-pecuniary damages.

Timeline of Events since the Notice of Appeal was Filed

- [6] Counsel for the parties have sworn and filed affidavits describing the events that have transpired since the filing of the notice of appeal. The circumstances are not particularly contentious. The parties have attempted, without success, to settle the issue under appeal as well as other issues arising from the respondent's claims.
 - [7] Counsel for the appellant submits that the appellant has always intended to prosecute the appeal. He describes that intention at paras. 4-5 of his affidavit:
4. The appellant has intended to prosecute the appeal throughout the period of time since the filing of the notice of appeal, except, if the issue on appeal could be resolved by settlement, the appellant would have abandoned his appeal.

5. The parties have been engaged in ongoing settlement discussions since the notice of appeal was filed. To save time and expense for both parties, and to preserve judicial resources, I focused on attempting to settle the matter. At all material times, I anticipated settlement could be achieved, which would have rendered the appeal unnecessary.
- [8] Counsel for the appellant says that settlement discussions proceeded in earnest through July 2019. He says the appellant "refrained from ordering the Appeal Materials at that time in order to avoid a potentially unnecessary disbursement of over \$16,000". Appellant's counsel also acknowledges that respondent's counsel advised throughout the summer of 2019 that the respondent would not agree to an extension of time for filing the appeal materials. Eventually, in early August 2019, counsel for the appellant instructed their assistant to order the appeal materials. The appeal transcript was received on October 9, 2019, and the appeal record was received on October 11, 2019. As a result of an error, the appeal books were not ordered until October 15, 2019. Paper copies of the appeal books were received in January 2020, and an electronic version was received in March 2020. However, no application was brought for an extension of time to file the appeal materials. The sole explanation offered by counsel for not bringing that application was ICBC's focus on settlement.
- [9] As the appellant was uninsured, a number of issues arose regarding the availability of Underinsured Motorist Protection ("UMP") compensation benefits. Those issues became a serious barrier to resolving all of the issues in dispute between the parties, which also included a dispute about trial costs. In February 2020, the dispute regarding the UMP benefits was referred to arbitration pursuant to the Insurance (Vehicle) Regulation, B.C. Reg. 447/83.
- [10] Counsel for the appellant notes that the parties continued to engage in settlement discussions in early 2020 with a particular focus on the UMP issues. Counsel also notes that the parties engaged in settlement discussions in September 2020 about the non-pecuniary damages issue and trial costs, which were unsuccessful.
- [11] Counsel for the respondent says he made it clear to counsel for the appellant throughout this year and last that the respondent would not agree to an extension of time to file appeal materials. He refers to telephone discussions and email correspondence in July 2019 in which he first made that point.
- [12] In an email of July 25, 2019, counsel for the appellant proposed that "if settlement has not been reached by Friday, August 2, 2019, the clock starts ticking in accordance with the Rules". That same day and prior to obtaining instructions on that proposal, counsel for the respondent had explained that he "did not want to agree to an extension in this case because I [want] to maintain some urgency in getting this matter resolved (I believe my exact words were that I wanted to keep the pressure on ICBC)." He also explained that his position was driven by the respondent's circumstances:

I say all of this mindful of the particular circumstances. [The respondent] is currently in the midst of an inpatient stay at Ravensview where he's been since late June. It's the brand new private mental health facility on Vancouver Island; he's working through his severe depression and mental health issues.

[13] On August 2, 2019, respondent's counsel responded to the appellant's proposal. He advised that the respondent did not agree to the proposed timelines and noted that the deadline for filing the appeal record and transcripts had already passed. He also wrote:

I specifically said when we spoke on July 4th that this is not a case where I would agree to an extension of the timelines given the circumstances.

[14] On October 15, 2019, respondent's counsel confirmed that his client has "not agreed to an extension of any timelines on the appeal". On January 27, 2020, respondent's counsel sent an email to the appellant's counsel reiterating the positions he had taken in the previous eight months concluding with the statement:

If ICBC intends to proceed with the appeal, please send your materials to extend the time for filing the appeal record, the transcripts and your factum.

[15] Despite that clear statement of the respondent's position, it was not until November 10, 2020 that the appellant brought this application to extend the time for filing the appeal materials. While settlement discussions continued, ICBC has not paid any portion of the trial award to the respondent. Counsel for the appellant indicates that the appeal books, appeal record, and trial transcripts are ready to file and that the factum can be filed within 30 days of the hearing of this application.

Applicable Test

[16] Under the applicable Court of Appeal Rules (Rules 19 and 20), the appellant must file and serve the appeal record and transcripts within 60 days of bringing an appeal. Within 30 days after filing the appeal record, the appellant must file and serve an appeal book under Rule 26 and a factum under Rule 21.

[17] Section 10(2) of the Court of Appeal Act gives justices broad discretion to extend or shorten timelines:

10 (2) In an appeal or other matter before the court, a justice may do one or more of the following:

- (d) extend or shorten the time provided in this Act or the rules or in an order extending or shortening time, for the doing of an act or taking of a proceeding;
- (f) when making an order, impose terms and conditions and give any directions as the justice thinks just.

- (4) The power to extend time under this section may be exercised even though the application for the extension or the order granting the extension is made after the expiry of the period of time in respect of which the application to extend is made.
- [18] The factors to be considered on an application for an extension of time were set out in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 (C.A.) at 259-260:
- 1) Was there a bona fide intention to appeal?
 - 2) When were the respondents informed of the intention?
 - 3) Would the respondents be unduly prejudiced by an extension of time?
 - 4) Is there merit in the appeal?
 - 5) Is it in the interest of justice that an extension be granted?
- [19] The Davies criteria are applied, with appropriate modifications, in applications to extend the time for taking any step necessary in the prosecution of an appeal: *Vancouver City Savings Credit Union v. R.D. Backhoe Services Inc.*, 2011 BCCA 159 at para. 8 (Chambers), reconsideration denied 2012 BCCA 79.
- [20] The court will be less stringent in applying the Davies factors where the extension sought is for filing appeal materials as opposed to filing a notice of appeal: *Hydro Fuels Inc. v. Moran* (1993), 25 B.C.A.C. 139 at para. 9 (C.A.) (Chambers). The burden is on the applicant to establish that the criteria are met: *Westsea Construction Ltd. v. Veale*, 2013 BCCA 191 at para. 7.

Discussion

- [21] I will consider the relevant Davies criteria as they apply to the circumstances of this appeal and explain why I have concluded that it is not in the interests of justice to grant an extension of time.
- [22] As the appeal was commenced in a timely manner, the focus of the analysis must be on the length of the delay as it relates to the appellant's intention to prosecute the appeal, prejudice to the respondents, and the overarching interests of justice.
- [23] In *Davies*, Seaton, J.A., for the Court, stated that the fifth factor, the "interests of justice", encompasses the other factors and "states the decisive question": at para. 22. In *Perren v. Lalari*, 2009 BCCA 564, Prowse J.A., for the majority, held that this fifth factor is not to be applied independently of the other Davies factors, citing *Haldorson v. Coquitlam (City)*, 2000 BCCA 672 at para. 9:

The fifth rule, of course, in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 is that in deciding whether to extend time to someone who files a notice of appeal late, the overriding rule, called the fifth rule, is that there must be a balancing of the interests of justice as they affect both parties and in reaching a decision the interests of justice will prevail. The first four rules cannot be used to defeat the interests of justice but are themselves guides to the application of the interests of justice.

[Emphasis added.]

[24] With the overriding principle of the interests of justice in mind, I turn first to the appellant's intention to appeal. It is clear from decisions of this Court on extension applications that the timelines in the Rules are not to be lightly disregarded even where an appeal is commenced in time. This is because the failure to order transcripts or arrange to file the appeal books within the time required by the Rules may be taken as a sign that there was no settled or genuine intention to continue to prosecute the appeal. In *Poirier v. Poirier Estate* (1991), 60 B.C.L.R. (2d) 332 (C.A.), Southin J.A., for the Court, explained:

31. By obeying the Rule, an appellant evinces a serious and settled intention to proceed with the appeal. By not obeying, an appellant casts grave doubt upon the purpose for which she gave the notice of appeal. ...
33. It is important to note that in this case we are not dealing with a delay in filing the transcript and appeal book caused by delays on the part of the court reporters nor with a failure to file proof nor with any solicitor's inadvertence. We are dealing with a failure to order. To my mind, such a failure is almost as grave an omission on the part of an appellant as failing to file a notice of appeal within time.

[Emphasis added.]

[25] In *Poirier*, the notice of appeal was filed on June 23, 1991. The appellant brought an application to extend time to order appeal books on September 26, 1991, slightly over one month past the 60-day deadline. The petitioner's application for an extension of time was dismissed in chambers but that order was reversed on review by a division of this Court. The Court granted the extension of time but only on certain conditions, including advance payment of the share of the estate and special costs payable from the estate if the appeal failed: at paras. 44-48.

[26] In the context of applications to extend time to bring an appeal, where there is inordinate or inexcusable delay on the part of the appellant, the burden falls on the appellant to show that the respondent would not be prejudiced by allowing the appeal to continue: *El-Nachar v. Alsakka*, 2002 BCCA 191 at para. 22 (Chambers). However, prejudice will not be fatal where it may be remedied. In *Greither v. Greither*, 2005 BCCA 339, the Court acknowledged the prejudice resulting from the appellant's five-month delay in filing her factum but nonetheless granted an extension of time. Saunders J.A., for the Court, observed at para. 20: "while there is always some prejudice in delay in pursuing the appeal and thus in achieving

finality, the delay here is relatively short and can be repaired by expeditiously setting this matter for hearing."

- [27] Prejudice may be deemed to arise where there is substantial delay as explained by McEachern C.J.B.C. in *Frew v. Roberts* (1990), 44 C.P.C. (2d) 34, albeit in the context of an application for dismissal of an appeal for want of prosecution:
- [10] It seems to me that a delay of the nature we are concerned with in this case, of over a year after the matter is brought to the attention of the parties in the way that it was, must lead to prejudice and the failure of parties to have their rights settled in a timely and reasonable way by the procedures that are provided by the Rules of Court and by the statute.
- [28] In *Trak Energy Corp. v. Happy Valley Resort*, [2016] B.C.J. No. 1329 (Chambers), Bennett J.A. considered an extension of time to file appeal materials where the appeal records and transcripts were five months late. She granted the extension despite this "substantial" delay. Much of the delay was caused by adjournments and obtaining a final order from the court below, and the respondents could be insulated from most of the prejudice by ordering security and fixing a timeline for filing appeal materials: at paras. 53-55.
- [29] In *Besic v. Kerenyi*, 2011 BCCA 503, an extension was granted despite a five-month delay, in part because the appellant offered to secure the amount of the judgment and costs order. This went "a long way to alleviating the prejudice caused by the delay in this Court": at para. 41.
- [30] The interests of justice include the interests of both parties and other factors, including the circumstances and length of the delay: *Clock Holdings Ltd. v. Braich*, 2009 BCCA 437 at para. 24:

The interests of justice encompass a myriad of factors, including the interests of the parties and compliance with the Rules of Court [citation omitted]. Here, there was deliberate non-compliance with the rules for three months, and action only occurred when the respondents took steps to bring the issue before the court. This Court's Act and Rules exist for a purpose and it is not in the interests of justice to permit appellants to flagrantly ignore them.

[Emphasis added.]

- [31] Perren bears some resemblance to this case. It was a personal injury case and, as here, ICBC had conduct of the appeal. The notice of appeal was filed in August 2008, but counsel did not place an order for the preparation of the appeal record, appeal book, and transcripts until late December. The appeal materials were prepared and ready to file by mid-February. Despite respondent counsel's refusal to consent to an order extending time, the appellant did not apply for an extension of time until June 2009 (roughly six-and-a-half months after the appeal materials were due). The reason for the delay was that new counsel who was retained to conduct the appeal, "made what turned out to be the fatal decision to wait until he had prepared his factum before seeking an extension." Because he was engaged in other work, it took him much longer to prepare the factum than he originally estimated: at para.

36.

[32] A justice in chambers denied the application to extend time. On review, the Court (Lowry J.A. dissenting) reversed, with the majority holding that the interests of both parties and the Davies factors did not justify dismissal of the appeal. In reversing the order, Prowse J.A. (for the majority) observed that the respondent would not suffer any real prejudice if the order for an extension were granted because ICBC had paid all but \$10,000 of the amount owing under the judgment. Further, an important feature of the appeal was that the issue under appeal was of significance to the practice: at paras. 34-35.

[33] Prowse J.A. noted at para. 37:

The interests of justice are generally best served by having appeals heard and disposed of on their merits. In some cases, the actions or inaction of counsel have been visited on their clients, as reflected in some of the authorities referred to by the chambers judge. That occurs more often in cases where the appeal is of dubious merit, where there have been lengthy delays, and/or where there is prejudice to the defendant.

[34] I turn to examine the factors set out in Davies while considering the overall interests of the parties and the interests of justice.

[35] On an application to extend the time for filing transcripts, the appeal record, and the appeal books, consideration of the appellant's intention to appeal looks at the appellant's intention to actively pursue an extant appeal rather than their initial intention to bring that appeal. In this case, by filing the notice of appeal, the appellant demonstrated an intent to pursue the issue raised on appeal (resolution of the quantum of non-pecuniary damages), and recognized that pursuit of the appeal may be required to resolve that issue. However, the appellant's actions after commencing the appeal lead to the inference that ICBC regarded pursuit of the appeal as a secondary or backup means of achieving the resolution it wanted (namely, settlement).

[36] Initially, ICBC chose not to order transcripts or appeal books in an effort to save that expense. While it realized in August 2019 that it would have to incur that expense, it never took the follow-up step of bringing the application to extend the time for filing. It failed to take any steps to continue prosecuting the appeal knowing that the respondent was steadfast in his position; he was not going to consent to an extension of time. The appellant's failure to take the next steps required by the Rules may be because ICBC was still hoping to save the expense of the preparation of a factum and the attendance of counsel for the hearing of the appeal. In other words, the appellant continued to regard prosecution of the appeal as a secondary means of achieving its goals. In this sense, ICBC's decision not to actively pursue the appeal was intentional and strategic.

- [37] Of course, the circumstances of this case are somewhat unusual. The real barriers to settlement were the UMP issues. The respondent decided early on to insist that he would not settle the appeal issue separately; any settlement must be comprehensive and include resolution of the UMP issues. The respondent perceived this to be an advantageous negotiating position and he clearly advised the appellant of his position.
- [38] In the circumstances, the appellant knew that delaying an application to extend the time for filing the appeal materials came with a risk: the Court may not grant the extension. The appellant was, to use a colloquial term, "rolling the dice". There is longstanding authority that if respondent's counsel has placed appellant's counsel on notice that he or she will require strict compliance with the Act and Rules, a justice may take this into account in denying an extension: *Sildon Commercial Corp. v. Bradley Street Holdings Ltd.*, [1985] B.C.W.L.D. 715 (C.A.) at paras. 3-5 (Chambers).
- [39] It is also evident that the respondent would be prejudiced by an extension of time. There are two aspects to this prejudice. First, there is the prejudice, referred to above, that arises from lengthy delay. The delay in this case has been inordinate. The appellant has not referred to any decision considering such a lengthy delay. The application to extend time was filed on November 10, 2020. Even after accounting for the suspension in service and filing deadlines for existing appeals and chambers applications between March 18, 2020 and September 14, 2020 (as a result of the COVID-19 Notice to the Public), approximately a full year (358 days) had passed since the notice of appeal was filed. This is much longer than the so-called "substantial" delay in *Trak Energy*. It is greater than the six-and-a-half-month delay in *Perren*. With this length of delay, the respondent has suffered prejudice because his rights have not been settled in a timely and reasonable way by the procedures provided for by the Rules and the Act.
- [40] The respondent has also suffered actual prejudice as he has received no payment on the trial judgment while continuing to suffer from depression and anxiety. The circumstances here are quite different from those in *Perren* and from cases where an extension was granted where a majority of the trial judgment had already been paid. Further, the appellant has not proposed any conditions to ameliorate the respondent's prejudice if the application were to be granted.
- [41] I must also consider the interests of the appellant. In the circumstances of this case, that requires considering the interests of ICBC, which has conduct of the appeal, and the interests of the individual appellant, Mr. Monaghan. As counsel noted, their positions are different. ICBC's liability to the respondent involves consideration of the UMP issues as well as the appeal issue. Depending on the result of the UMP arbitration, a successful appeal that results in a reduction in the quantum of the respondent's non-pecuniary damages may have little or no consequences for ICBC. However, a reduction in the quantum of non-pecuniary damages if the appeal is successful would reduce Mr. Monaghan's potential liability to ICBC if it seeks reimbursement from him. However, as counsel observed, ICBC owes a duty to the appellant which would include taking reasonable steps to minimize his potential liability. I

cannot comment on whether his potential liability to ICBC would be affected by an order denying an extension of time. However, the appellant's potential liability to ICBC is substantial and any reduction by a successful appeal would not be significant in relation to his total potential liability.

- [42] I would also observe that this is not a case where the appellant is alleging solicitor error as a justification for the extension of time: see e.g., *Le Soleil Hospitality Inc. v. Louie*, 2008 BCCA 142. Further, as I have noted, it is not a case involving any issue of broad legal importance: see e.g., *House of Sga'nisim v. Canada (Attorney General)*, 2006 BCCA 413; *Verlaan v. Von Deichmann*, 2006 BCCA 389 at para. 35, additional reasons at 2006 BCCA 534. The sole issue in this appeal is the quantum of non-pecuniary damages for the respondent, an issue that is of concern only to the parties. While it is always preferable to have a dispute determined on its merits, the quantum of non-pecuniary damages in a particular case does not involve issues of broad legal importance.
- [43] When I consider these factors, including that the appeal appears to be meritorious, and balance the interests of justice, I conclude that the appellant's application should be dismissed. The delay in this case was inordinate. It was intentional in the sense that the appellant deliberately held off in bringing an application for an extension of time for over a year. It was strategic as the appellant knew the respondent's position and knew the risk it was taking by pursuing that course of action. The respondent has been prejudiced by the lengthy delay. He has not received any portion of the damage award and has been unable to have his rights settled in a timely and reasonable way in accordance with the procedures set out in the Rules.
- [44] On balance, I am of the view that the interests of justice favour denying the appellant's application.

Disposition

- [45] The appellant's motion to extend time to file the appeal record, transcripts, and factum is denied. Accordingly, I direct that the appeal be dismissed as abandoned pursuant to s. 10(2) (e) of the Court of Appeal Act in accordance with the Order Made When Extension of Time Refused (Civil Practice Directive, dated 19 September 2011).

"The Honourable Mr. Justice Butler"

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Prepared on 28 October 2026 · Esheria