

CANADA / JUDGMENT

Storey v. Singh

2023 BCCA 344

COURT

British Columbia Court of Appeal

DECIDED

25 August 2023

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2023 BCCA 344 Storey v. Singh COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Storey v. Singh, 2023 BCCA 344 Date: 20230825 Docket: CA48521 Between: John Charles Storey Appellant (Defendant) And Ravinder Kaur Singh Respondent (Plaintiff) Before: The Honourable Justice Marchand (In Chambers) On appeal from: An order of the Supreme Court of British Columbia, dated August 8, 2022 (Singh v. Storey, 2022 BCSC 1338 New Westminster Docket M214298). Oral Reasons for Judgment No one appearing on behalf of the Appellant Counsel for the Respondent: B.J. Yu Place and Date of Hearing: Vancouver, British Columbia August 25, 2023 Place and Date of Judgment: Vancouver, British Columbia August 25, 2023 Summary: The applicant seeks an order dispensing with the requirement under s. 29(1) of the Court of Appeal Rules that the respondent must wait until the appellant has filed a factum to file their cross appeal factum and appeal book. Held: Application granted. It is in the interests of justice to grant an order dispensing with the requirements of Rule 29 that the appeal factum be filed before the cross appeal factum. The applicant has been diligent in her efforts to pursue the cross appeal and she should no longer be constrained by the respondent's lack of diligence in advancing his appeal. MARCHAND J.A.:

Introduction

- [1] The respondent on the main appeal and appellant on the cross appeal, Ravinder Kaur Singh, applies under R. 41 of the Court of Appeal Rules, B.C. Reg. 120/2022 [Rules] and s. 32 of the Court of Appeal Act, S.B.C. 2021, c. 6 [Act] for an order dispensing with the requirement under s. 29(1) of the Rules that the respondent must wait until the appellant has filed a factum to file their cross appeal factum and appeal book.
- [2] The appellant on the main appeal and the respondent on the cross appeal, John Charles Storey, has not filed an appearance to the cross appeal. Under R. 10(2), Mr. Storey is presumed to take no position on the cross appeal and Ms. Singh has no obligation to serve any further documents related to the cross appeal on him unless the Court orders otherwise.
- [3] Ms. Singh did not serve her application on Mr. Storey. Accordingly, he did not appear for the hearing of this application.

Background

The Underlying Action

- [4] The underlying action is for damages that Ms. Singh sustained in two motor vehicle accidents. In one of the accidents, Ms. Singh was rear ended by a vehicle driven by Mr. Storey. In reasons indexed at 2021 BCSC 1825, Justice Basran ordered total damages from both accidents in the amount of \$601,621 including \$80,176 for cost of future care.
- [5] Following the trial, Mr. Storey applied under s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996 c. 231 in respect of benefits paid under Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83 seeking a reduction in the damages award (the "s. 83 Application"). Specifically, he sought an order that Ms. Singh's award at trial be reduced by the entire award for cost of future care (\$80,176) and a portion of the award for past wage loss (\$4,832).
- [6] Ms. Singh consented to the deduction of \$4,832 for past wage loss but submitted that the deduction for cost of future care should be significantly less than \$80,176.
- [7] Justice Basran allowed the s. 83 Application, and reduced Ms. Singh's damages award by \$68,906. Justice Basran's reasons for judgment are indexed at 2022 BCSC 1338. Mr. Storey's appeal and Ms. Singh's cross-appeal are taken from Justice Basran's s. 83 order. Appeal Proceedings
- [8] Mr. Storey filed his Notice of Appeal on September 6, 2022 and Ms. Singh filed her notice of cross appeal on September 12, 2022.
- [9] On November 7, 2022, Mr. Yu, counsel for Ms. Singh, emailed Mr. Godwin, counsel for Mr. Storey, regarding the appeal. In that email, he said "[b]y my calculation, your factum is due today and I'll appreciate receipt of the same".
- [10] On November 16, 2022, having not received a response to his November 7 email, Mr. Yu once again emailed Mr. Godwin. He stated that Mr. Godwin's response to his November 7 email "would be appreciated" and noted that the deadline had passed for Mr. Storey to file his appeal record and transcripts. By November 29, 2022, Mr. Yu had still not received a response. He emailed Mr. Godwin again, reminding him that he was cross appealing and thus if Mr. Godwin was not filing the appeal record and ordering transcripts on time, Mr. Yu would have to order the transcripts himself to proceed with the cross appeal.
- [11] On December 5, 2022, Mr. Godwin responded to Mr. Yu's emails. He stated that he was awaiting completion of the transcripts and would provide them to Mr. Yu as soon as they were ready.
- [12] On February 28, 2023, the parties entered into a Consent Order to extend the filing deadline for the transcript and the appeal record. The Consent Order provided that all parties consented to extending Mr. Storey's deadline for filing and serving the transcript and appeal record until March 1, 2023.

- [13] Mr. Godwin filed the appeal record and transcript on February 15, 2023. He filed a supplementary transcript on February 28, 2023. Mr. Storey's appeal has not progressed since.
- [14] Given Mr. Storey's failure to pursue the appeal since February, Ms. Singh attempted to file her factum and proceed with her cross appeal. On August 14, 2023, the Registry rejected Ms. Singh's factum, stating "[u]nfortunately per rule 29(1) we cannot accept this as the appellant has yet to file their own factum and they have not abandoned the appeal".
- [15] Ms. Singh filed her Notice of Application to dispense with the requirement of Rule 29 on August 17, 2023.

Legal Framework

Filing Deadlines

- [16] Under Rule 25(1) of the Rules, Mr. Storey was required to file his factum 30 days after filing his Notice of Appeal on September 6, 2022. Almost a year later, Mr. Storey has not done so.
- [17] Rule 29 of the Rules provides that a respondent who has brought a cross appeal must file and serve their cross appeal factum not more than 30 days after being served the appellant's factum under Rule 25(2). Given that Mr. Storey has not filed a factum, Ms. Singh cannot file a cross appeal factum unless a judge dispenses with Rule 29.
- [18] Under Rule 26, the parties must file and serve an appeal book when they file and serve their factums. If, however, the parties are filing a joint appeal book, they must do so not more than 30 days after the respondent files the respondent's factum. Dispensing with a requirement under the Rules
- [19] Rule 41 of the Rules provides the following for dispensing with a rule: 41 A person may apply to a justice to do one or more of the following under section 32 [dispensing with rules and varying time limits] of the Act:
- (a) dispense with a requirement of these rules;
 - (b) extend the time limit provided in these rules for doing an act.
- [20] Rule 41 replaces Rule 52 of the former Court of Appeal Rules, B.C. Reg. 297/2001 [former Rules]. Former R. 52 provided that a justice could extend or shorten any time provided for in the former Rules for doing an act or the taking of a proceeding. Compared to the former Rules, Rule 41 specifies that a justice may also dispense with a requirement of the Rules. While the test for extending time under the Rules is well established (see *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 at 259-260, 1987 CanLII 2608 (C.A.) [Davies]), there is no established test for dispensing with a requirement of the Rules.

- [21] The factors which govern an application to dispense with a requirement of the Rules under R. 41(a) will necessarily vary based on the rule sought to be dispensed with. Ms. Singh's application does not call on me to lay down a strict legal test regarding applications under R. 41. In my view, it is sufficient for the purposes of her application to simply say that a justice has broad discretion to dispense with a requirement of the Rules. The overarching question is whether dispensing with a rule is in the interests of justice. Continuing with a cross appeal without the main appeal
- [22] Section 14(2) of the Act provides that a cross appeal must be treated as an appeal for all purposes of the Act.
- [23] A party can continue to pursue a cross appeal even when the main appeal becomes inactive or abandoned: *Connick v. Owners, Strata Plan VIS7092*, 2021 BCCA 254; *Garcha v. 690174 B.C. Ltd.*, 2022 BCCA 178 at para. 30. When that occurs, the relevant timelines under the Act and the Rules run as though the notice of cross appeal had been filed as a notice of appeal: *Connick* at para. 35. This means that "the responsibility to file an appeal record, transcript, and other books falls to the cross-appellants, who become de facto appellants pursuing their newly freestanding appeals": *Garcha* at para. 30.

Analysis

- [24] It is regrettable that Ms. Singh chose not to serve Mr. Storey with her application. However, Ms. Singh has given Mr. Storey ample notice and opportunity to proceed with his appeal, and he has simply not done so. In all the circumstances, no purpose would be served by now requiring Ms. Singh to serve her application on Mr. Storey because the equities lie so heavily in favour of allowing Ms. Singh to proceed with her cross appeal.
- [25] In my view, it is in the interests of justice to grant an order dispensing with the requirements of Rule 29. Ms. Singh has been diligent in her efforts to pursue the cross appeal. Her counsel has repeatedly contacted counsel for Mr. Storey to attempt to move the appeal and cross appeal forward. She is ready to file her factum and proceed with her cross appeal. She should no longer be constrained by Mr. Storey's lack of diligence in advancing his appeal.
- [26] If Mr. Storey wishes to pursue his appeal and/or respond to Ms. Singh's cross appeal, he will have to seek an order extending the time for him to file his appeal factum and/or file an appearance to the cross appeal. In the meantime, Ms. Singh can proceed with her cross appeal.

Disposition

- [27] I dispense with the requirement of Rule 29 that the appeal factum be filed before the cross appeal factum. I direct that all relevant timelines under the Act and the Rules will run as though the notice of cross appeal had been filed as a notice of appeal, beginning today, August 25, 2023. "The Honourable Justice Marchand"

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