
CANADA / JUDGMENT

Talwerdi v. Green

2019 BCSC 1891

COURT

Supreme Court of British Columbia

DECIDED

5 November 2019

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2019 BCSC 1891 Talwerdi v. Green

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Talwerdi v. Green,

2019 BCSC 1891

Date: 20191105

Docket: No. M173781

Registry: Vancouver

Between:

Arian Talwerdi

Plaintiff

And:

Marilyn Ruth Green

Defendant

Before: The Honourable Madam Justice Horsman

Reasons for Judgment - Costs

Counsel for the Plaintiff:

D. Wallin

J. Hamel

Counsel for the Defendant:

P. Spinks

Place and Date of Hearing:

Vancouver, B.C.

October 16, 2019

Place and Date of Judgment:

Vancouver, B.C.

November 5, 2019

INTRODUCTION

- [1] This action arose as a result of a motor vehicle collision which occurred on May 15, 2015 in Squamish, British Columbia (the "Accident"). The plaintiff's vehicle was rear-ended by a vehicle driven the defendant. The defendant admitted liability. The issues in dispute at trial were causation and the quantum of damages. The case was tried by jury over 10 days starting July 15, 2019. On July 27, 2019, the jury returned a verdict awarding the plaintiff a total of \$109,600 in damages.
- [2] The defendant applies for an order that the plaintiff pay the defendant's costs and disbursements after July 9, 2019. July 9 is the date on which the defendant made a formal offer to settle the action for \$125,000, plus costs and disbursements. The defendant says that the plaintiff's decision not to accept the offer should carry costs consequences pursuant to Rule 9-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [SCCR].
- [3] The plaintiff opposes the relief sought by the defendant. She seeks an order that the defendant pay her reasonable costs and disbursements throughout the proceeding. The plaintiff says that the court's discretion in awarding costs should be exercised in a manner that achieves a just and fair result in all the circumstances. The plaintiff says it would not be just or fair to impose a cost award against her as a penalty for wrongly guessing the eventual outcome of the proceeding, particularly given the uncertainty associated with assessing damages in this case.
- [4] Each party also seeks an order that the other pay the costs of this application.

BACKGROUND

The issues at trial

- [5] The plaintiff was 32 years old at the time of the Accident. In the fall of 2014, she enrolled in a full-time Master's psychology program at Pepperdine University in Los Angeles, California. The Accident occurred while the plaintiff was back in Vancouver for a visit before starting her summer session at Pepperdine.

- [6] At trial, the plaintiff alleged that as a result of the Accident she suffered injuries that included pain and numbness in her shoulders and arms, injury to her back and neck, headaches and nausea, diminished cognitive function, and psychological injuries such as depression and anxiety. The plaintiff claimed that her injuries would permanently impair her earning capacity and require ongoing treatment, and she sought a significant award of damages on that basis.
- [7] The plaintiff tendered reports from five experts:
- i) Dr. Anthony Salvian, vascular surgeon: Dr. Salvian opined that the plaintiff suffers from post-traumatic thoracic outlet syndrome as a result of the Accident. He stated that the plaintiff would require ongoing accommodation in the workplace, including flexible hours and modified job duties.
 - ii) Dr. Raphael Chow, physiatrist: Dr. Chow opined that the plaintiff has impairments of the cervical spine, thoracic outlet, and the left shoulder as a result of the Accident. Dr. Chow was also of the view that the plaintiff would require ongoing accommodation in the workplace.
 - iii) Edgar Emnacen, occupational therapist: Mr. Emnacen opined that the plaintiff has physical limitations that include a limited tolerance for sustained reaching or for sitting or standing upright. He stated that she could continue to work part-time, but may be limited in her ability to work full-time depending on how she manages her pain.
 - iv) Dr. Leslie Kiraly, psychiatrist: Dr. Kiraly diagnosed the plaintiff as suffering from an adjustment disorder with anxious and depressed mood, mixed chronic pain syndrome, and generalized anxiety disorder. He stated that her prognosis was poor due to the chronicity of her symptoms. He opined that she would need psychotherapy for many years.
 - v) Darren Benning, economist: Mr. Benning quantified the plaintiff's past and future income loss and future care costs on the basis of factual assumptions provided by plaintiff's counsel. He calculated the plaintiff's future income loss, on the assumption she would never be able to work full-time, as \$761,476. He calculated the present value of her future care costs, on the assumption that all treatment recommendations were adopted, as \$252,900.
- [8] The defendant had served one expert report from Dr. Robin Rickards, an orthopedic surgeon, prior to trial. However, the defendant did not tender the report from Dr. Rickards at trial and Dr. Rickards did not testify.
- [9] A significant issue of dispute at trial was whether the Accident caused the flare-up of symptoms that the plaintiff experienced in the fall of 2016, over one year after the Accident. The plaintiff testified she had chronic pain in her neck, back, and shoulders from the time of the Accident, but the symptoms worsened in the fall of 2016.
- [10] The defendant cross-examined the plaintiff, and all of her expert witnesses, on the absence of references to Accident-related injuries in clinical records generated between the time of the Accident and the fall of 2016. The plaintiff had sought medical treatment for various

unrelated complaints in this time-period from medical practitioners in Vancouver and Los Angeles. The plaintiff's medical experts agreed that their diagnoses depended, in part, on the accuracy of the plaintiff's subjective reports of the history of her pain symptoms from the time of the Accident.

The formal offers exchanged by the parties and the jury verdict

- [11] On July 3, 2019, defence counsel delivered a formal offer to settle pursuant to Rule 9-1 of the SCCR in the amount of \$95,000, plus costs and disbursements. By this time, counsel for the parties had conducted a joint interview of the plaintiff's treating physicians to confirm the accuracy of statements attributed to the plaintiff in the clinical records generated between the time of the Accident and the fall of 2016.
- [12] On July 9, 2019 at 9:37 a.m., the plaintiff delivered a formal offer to settle in the amount of \$395,000, plus costs and disbursements.
- [13] On July 9, 2019 at 12:08 p.m., the defendant delivered a formal offer to settle for \$125,000 plus costs and disbursements. The offer was open for acceptance until 4 p.m. on the last business day (July 12) before the commencement of the first day of trial (July 15).
- [14] On July 9, 2019 at 4:05 p.m., the plaintiff delivered a formal offer to settle for \$300,000, plus costs and disbursements. This offer was also open for acceptance until 4 p.m. on the last business day before commencement of the first day of trial.
- [15] The jury rendered its verdict on Saturday, July 27, 2019, awarding the plaintiff a total of \$109,600. The breakdown of the award is as follows:

General damages:

\$50,000

Past wage loss:

\$8,300

Loss of future earning capacity:

\$26,000

Future care costs:

\$21,000

Special damages:

\$4,300

ANALYSIS

Legal framework

- [16] Rule 14-1(9) of the SCCR provides that the costs of a proceeding are to be awarded to the successful party unless the court orders otherwise. The fact that a successful plaintiff may have obtained a judgment for an amount less than was claimed is not a proper basis to depart from the presumptive rule that costs follow the event: 3464920 Canada Inc. v. Strother, 2010 BCCA 328 at para. 43.
- [17] A court may "order otherwise" under rule 14-1(9) where a plaintiff fails to accept a formal offer to settle served under Rule 9-1. Rule 9-1(5) provides that 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.
- [18] Rule 9-1(6) provides that in making an order under Rule 9-1(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
- [19] An award of double costs cannot be made to a defendant if a plaintiff has obtained a judgment in his or her favour: C.P. v. RBC Life Insurance Company, 2015 BCCA 30 [C.P.] at paras. 75-92.

- [20] The purpose of Rule 9-1 is to encourage the early settlement of disputes by rewarding a party who makes a settlement offer that should have been accepted and penalizing the party who declines to accept such an offer: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25.
- [21] The question of whether an offer "ought reasonably to have been accepted" [per Rule 9-1(6) of the SCCR] must be examined under the circumstances existing when the offer was open for acceptance and not by reference to the ultimate judgment. This inquiry has both a subjective and objective component. The court may taken into account the reasons why the plaintiff declined the offer, but must also consider whether those reasons are objectively reasonable: C.P. at para. 97.
- [22] In light of the wording of Rule 9-1(6), the issue is not whether the offer is reasonable but whether it was unreasonable for the plaintiff to refuse it: *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26 [Cottrill] at para. 30; *Kobetitch v. Belski*, 2018 BCSC 2247 at paras. 24-25.
- [23] The fact that it may be reasonable for a party to refuse an offer does not necessarily immunize that party from the consequences of failing to accept a reasonable settlement offer as other factors may weigh in favour of a costs sanction: Cottrill at para. 32.

Application to the facts

- [24] The options available on this application are to deny the plaintiff her costs in connection with steps taken in the proceeding after July 9, 2019, award the defendant her costs in respect to steps taken in the proceeding after July 9, 2019, or award the plaintiff her costs throughout as though the offer had not been made: Cottrill at para. 21. The choice as between these options is governed by the factors set out in Rule 9-1(6) of the SCCR.
- (a) Whether the offer ought reasonably to have been accepted
- [25] The defendant argues that by July 9, 2019, the plaintiff ought to have recognized the weaknesses in her case and the very real prospect that the jury would find her not to be credible in her subjective account of her Accident-related injuries. The defendant emphasized the joint interviews of the plaintiff's treating physicians that had been conducted by July 9, 2019, which confirmed the accuracy of the plaintiff's clinical records in the period between the Accident and the fall of 2016. The defendant says that the plaintiff took an unreasonable risk that a jury would believe her evidence about the chronicity of her physical symptoms despite the absence of corroborating evidence in the clinical records.
- [26] I do not accept the defendant's argument in this regard. A plaintiff's credibility is often, if not invariably, in issue in a damage claim involving chronic pain resulting from soft-tissue injuries. That, in itself, does not mean that a plaintiff ought reasonably to accept a settlement offer that is a substantially less than the claimed damages. Nor was it obvious that a jury would infer that the plaintiff was not credible simply from an absence of reference to her Accident-related injuries in the clinical records over a defined period of

time.

- [27] There was, in this case, a significant body of expert evidence that supported the injuries claimed by the plaintiff. It was not unreasonable for the plaintiff to have confidence in the strength of her case, particularly given that liability had been admitted and the only question was the plaintiff's degree of success: *Tisalona v. Easton*, 2017 BCCA 272 at para. 101-102.
- [28] Furthermore, this is not a case in which can be said that the risk that a jury would reject the expert evidence should have been apparent to the plaintiff because she misled her experts, as in *Dennis v. Fothergill*, 2014 BCSC 452. Indeed, it is not even clear from the jury verdict, which is of course unaccompanied by reasons, what view the jury actually took of the plaintiff's credibility. Although the quantum was less than that claimed by the plaintiff, the jury did make a significant award of damages.
- [29] As of July 9, 2019, the plaintiff would also have known that the defendant intended to tender the report of Dr. Rickards. Notably, Dr. Rickards found that the plaintiff did suffer injuries in the Accident, although he disputed the opinions of the plaintiffs' experts as to the severity of the injuries. Presumably, the defendant made her decision not to tender the report of Dr. Rickards on the basis of her perception of how the trial was unfolding. The future trajectory of the trial was not, of course, information available to the plaintiff as of July 9, 2019.
- [30] As observed by Madam Justice Humphries in *Lumanlan v. Sadler*, 2009 BCSC 142 at para. 35, a court should be cautious, with the advantage of hindsight, in equating having guessed wrongly with having been unreasonable in rejecting an offer, especially where the plaintiff receives a substantial award at trial.
- [31] In the circumstances, in my view it was not unreasonable for the plaintiff to have rejected the defendant's offer to settle July 9, 2019. I place particular reliance on the nature of the evidentiary record as it appeared on July 9, 2019, the fact that liability was admitted in this case, and the uncertainty inherent in the damage assessment process.
- b) The relationship between the offer and final judgment
- [32] The defendant's formal offer to settle (\$125,000) exceeded the jury award (\$109,600) by \$15,400. The relatively modest gap between the offer and the ultimate judgment is a factor that can pull the analysis in opposite directions. On the one hand, it provides the court with an objective measurement of the reasonableness of the offer made. On the other hand, it demonstrates that even a slight variation in the jury's perception could have resulted in an award that exceeded the settlement offer: *Park v. Targonski*, 2016 BCSC 31 at para. 43.
- [33] Costs should not be a penalty for failing to guess the outcome: *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1497 at para. 19. As stated by Mr. Justice Ehrcke in *Wepryk v. Juraschka*, 2013 BCSC 804:

- [19] The assessment of damages in a personal injury case is not a matter of mathematical certainty. Damages are assessed, not calculated. The plaintiff and her counsel cannot be faulted for having regarded the April 19, 2012 offer of \$83,500 as being one which would likely be exceeded if they went to trial. Although the final judgment was for slightly less, it might just as easily have been slightly more.
- [34] On balance, I do not consider this to be a factor that lends significant weight to either party's position on this application.
- c) Relative financial positions of the parties
- [35] While the plaintiff's financial circumstances are no doubt less advantaged than the defendant's insurer, there is no evidence that the insurer improperly used its financial advantages in the litigation: Cottrill at para. 34. As such, the relative financial positions of the parties is a neutral consideration.
- d) Other considerations
- [36] I acknowledge that the defendant's offer was a genuine attempt at settlement and not in the nature of a nuisance offer. However, for the reasons already stated I conclude that the plaintiff did not act unreasonably in declining to accept the defendant's offer on July 9, 2019. In my view, that factor is of primary importance to the exercise of costs discretion in the present case.

Conclusion/order

- [37] I conclude that in the circumstances of this case, the defendant's July 9, 2019 offer to settle is not a sufficient basis upon which to depart from the usual rule that costs follow the event. Accordingly, the defendant's application is dismissed.
- [38] The plaintiff is entitled to her reasonable costs and disbursements of this proceeding throughout, including the costs of this application.

"Horsman J."

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