

CANADA / JUDGMENT

Thiessen v. Kepfer

2025 BCSC 127

COURT

Supreme Court of British Columbia

DECIDED

24 January 2025

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2025 BCSC 127 Thiessen v. Kepfer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Thiessen v. Kepfer,

2025 BCSC 127

Date: 20250124

Docket: M34708

Registry: Chilliwack

Between:

Corinna Jean Thiessen

Plaintiff

And

Diane Mae Kepfer and Anthony John Warren

Defendants

Before: The Honourable Justice Kent

Oral Reasons for Judgment (Costs)

Counsel for the Plaintiff:

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Place and Dates of Hearing:

Vancouver, B.C.

January 24, 2025

Place and Date of Judgment:

Vancouver, B.C.

January 24, 2025

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INTRODUCTION AND OVERVIEW

- [1] The trial judgment in this personal injury motor vehicle accident case was released on September 11, 2023 and is indexed at 2023 BCSC 1593. Liability for the accident was admitted by the defendants and the trial was limited to quantification of damages for the plaintiff's injuries and loss. In final arguments the plaintiff sought an aggregate award of damages in the range of \$1,160,000-\$1,362,000 whereas the defendants submitted the aggregate award was properly assessed in the range of \$575,000-\$725,000.
- [2] Judgment was ultimately issued in the amount of \$1,224,699.74. However, the judgment was subject to adjustment in respect of tax gross-up on the award for cost of future care and/or the statutory deduction mandated by s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231. If the parties were unable to agree on these matters, they were granted liberty to apply for a further ruling from the court. I am advised that this issue has been settled by the parties.
- [3] The trial judgment also made a preliminary costs ruling in favour of the plaintiff, with costs to be assessed on Scale B of Appendix B of the Supreme Court Civil Rules ("SCCR"). However, liberty was granted for a hearing on the matter if necessary. Hence the costs application before me on January 24, 2025 which gives rise to these Reasons for Judgment.

- [4] The plaintiff applies for an order granting her special costs of this action or, in the alternative, "uplift costs" pursuant to s. 2(5) of Appendix B of the Supreme Court Civil Rules. In the further alternative, because the trial judgment substantially exceeded two formal settlement offers earlier made by the plaintiff, an order is sought granting the plaintiff double costs pursuant to SCCR 9-1(5)(b).
- [5] As well, the plaintiff seeks orders providing for pre-judgment interest on the awards for past loss of earning capacity and special damages, and post-judgment interest from September 11, 2023 onwards. The trial judgment already awarded that pre-judgment interest and post-judgment interest is required by statute. The defendants concede that both pre- and post-judgment interest is payable and, and indeed have made a partial payment of such interest while the trial judgment is under appeal. Given the absence of any controversy on the matter, no order is necessary and I will say no more about it.
- [6] The defendants oppose the application for special or uplift costs, however they consent to an order pursuant to SCCR 9-1 granting the plaintiff "double costs at Appendix B" for all steps taken in the proceeding from May 17, 2023 onwards except for this particular costs application.
- [7] For the reasons that follow I dismiss the plaintiff's application for special or uplift costs but I grant the order for double costs that has been consented to by the defendants.

Application Materials

- [8] Pursuant to the court's earlier direction, the parties filed their application materials on January 17, 2025. The materials are extensive. They include one affidavit sworn by the plaintiff, an affidavit sworn by trial counsel for the defendants, and two affidavits from legal staff at the law firms representing the parties.
- [9] As well, the materials included the plaintiff's 34-page Notice of Application and the defendants' 37-page Application Response each of which contained comprehensive submissions on the facts and the law pertaining to this costs dispute. In addition, the parties filed four volumes of case law containing some 67 cases for the court's consideration.
- [10] In these Reasons I have not referred to all of the evidence or all of the authorities submitted by the parties, however I wish to assure the litigants that I have read every page of the Application Record and most of the case authorities.
- [11] The simple fact of the matter, however, is that I am not persuaded that either special or uplift costs are appropriate in this case. Indeed, I essentially agree with almost all of the submissions made by the defendants in that regard.
- [12] I have no doubt the litigation was extremely stressful for Ms. Thiessen and that the pending appeal of the trial judgment exacerbates that stress. However, this is almost invariably the experience of every litigant who appears before this court. The defendants were entitled to dispute Ms. Thiessen's claims regarding the nature and extent of her injuries and related

financial loss and, in doing so, did not engage in any reprehensible litigation conduct warranting censure by way of special costs. Nor are there any unusual circumstances in this case that would render "grossly inadequate or unjust" the usual scale of costs awarded in this type of litigation.

- [13] The defendants rightly concede that the plaintiff's pre-trial offers of settlement ought reasonably to have been accepted. This will result in the plaintiff receiving double the usual costs that would otherwise have been awarded for every step taken in the litigation following the date of the offers. This is the mechanism expressly designed by the Supreme Court Civil Rules for rewarding a party who makes a reasonable settlement offer and penalizing the party who unreasonably declines to accept that offer. That, in my opinion, is the appropriate costs outcome in this particular case.

The Relevant Law

- [14] It is not necessary to refer to the authorities submitted by the parties. Very fortunately, the law regarding offers to settle, uplift costs and special costs was very recently and extensively reviewed by Mr. Justice Veenstra of this court in *Real Organics & Natural House Ltd. v. Canadian Phytopharmaceuticals Corp.*, 2025 BCSC 1:

Offers to Settle

- [60] Where a formal offer to settle has been made in accordance with the requirements of R. 9-1, the court may consider that offer to settle when exercising its discretion in relation to costs: R. 9-1(4). The court may, among other things, deprive a successful party of some or all of the costs to which it would have otherwise been entitled, or alternatively award either regular or double costs to the party who made the offer: R. 9-1(5). As set out in R. 9-1(6):
- (6) In making an order under subrule (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.
- [61] The purpose of R. 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 declined to accept such an offer: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25.
- [62] Rule 9-1(6) makes clear that the court considers not only whether the party making the offer did "better" at trial, which is factor (b), but also whether the offer was one that "ought reasonably to have been accepted". As noted in *Hartshorne* at para. 27:

- [27] The first factor - whether the offer to settle was one that ought reasonably to have been accepted - is not determined by reference to the award that was ultimately made. Rather, in considering that factor, the court must determine whether, at the time that the offer was open for acceptance, it would have been reasonable for it to have been accepted: *Bailey v. Jang*, 2008 BCSC 1372, 90 B.C.L.R. (4th) 125 at para. 24; *A.E. v. D.W.J.* at para. 55. As was said in *A.E. v. D.W.J.*, "The reasonableness of the plaintiff's decision not to accept the offer to settle must be assessed without reference to the court's decision" (para. 55). Instead, the reasonableness is to be assessed by considering such factors as the timing of the offer, whether it had some relationship to the claim (as opposed to simply being a "nuisance offer"), whether it could be easily evaluated, and whether some rationale for the offer was provided. We do not intend this to be a comprehensive list, nor do we suggest that each of these factors will necessarily be relevant in a given case.
- [63] Rule 9-1 was recently discussed in *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26 at paras. 30-31:
- [30] As recently noted by Justice Gomery in *Kobetitch v. Belski*, 2018 BCSC 2247 at paras. 24-25, the wording of the subrule is important. The issue is not whether the offer was reasonable but whether it was unreasonable to refuse it. He explained the distinction as follows:
- [24] In my opinion, the wording of the subrule stating this consideration is important. The consideration is not whether it would have been reasonable for the plaintiff to have accepted the offer. It is whether the plaintiff ought reasonably to have accepted the offer. The difference is this. An offer might be such that a reasonable plaintiff could choose to accept it or not. One might term it "a reasonable offer". On the other hand, to say that an offer ought reasonably to have been accepted is to say that a reasonable person should have accepted it. It was unreasonable to refuse it.
- [25] According to the distinction I am drawing, having regard to the wording of the subrule, the consideration is not whether the offer was a reasonable offer. It is whether it was unreasonable for the plaintiff to refuse it.
- [Emphasis in original.]
- [31] We agree with that analysis. It is also important to point out that the fact that it may be reasonable for a party to refuse an offer does not necessarily immunize that party from the consequences of a reasonable offer to settle: *Wafler v. Trinh*, 2014 BCCA 95 at paras. 79-82. For example, in the oft cited cases of *Bailey v. Jang*, 2008 BCSC 1372, and *A.E. v. D.W.J.*, 2009 BCSC 505, referenced in the above quotation from *Hartshorne*, the plaintiffs were sanctioned in costs notwithstanding that the trial judges in each case found that it was not unreasonable for them to reject the offer to settle.
- [32] In this case the Company's offer to settle accurately forecast the outcome of the trial. Ms. Cottrill had adequate time to consider the offer as evidenced by her rejection of the offer while it remained outstanding. A reasonable person may have chosen to accept the offer.

The offer was, however, for but a small fraction of the amounts that Ms. Cottrill was seeking in the litigation and gave no recognition to the possibility that Ms. Cottrill may be awarded more than eight weeks severance, as well as costs. The offer did not offer a genuine compromise or an incentive to settle. Given the amounts sought in the litigation, it was not unreasonable for her to refuse it. Ms. Cottrill did not act unreasonably by taking a chance and proceeding to trial. We are of the opinion that the offer was not one that ought reasonably to have been accepted by the plaintiff.

Uplift Costs

- [64] As noted above, costs are ordinarily assessed as party and party costs, based on the tariff found in Appendix B of the Supreme Court Civil Rules: R. 14-1(1). Pursuant to s. 2 of Appendix B, the court may fix a scale of costs, which impacts the unit value of tariff items. Matters of ordinary difficulty are assessed on Scale B (\$110 per unit), while matters of more than ordinary difficulty are assessed on Scale C (\$170 per unit).
- [65] Section 2(5) and (6) of Appendix B provides for uplift costs:
- (5) If, after it fixes the scale of costs applicable to a proceeding under subsection (1) or (4), the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust, the court may order that the value for each unit allowed for that proceeding, or for any step in that proceeding, be 1.5 times the value that would otherwise apply to a unit in that scale under section 3 (1).
 - (6) For the purposes of subsection (5) of this section, an award of costs is not grossly inadequate or unjust merely because there is a difference between the actual legal expenses of a party and the costs to which that party would be entitled under the scale of costs fixed under subsection (1) or (4).
- [66] The legal test for uplift costs was discussed in *Ding v. Canam Super Vacation Inc.*, 2024 BCCA 102 at paras. 211-213:
- [211] The exercise of discretion to award uplift costs requires two things: (1) unusual circumstances, that would result in (2) a grossly inadequate or unjust award of costs at the fixed scale. This is necessarily a fact-based inquiry driven by the nature of the litigation and the conduct of the parties: *Herbison v. Canada (Attorney General)*, 2014 BCCA 461 at para. 42; *Shen* at para. 31. An award of uplift costs is a discretionary costs order that attracts a high degree of deference.
- [212] A party's conduct can constitute unusual circumstances if it is deserving of some form of rebuke (less than that required for special costs), but there are numerous circumstances that may be "unusual" within the meaning of s. 2(5). These include (a) misconduct by the unsuccessful party; (b) the serious nature of the allegations; (c) the complexity or difficulty of the issues in the litigation; and (d) the importance of the litigation to the parties or to the development of the law. These last two factors overlap with some of the factors that are

considered in determining the appropriate scale of costs: *British Columbia v. Adamson*, 2017 BCSC 168 at para. 53, citing *International Energy and Mineral Resources Investment (Hong Kong) Company Limited v. Mosquito Consolidated Gold Mines Limited*, 2012 BCSC 1475 at paras. 23-24; *Shen* at paras. 32-35.

- [213] Whatever constitutes the unusual circumstances, uplift costs are not intended to punish the unsuccessful party but rather to indemnify the successful party: *Shen* at para. 30.

Special Costs

- [67] A court may order that the costs of a proceeding (or any step within a proceeding) be assessed as special costs: R. 14-1(1)(b). If special costs are ordered, then the party awarded such costs is entitled to the actual amount of "those fees that were proper or reasonably necessary to conduct the proceeding": R. 14-1(3).
- [68] The circumstances in which special costs may be awarded were summarized in *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at paras. 56-57:
- [56] Special costs are typically awarded when there has been some form of reprehensible conduct on the part of one of the parties: *Young v. Young*, [1993] 4 SCR 3 at 134-138. Special costs are not compensatory; they are punitive: *Grewal v. Sandhu*, 2012 BCCA 26 at para. 106. They are awarded when a court seeks to disassociate itself from some misconduct: *Fullerton v. Matsqui (District)* (1992), 74 B.C.L.R. (2d) 311 (C.A.) at para. 23. There are circumstances where special costs may be ordered where there has been no wrongdoing: *Gichuru v. Smith*, 2014 BCCA 414 at para. 90. These reasons are not concerned with such types of cases.
- [57] The leading authority on special costs is this Court's decision in *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.). There, Mr. Justice Lambert, writing for the Court, set out that the threshold for special cost awards is "reprehensible conduct". He noted the continuum of circumstances in which special costs could be awarded, ranging from "milder forms of misconduct deserving of reproof or rebuke" to "scandalous or outrageous conduct":
- [17] Having regard to the terminology adopted by Madam Justice McLachlin in *Young v. Young*, to the terminology adopted by Mr. Justice Cumming in *Fullerton v. Matsqui*, and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in *Leung v. Leung* in awarding special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous, but could only be categorized as one of the "milder forms of misconduct" which could simply be said to be "deserving of reproof or rebuke", it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing

expression of the applicable standard for the award of special costs.

[69] Special costs may only be awarded in respect of reprehensible conduct in the course of litigation - it may not be awarded in respect of pre-litigation conduct or in respect of acts occurring outside the course of litigation: *Evergreen Building Ltd. v. IBI Leaseholds Ltd.*, 2009 BCCA 275 at paras. 24-33; *Smithies Holdings* at paras. 133-134; *Kong v. Lee*, 2021 BCSC 606 at para. 171.

Submissions and Analysis

[15] The plaintiff submits:

- the defendants "used its significant financial advantage in an untoward manner and weaponized the trial process against the plaintiff" such that their litigation conduct was "an abuse of the Courts process";
- the defendants "forced the plaintiff to trial" even though they had "no credible defences" and their "allegations were completely without merit";
- refusing to settle the case for an amount that was less than the defendants' final submissions at trial on the range of appropriate damages and instead "forcing the plaintiff to trial" is an abuse of the courts process; and,
- even though the defendants had the plaintiff assessed by a neurologist and a psychiatrist, they did not provide their, or indeed any, expert evidence on the "critical issue" of the plaintiff's headaches, nor did they even "challenge the plaintiff's credibility" in their closing arguments. This, the plaintiff says, underscores the reprehensible nature of the defendants conduct in taking the case to trial.

[16] The plaintiff's submission essentially boils down to an accusation that the defendants knew they had a weak case yet took the case to trial even though a reasonable offer of settlement had been made and should have been accepted.

[17] The defendants submit:

- SCCR 9-1 specifically sets out the regime for imposing cost consequences in favour of a litigant who makes a formal offer on terms more favourable than the ultimate judgment. That consequence in this case, which is acknowledged by the defendants, is double costs;
- the final submissions at trial reflected the "trial realities" of unanticipated evidence, some evidence being excluded, other evidence being undermined on cross-examination, and so on. It is not unusual for a party's assessment to change as a trial proceeds and for parties to re-evaluate and make closing submissions that might differ from pre-trial expectations. This is what occurred here with respect to additional evidence elicited at trial which was not previously known e.g. the physicians opinions on the very low likelihood of a recovery enabling some sort of return to work, the evidence about an offer of full-time employment, and so on;

- in this case there was evidence of a pre-accident history of headaches, significant unrecorded delay in the onset of facial droop symptomology, a matter that might have been congenital, an established pattern of part-time employment, a significant gap in treatment, and various other elements that put matters "fairly in issue" and which, if decided in the defendant's favour, might have seen a significant reduction in damages; and,
- none of this amounts to an "abuse of process", nor is it anything sufficiently "unusual" that warrants either special costs or uplift costs. Neither special nor increased costs should become the norm instead of simply awarding double costs where a defendant fails to accept a reasonable offer to settle before trial.

[18] I agree with the defendants' submissions. This was a fairly typical MVA personal injury case where only quantum was in issue, where at trial the defendants' expert testimony was rejected, where the credibility and reliability of the testimony of the plaintiff and her witnesses was not successfully challenged, where unexpected testimony was elicited and admitted on certain matters, and where the defendants' perhaps optimistic assessment of the likely outcome turned out to be inaccurate.

[19] Like other types of civil litigation, most motor vehicle accident cases settle and only a small number actually proceed to trial. Here, the parties proceeded to mediation. Offers were made but no settlement was reached and trial ensued. The plaintiffs are essentially asking the court to impute misconduct and infer ominous motives on the part of the defendants i.e. "forcing the plaintiff to trial with no credible defences". There is, however, no real evidence before the court directly impugning the motives or conduct of the defendants or their insurer in this case and the foundation relied on for the requested inference is weak and insufficient to meet the burden of proof.

[20] I conclude that the plaintiff has not established abuse of process or any other improper or reprehensible litigation misconduct on the part of the defendants in this case that satisfies the test for an award of special costs. Nor has she established any unusual circumstances which render ordinary costs and double costs of trial grossly inadequate or unjust.

[21] The plaintiff's application for special or uplift costs is dismissed but I grant her the requested order for double costs for all steps taken in the proceeding from May 17, 2023 onwards except for the present application for which no costs are awarded.

"Kent J."

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