

CANADA / JUDGMENT

Whaley v. Bryant

2020 BCSC 797

COURT

Supreme Court of British Columbia

DECIDED

13 February 2020

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2020 BCSC 797 Whaley v. Bryant IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Whaley v. Bryant, 2020 BCSC 797 Date: 20200213 Docket: M47007 & M47008 Registry: Kamloops Between: Tegan Darlene Whaley, an infant by her litigation guardian Shawnalea Whaley and the said Shawnalea Whaley Plaintiffs And: Leslie Bryant Defendant

- and - Between: Tegan Darlene Whaley, an infant by her litigation guardian Shawnalea Whaley and the said Shawnalea Whaley Plaintiffs And: Michael Burke And Margaret Ann Kendrick Defendants Before: The Honourable Madam Justice Donegan Oral Ruling on Application re Costs Counsel for the Plaintiff: K.D. Priddle Counsel for the Defendants: G. Ginter Place and Date of Hearing: Kamloops, B.C. February 13, 2020 Place and Date of Judgment: Kamloops, B.C. February 13, 2020

Introduction

- [1] Following a ten-day trial, a jury awarded the plaintiff damages in relation to injuries that she suffered in two motor vehicle accidents that occurred in 2009 and 2010. Following the jury's verdict on December 13, 2019, plaintiff's counsel has been trying to resolve a number of post-verdict issues with the defendants, to no avail. These issues were brought before me today and among them was the issue of costs. Specifically, the plaintiff seeks:
4. The defendants shall pay to the plaintiff costs at Scale B and disbursements to September 12, 2018 to be agreed or assessed;
 5. The defendants shall pay to the plaintiff double costs at Scale B and disbursements to be agreed or assessed from September 12, 2018 to December 13, 2019;
 6. The defendants shall pay to the plaintiff double costs for a second counsel at Scale B for preparation and attendance at trial to be agreed or assessed;
 11. Costs of preparation and attendance for this within hearing be awarded to the plaintiff as double costs.
- [2] The defendants now consent to the relief sought at 4, 5 and 11. The relief sought at 6 is for me to determine today. Discussion

- [3] The plaintiff was represented by two counsel at trial, Ms. Priddle and Ms. Kooner. She argues that it was appropriate and reasonable to have two counsel at trial because it was a jury trial that involved not only the preparation and calling of witnesses, but several applications during the course of the trial itself, in and around the time the jury was sitting. In particular, she contends that second counsel's ability to take detailed notes of the witness's evidence as it unfolded in court ensured that counsel's closing submissions to the jury were factually correct. She points to the defendants having two counsel at trial as well as indicative of the complexity of the matter. Overall, she submits that an order for costs for two counsel ought to be made.
- [4] The plaintiff argues there is authority for such an award. She points to *Thom v. Canada Safeway Ltd.*, 2015 BCSC 2026 at para. 43, where Justice Saunders reviewed the authorities, including *Wallman v. Doe*, 2014 BCSC 968, where such an award was made.
- [5] The defendants rely upon *Thom* for its result. In that case, Justice Saunders declined to follow the authorities he summarized and held that there is very little authority for such an award. He concluded that considerations of the involvement of two counsel regarding complexity issues may be recognized, if appropriate, in an award of costs under Scale C.
- [6] In a case not referred to by counsel, Justice Dillon considered both *Wallman* and *Thom*, and ultimately agreed with Justice Saunders' decision in *Thom*. In *Pinch (Guardian ad litem of) v. Morwood*, 2016 BCSC 1907, the court held:
- [16] The plaintiff seeks costs for two counsel for attendance at trial and 90% of the time for a second counsel to be involved in preparation for trial. The plaintiff has argued that this case was complex with many technical issues, voluminous documents and many issues, similar to *Wallman*. The defendants oppose the application as having no basis in law, citing *Thom*.
- [17] In *Wallman*, the Court considered that the plaintiff was entitled to recover costs for two counsel because the trial attracted costs on Scale C and the attendance of two counsel at trial facilitated the trial moving smoothly and efficiently. The institutional defendants had been represented by two senior counsel. No case or rule was cited for the award for the costs of two counsel.
- [18] The decision in *Thom* was, with respect, more considered. Saunders J. considered the origin of the practice of awarding costs for two counsel in trials of complexity. The learned justice was aware that none of the recent cases that had made such an award had referred to any basis in the Supreme Court Civil Rules. He continued at paras. 44-49:
- [44] None of these decisions referred to there being any basis in the Supreme Court Civil Rules, nor in their predecessor, the Rules of Court, upon which such an award could be founded. In that regard, it does not appear that the court, in any of those cases, was directed to the comment made by Mr. Justice Tysoe in *Midland Mortgage Corp. v. Jawl & Bundon* (1997), 9 C.P.C. (4th) 236 (B.C. S.C.), where, at para. 16, he noted: If an extra counsel is justified, the amount of special costs will be increased but the tariff for ordinary costs is unaffected by the

addition of a second counsel

- [45] To some extent, awards of costs are a matter of discretion. The scope of the court's discretionary power may, however, be circumscribed by the Rules. This is set out in the decision of Mr. Justice Goepel in *A.E. v. D.W.J.*, 2009 BCSC 505, where he said:
- [48] The discretion a Supreme Court judge has in awarding costs was summarized in *Stiles v. British Columbia (Workers' Compensation Board)* (1989), 1989 CanLII 235 (BC CA), 38 B.C.L.R. (2d) 307 at 310, 39 C.P.C. 2(d) 74 (C.A.): The power of a Supreme Court judge to award costs stems from s. 3 of the Supreme Court Act which confirms that the judges of the Supreme Court have the inherent powers of a judge of superior court of record. The power to award costs is governed by the laws in force in England before 1858 and by the enactments, including the Rules of Court, affecting costs made in British Columbia since 1858. Generally, the decisions on costs, including both whether to award costs, and, if awarded, how to calculate them, are decisions governed by a wide measure of discretion. See *Oasis Hotel Ltd. v. Zurich Ins. Co.*, (1981) 1981 CanLII 433 (BC CA), 28 B.C.L.R. 230 (C.A.) [additional citations omitted]. The discretion must be exercised judicially, i.e. not arbitrarily or capriciously. And, as I have said, it must be exercised consistently with the Rules of Court
- [49] In *Cridge v. Harper Grey Easton & Co.*, 2005 BCCA 33], Lowry J.A. noted the right of the Lieutenant Governor in Council to restrict the exercise of a Supreme Court judge's discretion in awarding costs at para. 23: While, subject to abiding by established principles, a Supreme Court judge has a broad discretion in awarding costs, it remains open to the Lieutenant Governor in Council in promulgating the Rules of Court to restrict the exercise of that discretion as may be appropriate where it is thought that to do so will achieve a desired objective.
- [50] A trial judge cannot impose cost sanctions that are not authorized by the Rules
- [46] To the extent that complexity of a case supports the involvement of two counsel, that complexity may be recognized in an award of costs under Scale C. Other than that, and with due respect to those who have found in favour of such awards, I find only a very limited authority in the Rules under which an additional costs award for the participation of two counsel might be granted. Specifically, Appendix B, s. 2(4) provides that the value for each unit on the tariff for the proceeding, or any step in the proceeding, may be set at 1.5 times the value that would otherwise apply, but only if after fixing the scale of costs the court finds that an award on the basic scale would, because of "unusual circumstances", be "grossly inadequate or unjust". I can make no such finding in the circumstances of this case.
- [47] The Rules provide no other basis for such an award of increased party and party costs.

- [48] To the extent that the recent decisions of this court listed above would appear to support awards of double costs in circumstances less stringent than those set out in s. 2(4), I would regard those decisions, with respect, as not being binding authority due to the provisions of the Rules not having been considered (in accordance with *Re Hansard Spruce Mills Limited*, 1954 CanLII 253 (BC SC), [1954] B.C.J. No. 136).
- [49] Accordingly, I make no award for the participation of a second counsel for the plaintiff.
- [7] Relying on *Thom*, Justice Dillon made no award for the participation of second counsel at or in preparation for trial.
- [8] I agree with the reasoning of Justices Dillon and Saunders and decline to make an award for the participation of second counsel.
- [9] I will add that even if authority for such an award could be found to exist, I am of the view that the case at bar was not overly complex. It was a trial involving an assessment of damages. Liability had been admitted.
- [10] Ms. Airavelle's injuries were not overly complex. The trial did involve two accidents that occurred when the plaintiff was young, but it was not an overly lengthy trial. It involved only six witnesses, five of whom were called by the plaintiff. Of those five, two were expert witnesses. The defendants called only one witness, an expert witness, who was cross-examined for only a very brief period of time. The expert evidence was not overly complex.
- [11] There were several applications that arose during the trial itself. They were somewhat complex and burdensome, but were only burdensome because of their timing. I think that had they been argued pre-trial, they would not have been nearly so challenging. In any event, for all of these reasons, I have concluded the plaintiff's application for an award of costs for the participation of second counsel is dismissed. "S.A. Donegan J." DONEGAN J.

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