Brar v. Ismail, [2018] B.C.J. No. 3182

British Columbia and Yukon Judgments

British Columbia Supreme Court

New Westminster, British Columbia

E.M. Myers J.

Heard: August 28, 2018.

Judgment: September 13, 2018.

Docket: M178297

Registry: New Westminster

[2018] B.C.J. No. 3182 | 2018 BCSC 1573

Between Jaspal Kaur Brar, Plaintiff, and Joseph Ismail and Carter Dodge Chrysler Ltd., Defendants

(37 paras.)

Counsel

Counsel for the Plaintiff: Brij Mohan, Brian J. Yu.

Counsel for the Defendants: Travis W. Brine.

[Editor's note: A correction was released by the Court October 26, 2018; the change has been made to the text and the corrigendum is appended to this document.]

Ruling on Costs

E.M. MYERS J.

1 The defendants apply for costs following a jury's dismissal of the plaintiff's action.

Background

2 The plaintiff was involved in a motor vehicle accident in which she was rear-ended. The defendants admitted liability and called for a jury trial.

3 On March 14, 2018 the defendants offered to settle for $50,000 plus taxable costs and disbursements. The offer was not accepted.

4 On May 9, 2018, the defendants served the plaintiff with video surveillance done of her, which was used at trial.

5 On May 23, the defendants offered to settle for $65,000 plus taxable costs and disbursements. The offer was not accepted. No counter-offers were made to either offer.

6 After a two-week trial beginning May 28, the jury declined to award the plaintiff any damages.

7 The defendants ask for the costs of the action and for double costs subsequent to the March 14 offer or, alternatively, subsequent to the May 23 offer. The plaintiff submits that the defendants should bear their own costs and the plaintiff be awarded her full costs.

8 The trial hinged on the plaintiff's credibility. The defendants did not call any expert evidence; rather, they attacked the plaintiff's experts' opinions saying they were based on the inaccurate subjective reporting by the plaintiff.

9 As put to the jury by counsel for the plaintiff, the injuries the plaintiff claimed resulted from the accident were:

* Headaches
* Tinnitus
* Fatigue
* PTSD
* Neck pain
* Lower back pain
* Insomnia
* Concussion
* Traumatic brain injury
* Neurocognitive disorder
* Depression
* Anxiety
* Somatic symptom disorder
* Left shoulder injury
* Left wrist pain and weakness
* Vomiting
* Nausea
* Vertigo
* Dizziness
* TMJ

10 The plaintiff also claimed that she was suffering chronic pain as a result of the accident. This was the diagnosis of Dr. Tarzwell, a psychiatrist, and Dr. Purtzki, a physical medicine specialist, both of whom testified at the trial.

11 The plaintiff's claim was in excess of $500,000. (Plaintiff's counsel improperly suggested a calculated award for general damages, which they put to the jury. I issued a correcting instruction on that.)

12 The video surveillance took place between September 2015 and early January 2018. The most significant portion of the surveillance showed the plaintiff at the gym on May 5 and May 6, 2016 exercising briskly on a treadmill and elliptical machine.

13 Approximately three weeks before that, the plaintiff was evaluated by Dr. Purtzki whom she told:

* she is limited to 10- to 15-minute walks twice a week after which she is fatigued and lies down for half an hour;
* she does not go grocery shopping because she finds it too difficult;
* she is unable to use her left hand and arm.

14 On May 2, 2016 the plaintiff reported to a rehabilitation counsellor that:

* she is unable to walk for more than 15 minutes;
* after ten minutes of standing she needs to sit down due to pain;
* she cannot walk for more than 500 metres;
* she cannot lift or carry anything;
* she cannot do any recreational activities due to her neck pain.

15 There were additional credibility difficulties with the plaintiff's evidence, which I note below.

Basic Costs

16 As I said above, the plaintiff submits that the defendants should bear their own costs and the plaintiff be awarded her full costs.

17 Rule 14-1(9) states:

> Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders. [emphasis added]

18 In *Briante (Litigation guardian of) v. Vancouver Island Health Authority*, *2017 BCCA 148* at para. 197, the court reiterated that the successful party is to have its costs in the absence of special circumstances and that the onus of showing this a heavy one.

19 Ms. Brar's argument against having to pay costs may be distilled into two main points.

20 The first point is that the case was a close one on credibility and therefore unpredictable. The fact that

the case turned on credibility is not a rationale to deny costs, any more than the plaintiff's success in proving breach of the standard of care (but not causation) was in *Briante*. Moreover, I do not think this was a close case.

21 The second point is based on the plaintiff's financial circumstances. That also is not a reason to deny a successful litigant - including an insurance company - basic costs: *Smith v. City of New Westminster*, *2004 BCSC 1304*.

Double Costs arising from the Defendants' Offers to Settle

22 The next issue is whether double costs ought to be awarded under Rule 9-1(5). Subrule 6 sets out the factors the court may consider:

> 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.

Whether the offer ought reasonably to have been accepted

23 The issue of whether an offer to settle ought reasonably to have been accepted is determined by the factors existing at the time of the offer and not with the hindsight of a judgment or jury verdict.

24 The main point this question hinges on is whether the credibility issues were obvious and significant enough to the plaintiff so that she ought to have accepted one of the offers.

25 From at least the time the video surveillance was delivered, it was obvious that the plaintiff's credibility would be front and center. There were inconsistencies between what it showed and what she relayed to her experts. It was also obvious these inconsistencies would have a significant impact on her case. I do not agree with the plaintiff that what was seen in the video was not far off what she had had told her experts or said in evidence. Often video surveillance is not compelling; here it was.

26 Moreover, as argued by the defendants, the plaintiff also had further credibility difficulties that ought to have been apparent to her counsel:

* The plaintiff's evidence was that she hit her head in the accident and had immediate dizziness and nausea including vomiting at the accident scene; however, these complaints were not documented in her GP's records during her initial visit, which was only hours after the accident. Her GP testified that he would have made a note of these complaints if they were made to him.
* The plaintiff's evidence that she was disoriented and vomited at the accident scene was contradicted by Mr. Ismail's evidence and that of his brother;
* In her discovery, the plaintiff said she had not done any form of work, whether paid or voluntary. She had also stated during her examination for discovery that she never helped

her husband in his business (even though she was president and 100% shareholder). However, at the trial she acknowledged she had in fact done work for her husband's business since the accident. Further the surveillance video showed the plaintiff working at an elections voting station.

* At examination for discovery the plaintiff stated she did not have any other sources of income other than what she received from her employer, Swissport. She also said she did not own any other properties other than her primary residence. However, her income tax records showed significant amounts of rental income, and she later admitted at trial that she and her husband received rental income from a property she was on title for. Her reported rental income was more than she had ever earned from Swissport before the accident.

27 The courts have said that a plaintiff cannot avoid the cost penalty of an unaccepted offer merely because the case hinged on credibility: *Ross v. Andrews*, *2017 BCSC 338* and *Luckett v. Chahal*, *2017 BCSC 1983*, in which Abrioux J. said:

> [47] ... what happened here is that the plaintiff, well aware of the significant credibility issues at stake, chose to gamble or "take his chances" by going to trial and lost. He should live with the consequences which Rule 9-1(4) seeks to avoid: *Wafler v. Trinh* *2014 BCCA 95* at para. 81.

28 On the other hand, in *Khunkhun v. Titus*, *2011 BCSC 1677*, Willcock J. (as he then was) reached the opposite conclusion after a jury trial in which a number of credibility issues were involved. He said:

> [25] ... No aspect of the claim advanced was frivolous. The plaintiff did not unnecessarily lengthen the expense or duration of the litigation. To use one test, I do not consider that reasonable counsel aware of all of the evidence in this case but unaware of the jury award ought to have encouraged the plaintiff to accept the offer at the time it was made or up to the date of the rendering of the jury's award. I do not regard this as a case where the plaintiff should have freed up the judicial resources used to assess her claim. I am of the view that the plaintiff might have made a careful assessment of the strengths and weaknesses of her case at the commencement and throughout the course of this litigation and not accepted the settlement offer that was made to her. In summary, I find that it was entirely reasonable on the evidence for the plaintiff to prefer taking this case to the jury to accepting the offer that was made to her before trial. I adopt here what was said in *Sartori v. Gates* at para. 67:
>
> The plaintiff had the right to test to the extent of the range of damages by trial adjudication.

29 In *Paskall v. Scheithauer*, *2012 BCSC 1859*, the defendant did not provide any expert reports of her own. N. Smith J. declined to award double costs because the defendant provided no evidence against which the plaintiff could judge the reasonableness of the offer. He stated:

> [33] In this case, the evidence relied on by the plaintiff included opinions of a neuroradiologist, a neuropsychologist, a psychiatrist, an otolaryngologist and two physiatrists. The only experts put forward by the defendant on the question of damages were the occupational therapist dealing with cost of future care and the economist. The defendant served no medical expert opinions, although the plaintiff had attended two independent medical examinations at the request of defence counsel.
>
> [34] The onus of proof at trial is on the plaintiff. The defendant is under no obligation to produce medical evidence and may rely entirely on cross-examination of the plaintiff and the plaintiff's

> medical experts to support an argument that the plaintiff has failed to prove damages. That is what defence counsel chose to do in this case, apparently with great success.
>
> [35] But the onus of proof at trial is not necessarily relevant to the question of whether an offer made before trial "had some relationship to the claim" or "could be easily evaluated". In choosing to defend this case in the way he did, the defendant also chose not to provide the plaintiff with evidence on which she could judge the reasonableness of the offers to settle. With the plaintiff's medical reports in hand, and in the absence of contrary medical opinions, I do not see how reasonable counsel could have recommended acceptance of either of the defendant's offers or justified such a recommendation to the plaintiff.
>
> [37] In this case, I find the consideration under R. 9-1(6)(a) to be determinative. I am not only unable to say the offers ought reasonably to have been accepted, but I find that they could not reasonably have been accepted in the context of the evidentiary vacuum in which they were presented. I conclude the plaintiff is entitled to her costs as if the offers had not been made.

30 In contrast to *Paskall* and *Kunkhun*, while the plaintiff here did not receive expert reports from the defendants, it did receive the video surveillance. The plaintiff ought to have been aware of the risks her credibility would have at a trial.

31 There is another related point. The plaintiff's psychological state before the accident was a key factor to her credibility and the substance of her claim with respect to chronic pain syndrome and depression. She did not call the psychiatrist who had been treating her for 2 1/2 years before the accident and after the accident. Rather, she called a psychiatrist retained to do a report for this case who had only seen the plaintiff once. While he examined the plaintiff's treating psychiatrist's records, he acknowledged they were indecipherable. I ruled that the jury should be given an instruction regarding its ability to draw an adverse inference from this: *2018 BCSC 1487*. The risk of an adverse inference instruction should have been apparent to the plaintiff.

32 The $65,000 offer - which I will focus on because the surveillance video had been delivered by then - was not a nuisance value settlement. It was in the range of damages for a moderate whiplash. It would also have covered the plaintiff's costs and disbursements.

33 Subject to the timing issue, which I discuss later, the offer was one that ought reasonably to have been accepted. I do not reach the same conclusion with respect to the $50,000 offer, because of the lower amount and the fact that the surveillance had not been delivered.

The relationship between the offer and the judgment

34 The large discrepancy between the offer and the result favours the defendants' position.

The relative financial circumstances of the parties

35 I accept that, as the plaintiff points out, she is a person of modest means. Nevertheless, the courts have generally held that a disparity in financial circumstances between a party and the other party's insurer is not something to be taken into account: *Luckett v. Chahal* at paras. 30-32; *Wepryk v. Jurashka*, *2013 BCSC 804* at para. 5; *Dennis v. Fothergill*, *2014 BCSC 452* at para. 34. There was no misconduct or dragging out of the litigation here.

Other factors

36 The plaintiff alleges that the defendants improperly conducted surveillance of her leaving a settlement meeting. This was raised by the plaintiff during the trial and I held that nothing had been shown to merit the video not being shown to the jury. I also do not see anything here that would be a consideration for this costs application.

37 I said I would return to the timing of the second offer There was nothing to prevent the defendants from providing the surveillance far sooner, given its importance; as noted above, it was completed in January 2018. The fact that it was disclosed in compliance with the rules does not mean that its timing cannot be a consideration with respect to the discretion to award double costs. As well the $65,000 offer, which was not delivered until five days before trial, could have been delivered sooner. This would have given the plaintiff more time to consider her position, without prejudicing the defendants. Therefore, in my view, the defendants should receive ordinary costs up to and including the first five days of trial and double costs after that.

E.M. MYERS J.

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Corrigendum

Released: October 26, 2018

Please be advised that the attached Ruling on Costs of Mr. Justice Myers dated September 13, 2018 has been corrected in paragraph 5. The first sentence which read:

> "On May 23, the plaintiff offered to settle for $65,000 plus taxable costs and disbursements".

Has been corrected to reads as follows:

> "On May 23, the defendants offered to settle for $65,000 plus taxable costs and disbursements".
