

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *MacLellan v. Somers*,
2025 BCCA 107

Date: 20250317
Docket: CA49360

Between:

Richard MacLellan and Marilyn MacLellan

Appellants/
Respondents on Cross Appeal
(Defendants)

And

Cody Eugene Somers

Respondent/
Appellant on Cross Appeal
(Plaintiff)

Before: The Honourable Madam Justice Bennett
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated
August 21, 2023 (*Somers v. MacLellan*, 2023 BCSC 1449,
Vancouver Docket M196934).

Oral Reasons for Judgment

Counsel for the Appellants/Respondents on
Cross Appeal:

L.Y. Babbitt

Counsel for the Respondent/Appellant on
Cross Appeal:

N.A. McQuarrie

Place and Date of Hearing:

Vancouver, British Columbia
March 11, 2025

Place and Date of Judgment:

Vancouver, British Columbia
March 17, 2025

Summary:

The appellants apply to have their appeal removed from the inactive list and an extension of time to file supporting materials on the appeal. The appeal was placed on the inactive list because more than one year had passed since the filing of the notice of appeal. At the time of the application, eighteen months have passed since the notice of appeal was filed. The appellants' counsel asserts that the other materials are ready to be filed and the delay in applying for reactivation is partially attributable to getting these materials ready. The delay is also attributable to original counsel withdrawing. The respondent opposes the application, arguing that the delay has caused prejudice and if a new trial is ordered as a result of the appeal, the evidence will have eroded. Held: The application is allowed and the appeal is removed from the inactive list. The shortcomings of counsel in this case should not be visited on the appellants, who were diligent in contacting counsel, retaining new counsel when their original counsel withdrew, and had no knowledge that either counsel had missed filing deadlines. While there is some prejudice to the respondent, the trial turned on expert evidence, which has been recorded. The appeal is not bound to fail. In these circumstances, the interests of justice favour reactivating the appeal and allowing the appellants to file the necessary documents to allow it to proceed.

Nature of Application

[1] **BENNETT J.A.:** This appeal was placed on the inactive list in September 2023. The appellants apply to have it reactivated. Additionally, the appellants seek an extension of time to file the required appeal materials.

Background Facts**The trial**

[2] This appeal arises from a personal injury claim in the context of a motor vehicle accident. The first appellant, Richard MacLellan, was one of two defendants at trial. The second appellant, Marilyn MacLellan, was the registered owner of the vehicle and mother of Mr. MacLellan. The respondent, Cody Somers, was the plaintiff. The accident involved a single vehicle crash. Both Mr. MacLellan and Mr. Somers were in the vehicle but claimed the other was driving. Mr. Somers was severely injured and rendered paraplegic. Mr. MacLellan was not seriously injured. The trial judge awarded Mr. Somers some \$6 million in damages.

[3] At trial, reasons delivered August 21, 2023, and indexed at 2023 BCSC 1449, Justice Tucker found the appellants jointly liable for the accident. She found that Mr. MacLellan was driving the vehicle and consequently liable for Mr. Somers' injuries. Ms. MacLellan was held liable as the vehicle's owner, pursuant to s. 86 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318. She found Mr. Somers 25% contributorily negligent for his injuries.

[4] The appellants only challenge the liability finding on appeal. The respondent cross appeals the judge's holding of contributory negligence and its impact on the damages award.

Post-trial

[5] After the trial, the appellants retained counsel to pursue the appeal. The lawyer filed a notice of appeal within the time limit on September 19, 2023. On September 21, 2023, the respondent filed a notice of appearance and cross appeal.

[6] On September 20, 2024, the lawyer advised the appellants that he had a conflict and needed to withdraw as counsel on the appeal. Soon after, the appellants retained new counsel. New counsel received the file materials from former counsel on October 2, 2024. These materials included: the notice of appeal, appeal transcripts, and various trial documents. The file did not contain a draft factum or any other documents relating to the appeal. On September 23, 2024, the Court of Appeal Registry sent a letter to counsel advising that the appeal had been placed on the inactive list.

[7] Rather than immediately taking steps to reactivate the appeal, over the next 125 days, new counsel prepared a factum for the appeal, completing it on February 18, 2025. The application to reinstate the appeal was not filed until March 3, 2025, and set down less than a week before the appeal was deemed dismissed as abandoned.

[8] No affidavit was filed from former counsel explaining his delay. Ms. MacLellan filed an affidavit deposing that she and her son had formed the intention to appeal

within the appeal period, that neither had experience in the legal system other than this case, and that they relied on their former lawyer to pursue the appeal. She paid a retainer of \$5,000 and authorized an expenditure of \$21,349.65 to pay for the transcripts. She has not been asked to reimburse the law firm for that sum. She deposed that she called the former lawyer several times to follow-up on the appeal and he told her not to worry, and that the appeal process was long. There is no evidence that either appellant was aware that their lawyer had missed filing deadlines and had not advanced their appeal.

Issues

[9] This application raises two issues:

- a) Should the appeal be removed from the inactive list; and
- b) Should the appellants be granted an extension of time to file their appeal materials?

Legal Framework

Removing the appeal from the inactive list

[10] Inactive appeals are governed by s. 50 of the *Court of Appeal Act*, S.B.C. 2021, c. 6. Section 50(1) provides that:

50 (1) The registrar must place an appeal on the inactive appeal list if a notice of hearing of appeal is not filed in accordance with these rules by the date that is

- (a) one year after the notice of appeal is filed for the appeal, or
- (b) 60 days after the appeal is ready for hearing.

[11] A justice may reactivate an appeal pursuant to s. 50(3). Section 50(3) provides:

(3) The registrar must remove an appeal from the inactive appeal list if a justice grants leave to proceed with the appeal.

[12] There is no rigid or specific test for reactivation. The appellant bears the onus of establishing good reason for reactivation. The overriding consideration is whether

it is in the interests of justice to reactivate the appeal, which is guided by the following factors:

- a) The extent of the delay;
- b) The explanation for the delay;
- c) Any prejudice arising from the delay; and
- d) The likelihood of success on appeal.

Kar Recovery, Ltd. v. KDA, 2004 BCCA 503 (Chambers) at paras. 23–24; *Mill v. Orogenic Gold Corp.*, 2024 BCCA 258 (Chambers) at paras. 9–10.

[13] The question in this case is whether the shortcomings of counsel should be visited on the appellants: *Emerson v. Insurance Corporation of British Columbia*, 2001 BCCA 592 (Chambers) at para. 7.

[14] Applications for reactivation and extensions of time are generally treated as mutually determinative, with the analysis of the former being dispositive of the latter: see *Mill*, generally.

Analysis

The extent of the delay

[15] The extent of the delay is long. Although counsel advises that everything is ready to file, nothing beyond the notice of appeal has been filed in the almost 18 months since the original filing.

Explanation for the delay

[16] Former counsel has not filed an affidavit in this application. I find it most unfortunate that an affidavit has not been filed to explain the year long delay by counsel. One expects a member of the bar to take responsibility for causing prejudice to a client, if that is in fact what occurred. Counsel for the respondent repeatedly contacted former counsel asking for updates on the status of the appeal.

[17] In addition, new counsel focused on preparing the material to be filed, rather than complying with the *Court of Appeal Rules*, B.C. Reg. 120/2022. In *Clock Holdings Ltd. v. Braich*, 2009 BCCA 437, the Court did not permit an extension of time when the delay was caused by counsel. In *McKersie v. Macala*, 2022 BCCA 277, referencing the chambers decision in *Clock Holdings Ltd. v. Braich*, 2009 BCCA 269, Justice Butler commented on new counsel's decision to obtain transcripts and prepare a draft factum before bringing the application for an extension. He said:

[42] Before leaving consideration of this factor, I must comment on counsel's decision to obtain transcripts and prepare a draft factum before bringing the application for an extension. I know of no decision of this Court supporting such a practice. As Justice Frankel observed in *Clock Holdings* at para. 35, "the appellant has an obligation to bring an application to remedy the situation in a timely way." The Applicant here did not attempt to remedy the situation in a timely way, but rationalizes the delay by arguing that it was necessary to obtain transcripts and prepare a draft factum in order to advance his position on the merits. I would certainly not endorse that practice. It delays appeal proceedings and is not consistent with the requirements of the [*Court of Appeal Rules*].

[18] In my view, the delay has been inadequately explained.

Prejudice to the Respondent

[19] The insurer has paid out the maximum amount of its coverage to Mr. Somers. Unfortunately, that only amounted to around \$1 million. No other steps have been taken to pursue recovery from the appellants, save an adjourned appointment for an examination in aid of execution. There is no stay of the order in the court below. The respondent, through his counsel, submits that his life is difficult given the lack of funds in addition to a long delay in the resolution of the matter. No affidavit was filed to support that submission, however, in the circumstances, I do not think one is needed to accept that submission.

[20] Counsel also submitted that if a new trial was ordered, memories have been affected, exhibits perhaps disposed of and that generally, delay bodes against a new trial. While I accept that witnesses' memories fade over time, the case turned on the evidence of the experts. Reports were filed and their evidence is recorded. I do not see that as a significant prejudice. Counsel further submitted that if there was a new

trial, it would affect his client's reputation as now people might think that he caused the accident. I find that submission without merit.

[21] I accept that the delay has caused prejudice to the respondent in that he has suffered serious injuries, and the stress of the delay can be inferred in the circumstances. I do not accept that the delay will prejudice a new trial, if ordered.

Likelihood of success on the appeal

[22] The merits threshold in reactivation applications is low, in that it is "not bound to fail": *Mill* at para. 28. However, even if the appeal meets the merits test, that does not necessarily mean that the extension will be granted: *McKersie* at para. 35.

[23] The appellants argue that they have four grounds of appeal that, taken together, establish a strong likelihood of success on appeal. They say the judge erred:

- a) by applying the wrong burden of proof and impermissibly speculating;
- b) by misapprehending evidence and making a palpable and overriding error in determining who was the driver of the vehicle;
- c) in law, by failing to consider whether the driver of the vehicle was in fact negligent; and
- d) in their apportionment of contributory negligence.

[24] The appellants have not identified where in the reasons for judgment the judge applied the wrong burden of proof or misapprehended evidence. The judge did not give comprehensive reasons on the issue of negligence. She assumed that the parties conceded that whoever was driving was negligent. It is difficult to assess on the material before me whether that issue was actually conceded. While I do not see much merit in the appeal from the limited material before me, I am prepared to conclude that the appeal is not "bound to fail".

Interests of justice

[25] In *Clock Holdings* and *McKersie*, there was either evidence or a lack of evidence showing that the appellants were somehow complicit in terms of the delay. They either knew that their lawyer was not complying with the *Rules* of Court or made no effort to ensure that they were complying. That is not the case here. Ms. MacLellan has deposed that she contacted the lawyer to follow up and was told not to worry. The appellants clearly formed the intention to appeal within the appeal period, and when their lawyer withdrew, they moved quickly to retain new counsel. It is not their fault that new counsel also did not move expeditiously.

[26] In *Perren v. Lalari*, 2009 BCCA 564 at para. 37, this Court concluded that the interests of justice are best served by having appeals heard on their merits.

[27] In *Redfearn v. Elkford (District)*, 1999 BCCA 639, Justice Lambert in Chambers reactivated an appeal in the context of the delay caused by counsel in the absence of any explanation. Speaking to the general principle that a client should not be punished for the actions of their counsel, Lambert J.A. stated that “in circumstances where the client is in no way at fault, but is prejudiced by the actions of his counsel, steps should be taken to do the best one can to protect the interests of the client as long as in doing so no overriding prejudice is caused to the other side who will not have been at fault”: at para. 8. The appeal was ultimately reactivated and allowed to proceed.

[28] In *Emerson*, Justice Low in Chambers similarly allowed an appeal to proceed despite a delay caused by inattentive counsel. Justice Low held the “majority” of the cause for delay lay at the feet of the appellant’s counsel. In the absence of potential prejudice to the respondent, Low J.A. held that “the shortcomings of counsel should not be visited upon the litigant” and the appeal was reactivated and allowed to proceed: at para. 7. Justice Low added conditions requiring the matter to move forward expeditiously: at para. 9.

[29] When extensions are refused as a result of counsel’s conduct, it is generally when the applicant is complicit in the delay, the appeal is of dubious merit, or there is significant prejudice to the respondent. None of those factors is present here.

[30] In my view, it is in the interest of justice to allow the appellants an opportunity to have their case heard notwithstanding the delay caused by their previous and current counsel.

Conclusion

[31] The appeal is therefore reinstated.

[32] It follows that the appellants will have additional time to file their material. Counsel advised that it is ready to be filed. Therefore, the appellants will have until March 21 to file the outstanding material.

[33] However, as the delay was caused by the counsel for the appellants, necessitating this application, the respondent will have his costs of this application in any event of the cause.

“The Honourable Madam Justice Bennett”