IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mayer v. Woolley,*
2026 BCSC 803

Date: 20260501
Docket: S56888
Registry: Vernon

Between:

Erika Mayer

Plaintiff

And

Edward Woolley and Woolley & Co

Defendants

Before: The Honourable Justice Hardwick

Reasons for Judgment

Counsel for the Plaintiff:	M.S. Dugas
Counsel for the Defendants:	S.U. Hamilton
Place and Date of Trial/Hearing:	Vernon, B.C. April 1, 2026
Place and Date of Judgment:	Vernon, B.C. May 1, 2026

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[1] The defendants, Edward Woolley and Woolley & Co., apply pursuant to Rule 9-7 of the *Supreme Court Civil Rules* [*SCCR*], to dismiss all claims made by the plaintiff, Ms. Erika Mayer, in both contract and tort for professional negligence (the "Application") in this action (the "Negligence Action").

[2] The plaintiff opposes the Application on the basis that the Negligence Action is not suitable for summary determination, asserting that there are issues that can only be properly tested through *viva voce* evidence and cross-examination during the conventional trial currently set for 8 days on the assize commencing the week of September 21, 2026.

[3] Importantly, the plaintiff does not seek judgment in her favour as her counsel concedes that she requires expert evidence to establish any breach of the requisite standard of care owed by the defendants. The plaintiff does not currently have said expert evidence, but she asserts that she might be able to obtain it prior to June 29, 2026, which is the 84-day deadline for delivery of expert reports pursuant to R. 11-6(3) of the *SCCR*.

[4] Accordingly, the only two options for this Court are to:

a) grant the relief sought in the Application and dismiss the plaintiff's claims against the defendants in the Negligence Action; or

b) dismiss the Application on the basis of unsuitability for summary determination and allow the plaintiff's claims to proceed to trial.

Factual Overview

[5] The plaintiff is the only child of the late Mr. Siegfried Otto Mayer. Mr. Mayer passed away in hospital on March 16, 2015, after a lengthy battle with Parkinson's disease.

[6] Mr. Mayer and the plaintiff's mother separated in 1974 when the plaintiff was approximately four years of age.

[7] At the time of his death, Mr. Mayer had been in a marriage-like relationship of some 35 years with his spouse, Ms. Ursula Breidt. Ms. Breidt had a son from her prior marriage, Ronald, who was in his early 20s when her relationship with Mr. Mayer commenced.

[8] The only significant asset Mr. Mayer had at the time of his passing was his interest in a home located on East 37th Avenue in Vancouver, BC which he held in joint tenancy with Ms. Breidt (the "Property"). The Property was jointly purchased in 1986.

[9] Pursuant to his final last will and testament made in April 2002 (the "Will"), Mr. Mayer bequeathed half of the residue of his estate to Ms. Breidt, and the other half to the plaintiff (the "Estate"). According to the Will, if Ms. Breidt predeceased Mr. Mayer, the Property (or any replacement property) was to be transferred to the plaintiff and Ronald with the balance of his estate to the plaintiff. Ms. Breidt executed a will that mirrored these provisions with Ronald standing in the place of the plaintiff.

[10] Upon Mr. Mayer's death, the Property passed to Ms. Breidt by right of survivorship and did not form part of the Estate. The Estate itself was effectively impecunious. The impecuniosity of the Estate was tied to Mr. Mayer's gambling habits in the latter stages of his life, although the extent to which was a point of controversy.

[11] In April 2015, the plaintiff commenced an action against Ms. Breidt and the Estate, claiming an interest in the Property (the "Estate Action"). At the time the notice of civil claim was filed in the Estate Action, the plaintiff was represented by her current counsel in the Negligence Action, Mr. Dugas. Mr. Dugas also took on the role of solicitor for the Estate and the plaintiff called him as a witness at the trial of the Estate Action in that capacity.

[12] In the Estate Action, the plaintiff claimed an interest in the Property primarily based on assertions that: (i) the joint tenancy was not a true joint tenancy and the Property was held by Ms. Breidt on a resulting trust; (ii) the joint tenancy was

severed by Mr. Mayer and Ms. Breidt entering into mutual wills; and (iii) a constructive trust existed in favour of the plaintiff based on the doctrines of unjust enrichment and/or "good conscience". If the court determined that Mr. Mayer's interest in the Property fell into the Estate, the plaintiff applied for an order under the *Wills, Estates and Succession Act,* S.B.C. 2009, c. 13, that the Will be varied to make further provision for her.

[13] The "evidentiary underpinning" of the plaintiff's claims rested significantly on alleged statements made by Mr. Mayer that the plaintiff was to receive an interest in the Property. The statements were allegedly made primarily by Mr. Mayer to the plaintiff and her husband, Mr. Daniel Cocks.

[14] Ms. Breidt defended the plaintiff's claims in the Estate Action on the basis that she was free to do as she pleased with the Property (which had been her home and continued to be her home), unencumbered or unaffected by a trust or otherwise.

[15] The plaintiff was self-represented for a period in the Estate Action and during this period, Ms. Briedt brought an application to dismiss the claims pursuant to R. 9-7 of the *SCCR*. The summary trial application was supported by an affidavit sworn by Ms. Breidt (the "Breidt Affidavit"). The significance of a particular portion of the Breidt Affidavit will become apparent in due course.

[16] Ms. Briedt was unsuccessful in her summary trial application. The reasons for judgment of Justice G.P. Weatherill are indexed at 2017 BCSC 1345.

[17] After the initial period of being self-represented, a period of being represented by an estate litigation lawyer in Kelowna and another period of being self-represented, the claimant retained Mr. Woolley to represent her in the Estate Action in or about February or March 2018.

[18] Mr. Woolley had, at that time, been called to the bar for approximately 20 years.

[19] Approximately four months after Mr. Woolley was retained, the Estate Action proceeded to trial before Justice Crossin for six days in late July and early August 2018.

[20] In written reasons for judgment released on December 14, 2018, and published at 2018 BCSC 2225 (the "Trial Reasons"), Justice Crossin dismissed the plaintiff's claims in the Estate Action (the "Crossin Final Order").

[21] In the Trial Reasons, Justice Crossin expressed "grave doubts" about the reliability of the evidence of the plaintiff and Mr. Cocks regarding the statements purportedly made by Mr. Mayer prior to his passing: see para. 59 of the Trial Reasons. In any event, Justice Crossin found that even accepting the statements were made and accurately recited, they did not provide, "on their own or as part of the overall evidentiary matrix, a safe or logical foundation upon which to rest an inference in support of the position of the plaintiff": see para. 57 of the Trial Reasons. The statements were simply "too vague and uncertain": see para. 58 of Trial Reasons.

[22] Importantly, in the Trial Reasons, Justice Crossin specifically referred to Mr. Woolley's efforts to undermine Ms. Breidt's credibility and reliability—highlighting what were asserted to be inconsistencies between her *viva voce* evidence at trial, her examination for discovery and her prior affidavit evidence: see paras. 36 and 52 of the Trial Reasons. Notwithstanding this, Justice Crossin concluded that the credibility of Ms. Breidt was left "comfortably intact at the end of the day"; describing any conflicts in her evidence as inconsequential and noting that any inconsistencies were dealt with by Ms. Breidt with "aplomb, grace, and logic": see paras. 37 and 53 of the Trial Reasons.

[23] In ultimately dismissing each of the plaintiff's claims, Justice Crossin held that:

a) With respect to the joint tenancy, the evidence established that when the Property was purchased Mr. Mayer and Ms. Breidt intended to hold title as

true joint tenants. Justice Crossin further found the intention as between Mr. Mayer and Ms. Breidt was that if one of them died, the survivor would receive the Property as security for their old age: see Trial Reasons at paras. 121-123;

b) Given the property was held as a true joint tenancy, the result was that unless (i) the joint tenancy was severed prior to Mr. Mayer's death (e.g. by mutual wills), or (ii) another equitable remedy (namely, a constructive trust), was available to the plaintiff, Ms. Breidt received full title by right of survivorship: see Trial Reasons at para. 124;

    i. With respect to severance of the joint tenancy, Justice Crossin found that the plaintiff did not meet the onus of proving severance: see Trial Reasons at paras. 128 and 133-134;

    ii. Justice Crossin further found that the evidence did not reach the "clear and unequivocal" threshold required to establish the existence of a binding mutual will agreement: see Trial Reasons at paras. 139 and 147-151 and 153-156. Justice Crossin engaged in this substantive analysis even though he did note that the plaintiff's pleadings made no reference to "mutual wills": see Trial Reasons at para. 135; and

    iii. Finally, Justice Crossin found that the plaintiff had not established a constructive trust in her favour on either the basis of unjust enrichment or "good conscience": see Trial Reasons at paras. 162-164 and 173-174.

[24] In the end, Justice Crossin saw no practical purpose in varying the Will, given that the principal asset passed outside the Estate, and he dismissed the plaintiff's claims in the Estate Action entirely: see Trial Reasons at paras. 175-183.

Application to Reopen the Trial in the Estate Action and Appeals

[25] Whilst Justice Crossin's decision following the trial of the Estate Action was under reserve, the plaintiff accessed certain correspondence through a computer belonging to Mr. Mayer that had been provided to her by Ms. Breidt upon his passing years prior. The plaintiff believed, and continues to believe, that these communications prove that Ms. Breidt had made knowingly false statements in the Breidt Affidavit which resulted in her perjuring herself at trial. The allegedly false portion pertained to transfers Ms. Breidt deposed that she made to Mr. Mayer for "tax debts" when, the plaintiff asserts, Ms. Breidt knew that Mr. Mayer's tax debts had already been paid in full at the time the transfers were made.

[26] Importantly, the communications that the plaintiff sought to rely upon were emails between Ms. Breidt and her counsel in the Estate Action which were *prima facie* protected by solicitor-client privilege (even though the plaintiff obtained access through an email account in the name of Mr. Mayer on the computer Ms. Breidt provided to her). It was and remains the plaintiff's view that Ms. Breidt's counsel was knowingly involved in the alleged perjury.

[27] Mr. Woolley deposed that after seeking advice from a practice advisor with the Law Society of British Columbia (the "Law Society"), he drafted an application to re-open the trial to consider the relevance of the new evidence, or in the alternative, to have a mistrial declared (the "Re-Opening Application"), together with a supporting affidavit. Prior to the Re-Opening Application materials being filed, Mr. Woolley's office was notified by Supreme Court Scheduling that Justice Crossin's reasons for judgment in the Estate Action would be delivered the following day.

[28] Upon being notified of the impending release of Justice Crossin's reasons for judgment, Mr. Woolley's office provided an unfiled copy of the Re-Opening Application materials and requested that they be brought to the attention of Justice Crossin. Mr. Woolley did this on December 13, 2018. There is an email in the application record confirming this.

[29] The Trial Reasons were still released by Justice Crossin on December 14, 2018. As described above, all the plaintiff's claims were dismissed.

[30] Ultimately, the Re-Opening Application (and a related cross-application filed on behalf of Ms. Breidt) was heard by Justice Crossin on June 3, 2019. In transcribed but unpublished oral reasons for judgment delivered on June 6, 2019, Justice Crossin dismissed the Re-Opening Application (the "Re-Opening Reasons"). Specifically, Justice Crossin concluded that the communications were protected by solicitor-client privilege and, in any event, did not impact the plaintiff's case as the only relevance of the subject email related to the general credibility of Ms. Breidt which Justice Crossin concluded was of "much less" importance in the Estate Action notwithstanding the "concerted attack" launched by the plaintiff: see Re-Opening Reasons at paras. 6, 16, 18 and 23.

[31] On June 27, 2019, the plaintiff filed, on her own behalf, a notice of appeal of Justice Crossin's order dismissing the Re-Opening Application (the "Re-Opening Order"). The following day, the plaintiff terminated her retainer with the defendants in the Estate Action. The defendants allege that at this time, the plaintiff had outstanding invoices for legal fees owing to the defendants of approximately $40,000. Neither the plaintiff nor the defendants ever took steps to tax these accounts pursuant to the *Legal Profession Act,* S.B.C. 1998, c. 9. The relevance of these accounts at this stage of the Negligence Action is generally limited to what role, if any, they played in the timing of the filing of a notice of appeal in respect of the Crossin Final Order.

[32] Specifically, no notice of appeal of the Crossin Final Order was filed within the 30-day deadline required by s. 6 of the *Court of Appeal Rules*, B.C. Reg. 120/2022 despite, I accept, the plaintiff indicating to the defendants a desire to appeal.

[33] On this point, the documentary evidence favours the plaintiff's recollection. There is email correspondence from Mr. Woolley's office to the plaintiff which indicates a mistaken belief that the appeal period had not started running upon the release of the Trial Reasons due to the delivery of the Re-Opening Application.

There is no reference to outstanding accounts being an impediment to the filing of a notice of appeal.

[34] However, the plaintiff, on her own behalf, proceeded to file an application seeking an order extending the time within which to file a notice of appeal of the Crossin Final Order on June 28, 2019 (the day she deposes she terminated the defendants' retainer). This extension application was heard by Justice Willcock in chambers on August 20, 2019. In oral reasons for judgment delivered on August 22, 2019 and indexed at 2019 BCCA 363 (the "Extension Reasons"), Justice Willcock concluded that the plaintiff's actions were consistent with an intention to appeal but dismissed the application on the basis that the appeal had no reasonable prospect of success given that the plaintiff had identified no error of law or palpable overriding errors of fact.

[35] Specifically, in dismissing the plaintiff's application, Justice Willcock held, *inter alia*, as follows:

> [13] The trial judge dealt comprehensively with Ms. Mayer's claim to an interest in a house formerly owned jointly by her deceased father, Siegfried Mayer, and Ursula Breidt on East 37th Avenue in Vancouver. …
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> …
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> [25] Neither Ms. Mayer's notice of appeal (in this appeal) nor her affidavit sworn in support of the application are particularly helpful in identifying a meritorious ground of appeal. The appeal is framed in vague assertions, including assertions that the trial judge "erred in law":
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> a) In dismissing the … application to vary the estate;
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> b) In finding that the deceased's interest in the estate passed outside the estate … by survivorship;
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> c) In finding that the house was not held in a constructive trust;
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> d) In finding that the house was not held in a resulting trust; and
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> e) In finding that the respondent was not unjustly enriched.
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> [26] The respondent characterizes these as attacks upon findings of fact outside the proper scope of appellate review. It is true that the judgment is largely fact driven and for that reason the mere assertion that the judge erred in law in dismissing the claim can be seen as no more than an attack upon those findings. The trial judge referred correctly to the leading authorities and applied them to the facts as he found them. Findings of fact were fatal to almost all of Ms. Mayer's claims at trial, with the possible exception of her claim that the

> execution of mutual wills by Mr. Mayer and Ms. Breidt severed the joint tenancy. That issue required careful consideration of the jurisprudence but, even in relation to that issue, ultimately as Davey C.J.B.C observed in the leading case, *Szabo v. Boros* (1967), 64 D.L.R. (2d) 48 (BCCA) at p. 50, a finding of severance hinges upon the facts:
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> …
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> [27] Ms. Mayer does not identify an error of law. She does not expressly take issue with the judge's description of the law or his use of precedent. Nor does she identify any palpable and overriding error in the findings of fact upon which the judgment is founded. For that reason, in my view the intended appeal is bound to fail and it is in the interests of justice to dismiss the application.

[36] This last point is of particular significance because when I inquired during submissions, counsel for the plaintiff conceded that he also could not identify any legal error(s). Rather, he submitted there were possibly multiple palpable and overriding errors in Justice Crossin's findings of fact, none of which he could specifically articulate and which he acknowledged was a very challenging basis upon which to appeal given the deference the standard of review affords trial judges.

[37] Of additional import, Justice Willcock acknowledged that the plaintiff still had the ability to pursue her appeal of the Re-Opening Order as that appeal was commenced by the plaintiff within the requisite deadline. Justice Willcock further characterized this as the crux of the plaintiff's complaints relating to the allegedly perjured evidence of Ms. Breidt: see para. 28 of the Extension Reasons. In a similar vein, Justice Willcock concluded that allowing the extension of time for bringing an appeal of the Crossin Final Order would "unnecessarily enlarge the appeal to include an inappropriate challenge to factual findings": see para. 29 of the Extension Reasons.

[38] On October 8, 2020, a three-member panel of the Court of Appeal heard the appeal of the Re-Opening Order. The plaintiff was self-represented at the hearing. In oral reasons for judgment delivered from the bench, indexed at *Mayer v. Mayer Estate*, 2020 BCCA 282, Mr. Justice Grauer, on behalf of the Court, dismissed the appeal with special costs to Ms. Breidt. The Court found that the Re-Opening Order was discretionary, and Justice Crossin's findings were entitled to deference. Further,

the Court concluded that the new evidence would have had no impact on the result of the Estate Action and went only to the general credibility of Ms. Breidt.

[39] In this regard, Justice Grauer emphasized Justice Crossin's conclusion in the Estate Action that the plaintiff's claims were not based on what Ms. Breidt had said or done, but on the plaintiff's own evidence and that of Mr. Cocks, about what Mr. Mayer had said. That evidence was not accepted by Justice Crossin as it was found to be unreliable and further, even if the evidence had been accepted, it did not support the plaintiff's claims in any event. The new evidence also did not advance the plaintiff's position: see paras. 23-29. The basis for the award of special costs was because of the plaintiff's persistence in perusing her allegations of perjury "notwithstanding the absence of any evidence to support them" which was conduct deserving of rebuke: see paras. 43-44.

Commencement of the Negligence Action

[40] On December 11, 2020, the plaintiff filed the notice of civil claim initiating the Negligence Action (the "NOCC"). In the NOCC, the plaintiff alleges that the defendant breached the duty of care owed to the plaintiff and breached the retainer agreement in the context of the solicitor-client relationship. At the time that the plaintiff filed the NOCC, she was self-represented. Mr. Dugas came on the record as counsel in January 2023. The NOCC has never been amended.

[41] There are multiple breach allegations in the NOCC which the plaintiff asserts cumulatively caused damage and loss. Those allegations principally include the following:

a) Mr. Woolley did not take any steps or alter or amend the NOCC in the Estate Action to reflect the changes in the factual scenario or seek relief based upon the existence of mutual wills;

b) Mr. Woolley refused to allow the plaintiff to participate fully in the trial;

c) Mr. Woolley failed to present the evidence to establish entitlement to the relief claimed in the NOCC;

d) Mr. Woolley failed to object to irrelevant and inadmissible evidence during the trial;

e) Mr. Woolley failed to object to the removal of evidence from the record during the trial;

f) Mr. Woolley appeared to fall asleep or lose consciousness while laying his head down during the presentation of evidence at trial;

g) When the issue of Ms. Breidt's alleged perjury arose after the conclusion of the evidence, Mr. Woolley took no steps to advise the court of the potential value of the information prior to the release of Justice Crossin's reasons for judgment;

h) After an affidavit was prepared by Ms. Breidt's trial counsel containing statements which were alleged to be untrue, Mr. Woolley entered into an agreement with that counsel that the plaintiff would not hold counsel accountable for her involvement in the alleged perjury;

i) Mr. Woolley, as already noted above, failed to appeal the Crossin Final Order within the 30-day period; and

j) Mr. Woolley rendered excessive and inappropriate invoices for services which were of no utility, were redundant or for services negligently provided.

[42] The damages which the plaintiff alleges that she sustained in the NOCC are as follows:

a) a loss of her inheritance;

b) a loss of a portion of the Estate;

c) legal fees and expenses incurred without any benefit;

d) legal fees of trial;

e) legal fees of the appeals;

f) legal costs awarded on both the trial and appeals; and

g) stress, inconvenience and loss of enjoyment of life.

Application For Dismissal Pursuant to R. 9-6

[43] Between the filing of the NOCC in December 2020 and March 2023, the plaintiff took no significant steps to advance the Negligence Action.

[44] In March 2023, the defendants delivered an application to dismiss the plaintiff's claims pursuant to R. 9-6(5)(a) (the "Dismissal Application").

[45] The Dismissal Application was heard and dismissed by Justice Gibb-Carsley in reasons for judgment indexed at 2023 BCSC 1809 (the "Dismissal Reasons"). In so doing, Justice Gibb-Carsley concluded that the defendants had not established "beyond a reasonable doubt" that there was "no genuine issue for trial" and that the plaintiff's claims were bound to fail: see para. 54. There was no assessment of the merits of the plaintiff's claims in the Negligence Action based on the evidence as that assessment is not permitted in the context of a R. 9-6 application.

Solicitor's Negligence: The Test

[46] The legal test to be applied in a solicitors' negligence claim is well established. As articulated in *Fong v. Lew*, 2015 BCSC 436 at para. 17, aff'd 2016 BCCA 67 [*Fong*], to establish liability in negligence, a plaintiff must show that:

a) the defendant owed a duty of care to the plaintiff;

b) the defendant breached that duty by failing to fulfill or observe the relevant standard of care;

c) the plaintiff sustained damage or loss; and

d) the damage or loss was caused, in fact and in law, by the defendant's breach of duty.

[47] In the absence of express contractual terms, a solicitor's duty of care to the client is the same, whether the claim is brought in tort or in contract: see *Fong* at para. 16. As such, the analysis of the claim for breach of contract mirrors the negligence claim.

[48] A lawyer owes a client a duty to exercise reasonable care, skill and knowledge in the performance of professional services: see *Fong* at para. 19 citing *Tiffin Holdings Ltd. v. Millican* (1964), 49 D.L.R. (2d) 216 (Alta. S.C.). However, lawyers are not held to a standard of perfection. They are regularly required to make difficult judgment calls, often without the benefit of all relevant information and without the benefit of hindsight: see *Kitching v. Devlin*, 2016 ABQB 212 at para. 124 and *Odobas v. Yates*, 2022 BCSC 186 at para. 127 [*Odobas*].

[49] Even if a breach of contract or duty of care can be found, the court must assess what, if any, damages were caused by the breach. The onus is on the plaintiff to established that the breach caused a loss and that the loss has a real value: see *Nichols v. Warner*, 2007 BCSC 1383 at para. 103 [*Nichols*] citing *Cridge v. de Vooght*, 2004 BCSC 101 at para. 9 [*Cridge*]:

> [103] …
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> The courts have often referred to lawyers' negligence cases as containing a "trial within a trial". Simply put, in order to assess damages caused by a lawyer's negligence in the context of litigation, a plaintiff must show that if the lawyer had exercised a reasonable degree of skill and care the plaintiff would have had a reasonable prospect of success in the litigation (*Hagblom v. Henderson*, [2003] 7 W.W.R. 590 (Sask. C.A.); *Gorieu v. Simonot*, [1982] 6 W.W.R. 221 (Sask. Q.B.); *Prior v. McNab* (1976), 16 O.R. (2d) 380 (H.C.J.)).

[50] The damages are measured by the real value of the lost chance to recover more than the amount actually recovered in the original litigation. The purpose of the second trial is to establish if the plaintiff had a "reasonable probability of realizing an

advantage of real monetary value": see *Nichols* at para. 104 citing *Cridge* at para. 12.

The Summary Trial Rule: General Principles

[51] Rule 9-7 of the *SCCR*, the summary trial rule, permits a party to an action, to which a response to civil claim has been filed, to apply to the court for judgment under the rule, either on an issue or generally: see R. 9-7(2). In support of response to the application for a hearing by summary trial, R. 9-7(5) provides that a party may tender evidence in a variety of forms: (i) affidavit; (ii) answers to interrogatories; (iii) examination for discovery transcripts; (iv) admissions; and (v) expert reports.

[52] The scope of a summary trial application is set out in R. 9-7(15) of the *SCCR*:

> (15) On the hearing of a summary trial application, the court may
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> (a) grant judgment in favour of any party, either on an issue or generally, unless
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> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
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> (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
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> (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
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> (c) award costs.

[53] In the seminal decision of *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), the Court of Appeal confirmed at p. 211 that the court under this rule "tries the issues raised by the pleadings on affidavits", that "a triable issue or arguable defence will not always defeat a summary trial application", and that "cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law" provided that the judge does not find "it is unjust to do so".

[54] Processes like the summary trial rule are to be interpreted broadly, favoring proportionality and fair access to the affordable, timely and just adjudication of all claims. The purpose of the summary trial is to expedite the resolution of cases in

which disputed questions of fact can be decided on the basis of affidavit, unless it would be unjust to do so: see *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 5-6 and *Arbutus Investment Management Ltd. v. Russell*, 2022 BCSC 72 at paras. 40-50, aff'd 2023 BCCA 9 [*Arbutus*].

[55] In deciding whether it will see unjust to grant judgment on a summary trial, the non-exhaustive list of factors the court can consider include: (i) the amount involved; (ii) the complexity of the matter; (iii) its urgency; (vi) any prejudice likely to arise by reason of delay; (v) the cost of taking the case forward to a conventional trial in relation to the amount involved; (vi) the course of the proceedings; (vii) the risk of wasted time and effort; and (viii) whether credibility is a crucial factor: see *Arbutus* at paras. 40-50 and *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 31-32 [*Gichuru*].

[56] Importantly, a summary trial is a trial. Accordingly, all parties to an action must come to a summary trial hearing prepared to prove their claim, or defence, as judgment may be granted in favour of any party, regardless of which party has brought the application, unless the judge concludes that they are unable to find the facts necessary to decide the issues or are of the view that it would be unjust to decide the issues in this manner: see *Gichuru* at para. 32. This requirement was underscored by Madam Justice Newbury in *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275 at para. 34 (referring to the former R. 18A which is now R. 9-7):

> [34] It is trite law that where an application for summary determination under Rule 18A is set down, the parties are obliged to take every reasonable step to put themselves in the best position possible. As this court noted in *Anglo Canadian Shipping Co. v. Pulp, Paper & Woodworkers of Canada, Local 8* (1988) 27 B.C.L.R. (2d) 378 at 382, a party cannot, by failing to take such steps, frustrate the benefits of the summary trial process. Where the application is brought by a plaintiff, the defendant may not simply insist on a full trial in hopes that with the benefit of viva voce evidence, 'something might turn up': see *Hamilton v. Sutherland* (1992) 68 B.C.L.R. (2d) 115, [1992] 5 W.W.R. 151 (B.C.C.A.) at paras. 66-7. The same is true of a plaintiff where the defence has brought the R.18A motion.

[57] Whie there may be a dispute on credibility, this does not necessarily mean the matter cannot be dealt with by summary trial. As recently stated by Justice Schultes in *Kushty Consulting Ltd. v. Wissman*, 2025 BCSC 336 at paras. 5-6:

> [5] With respect to finding the necessary facts, a summary trial almost invariably involves a resolution of credibility issues: *MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270, at para. 22. In appropriate circumstances it is perfectly acceptable for a summary trial judge to make credibility findings on affidavit evidence alone: *Amacon Alaska Development Partnership v. ARC Digital Canada Corp.*, 2023 BCCA 34, at para. 40, citing *Orangeville Raceway Ltd. v. Wood Gundy Inc.*, [1995] 6 B.C.L.R. (3d) 391 (C.A.). The court in *ARC* cited as an example its previous decision in *Newhouse v. Garland*, 2022 BCCA 276, in which a negative inference about credibility was drawn from the implausibility and vagueness of the affidavit evidence, and the finding with respect to credibility was supported by circumstantial evidence.
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> [6] More frequently, a court is able to render judgment despite the conflict in the affidavits because there is other objective evidence, such as documents generated by the parties, or correspondence between them, which allows the conflict to be resolved: for example, *ARC*, at para. 42; *Orangeville*, at para. 43.

[58] At the hearing of a summary trial, the plaintiff, even if not the applicant, retains the onus of proving her claims on a balance of probabilities. The onus does not shift because the defendants brought the Application: see *Gichuru* at para. 35.

[59] Ultimately, R. 9-7 makes the presiding judge a gatekeeper. As described in *Main Acquisitions Consultants Inc. v. Yuen*, 2022 BCCA 249 at para. 89, it is an important role:

> [89] The Rule makes the judge a gatekeeper. It is a crucial role. Notwithstanding the wishes or indeed often the vociferous submissions of counsel, judgment should not be given if the court is unable, on the evidence, to find the necessary facts or if it would be unjust to do so. As noted by Justice Southin in her typically forthright language in *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Limited*, 2002 BCCA 138 [*Bacchus*]:
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> > [28] . . . the judge before whom a proceeding of this kind comes must not think of himself or herself as a puppet in the hands of the litigants.

The Parties' Positions Regarding Suitability for Summary Trial

The Defendants' Position

[60] The defendants submit that the Application is suitable for summary determination and that the plaintiff's claims ought to be dismissed pursuant to R. 9-7 on the basis that:

a) a summary trial is a trial;

b) the onus on the plaintiff to satisfy her evidentiary burden applies to all essential elements of the claim;

c) the plaintiff's claim requires her to establish both that the defendants' conduct fell below the standard of care and that the conduct caused the plaintiff damage; and

d) the plaintiff's evidence fails to meet the onus in respect of the issues of breach of standard of care and causation. In addition, there is no evidence of any loss or damage.

[61] Stated more simplistically, the defendants submit that the plaintiff was dissatisfied with the results obtained in the Estate Action and is now attempting to impermissibly re-litigate issues in that proceeding by making bald and vague assertions of alleged wrongdoing by the defendants in the Negligence Action which she cannot establish have a causal connection to any loss, let alone a proven loss.

The Plaintiff's Position

[62] The plaintiff submits, as articulated in her response to the Application filed March 19, 2026, that the matter is unsuitable for summary determination having regard to the factors articulated in *Gicharu* and *Arbutus*.

[63] Specifically, the plaintiff submits that:

a) the amount involved is the "entire inheritance" of the plaintiff from Mr. Mayer which would "be in the range of $600,000";

b) the matter is “complicated as it contains an analysis of the negligence of a solicitor at trial and potentially appeal”. The decisions made by the solicitor, it is asserted, “complicate the issues as he did not follow the advice and direction of his client in a number of decisions”;

c) there is no urgency as the trial is set for trial in September of 2026;

d) there is no prejudice likely to arise by reason of delay because the plaintiff is retaining an expert for trial. As noted, this is at the crux of the plaintiff’s opposition to summary determination and so I shall address it in further detail;

e) the cost of the litigation is not greatly decreased by summary trial;

f) the proceedings have been slow in progress but “much less so” once trial dates were set. Examinations for discoveries occurred after the notice of trial was filed;

g) there are some issues of credibility, although they are “somewhat affected by the admissions of the defendants”;

h) the summary trial has no benefit to the overall resolution because the “evidence is somewhat in dispute” and the “real issue is liability for the conduct of the defendants”; and

i) regarding the concern over litigating in slices, the case will not be resolved in a summary fashion because “the issue of liability should proceed to a full trial”.

Scheduling of the Application and the Expert Evidence

[64] The impugned conduct of the defendants in the Negligence Action took place between February/March 2018 when the defendants were first retained and on or about June 28, 2019 when the plaintiff deposes that she terminated her retainer with the defendants.

[65] This action was, as noted, commenced in December 2020 after the plaintiff's efforts in the Court of Appeal in respect of the Estate Action were ultimately unsuccessful.

[66] The plaintiff accordingly had approximately five years before the Application was delivered to obtain an expert report to substantiate her claims in the Negligence Action that the defendants breached the requisite standard of care.

[67] In this regard, I accept that it is the general rule, originating in the "common sense discussion" provided by Justice Southin in *Zink v. Adrian*, 2005 BCCA 93 at paras. 43-44 that, expert opinion evidence is required in a solicitor's negligence case unless the case falls within an exception, such as the cases involving non-technical matters or those in which an ordinary person may be expected to have knowledge: see *Odobas* at paras. 30-38.

[68] The plaintiff has not, to date, procured an expert report in the Negligence Action. The extent of the evidence in this regard adduced for the purposes of the Application is primarily set forth in the affidavit #2 of Mr. Cocks, sworn on March 19, 2026. Mr. Cocks, who for necessary context about a particular portion of his evidence is a police officer, deposes that:

> 20. As a personal representative of [the plaintiff] and her husband I have been involved in the decision making in this case where possible. In the fall of 2025, we met with our legal counsel to discuss discovery issues and additional steps necessary for the case. One issue raised was to provide the file [namely the file from Woolley & Co.] to a lawyer to provide an expert opinion on various aspect [*sic*] of the case.
>
> 21. In September and October of 2025, I was researching the issue and an expert and attempting to locate an expert. I was involved in a major file involving the Universal Ostrich Farm in Edgewood, BC. The hours were very long, and our members were stretched thin including me. I set the issue aside and made occasional phone calls to try and make arrangements until my health deteriorated.
>
> 22. Near the end of my work in Edgewood, I started to become ill and was diagnosed with cancer. This caused tremendous turmoil in our home life, and I underwent surgery on December 11, 2025. I was out of commission until recently I started to refocus on the court proceedings and my task of obtaining an expert for this case.

> 23. In February and March, I restarted my research and noted that it was a difficult task to find a lawyer to act as an expert against another lawyer. I have been discussing the issue with my wife Erika Mayer, and she was concerned with the progress although it became apparent there was nothing, we could do to force a lawyer to testify against another lawyer.
>
> 24. In early March I was able to contact two lawyers directly on the issue and actually receive a reply. I received an email from the Law Office and was advised that the earliest opportunity to take the steps to engage the lawyer willing to act on Erika's behalf would be the 26th of March 2026 at 10:00 am. I have confirmed this meeting, and my wife Erika MAYER will take the steps to retain the expert lawyer concerning this action on that date. I have reviewed the issue with Erika's lawyer in this matter, and he has directed me to provide him with the documents and not file the documents with the court. I understand there is a disclosure issue with experts we are respecting the process while pursuing the retainer of an expert to testify at the trial in September.

[69] In her affidavit sworn the following day, on March 20, 2026, the plaintiff deposes that:

> 5. I understand that there is a mixture of factual and legal issues in this claim against Ed [Mr. Woolley] which may require an expert to testify on various issues. My husband, Dan Cocks ("Dan") has taken on the role from the beginning of seeking to obtain an opinion from a lawyer on the issues of professional negligence. I have been advised by Dan and do believe that it is a difficult process to retain a lawyer to present expert evidence on the negligence of a lawyer. He ahs [*sic*] been able to make progress on the retention of a lawyer and we have a meeting scheduled near the end of March, 2026. As I understand the rules the review and report would be provided in time for the schedule [*sic*] trial in September 2026.

[70] Importantly in this regard, the prospect of the defendants bringing a summary trial application did not catch the plaintiff or her current counsel by surprise. In an affidavit affirmed by K.L., a legal administrative assistant employed by the defendants' counsel, there are email exchanges dating back to January 20, 2025 wherein the defendants advised that they anticipated receiving instructions to bring a summary trial application and were canvassing availability in the summer of 2025. Email discussions regarding this, as well as other matters including trial length and the possibility of a continuation of the plaintiff's examination for discovery continued in March 2025.

[71] The dates for the defendants' summary trial application on the 10-day Vernon assize commencing the week of March 23, 2026 were confirmed in an email from the defendants' counsel to the plaintiff's counsel on October 8, 2025.

[72] The Application itself was not filed until February 27, 2026, but there was approximately five months between October 8, 2025 and the hearing of the Application before me on April 1, 2026 for the plaintiff to have obtained an expert report in support of her claims against the defendants in the Negligence Action.

[73] In this regard, while I do have sympathy for the plaintiff that Mr. Cocks was busy with his career and had a serious health issue, the plaintiff is not self-represented in this proceeding. The plaintiff has counsel who has been on the record since January of 2023. That counsel also, as I noted above, drafted the initial pleadings in the Estate Action and was a witness at the trial before Justice Crossin. It ought, in my view, have been apparent that this case fell within the "general rule" of requiring expert evidence to support the plaintiff's claims.

[74] Further, I do not consider it unforeseen that some effort would be required to locate an expert with suitable qualifications who would be prepared to provide a report outlining their opinion that there was a breach (or breaches) of the standard of care (assuming of course that was their expert opinion) by the defendants. This is a reality in many professional negligence claims, and it simply underscores why timely attention needed to be given to this issue instead of outsourcing it to the plaintiff's husband who was, I accept, legitimately occupied with matters other than the Negligence Action in recent months.

[75] Even on the most favorable reading of the plaintiff and Mr. Cock's evidence, all that has occurred is that the plaintiff and Mr. Cocks were apparently able to arrange a meeting with a lawyer at the end of March who had not yet reviewed the file materials but might be prepared to be retained. That alone cannot, in my view, render the Action unsuitable for summary determination.

Suitability for Summary Determination: Analysis

[76] Upon consideration of R. 9-7, the aforementioned caselaw and the submissions of the parties, I conclude that the matter is suitable for summary determination and that it is not unjust to grant judgment in favour of the defendants.

[77] In reaching this conclusion, I find that the two most significant factors in my analysis of suitability are that the matter, on the evidence presented before me, is not overly complex, and credibility is not a crucial factor. Further, the summary trial was able to be conducted in a single day versus the eight days of trial currently scheduled, representing a significant cost efficiency. Further still, but for the lack of an expert report, all pre-trial procedures have been taken, including document disclosure and examinations for discovery. The defendants indeed rely upon portions of the plaintiff's discovery transcript in support of the Application (as R. 9-7 permits them to do). The plaintiff elected not to rely on any portions of the discovery of Mr. Woolley in opposing the Application, but that was the plaintiff's strategic choice. Mr. Woolley has been discovered and that transcript is presumably available.

Summary Determination of the Application: Analysis

[78] The defendants clearly owed the plaintiff a duty of care whilst representing her in the Estate Action. The outcome of the Estate Action was very unfavourable to the plaintiff with the result being that she effectively received no inheritance upon the passing of Mr. Mayer despite being his only biological child and having, for the last approximately 15 years of his life, a positive relationship with him.

[79] However, the plaintiff's evidence simply does not establish that any of the conduct of the defendants fell below the standard of care and even if it were, that such conduct is causally connected to a loss.

[80] Specifically, I find that the plaintiff's allegations are too vague to constitute a breach of any standard of care and, in any event, are untethered to the failure of her claims in the Estate Action. The allegations are also, in several instances,

demonstrably inconsistent with the documentary record and the reasons for judgment.

[81] The first example I shall specifically highlight relates to the alleged failure of Mr. Woolley to thoroughly cross-examine Ms. Breidt. The Trial Reasons make clear that Ms. Breidt's evidence was tested at trial and a concerted effort was made to highlight inconsistencies in her evidence. The fact that Justice Crossin ultimately concluded that Ms. Breidt's evidence was left "comfortably intact at the end of the day" cannot, simply based on the plaintiff's own assertions, amount to a breach of the standard of care.

[82] Similarly, it is not sufficient to allege that counsel failed to object to "irrelevant and inadmissible evidence during the trial" without providing particulars. The defendants cannot even provide a response to such an allegation beyond, as they have done, by providing a selection of pages from the trial transcript which indicate that Mr. Woolley did make certain objections during the trial, some of which were sustained. Again, the plaintiff did not establish a connection between the alleged failure to object and a loss.

[83] Further, the allegation that Mr. Woolley took no steps to advise the court about the possible issue of perjury whist Justice Crossin's decision was under reserve is disproven by the evidentiary record. The Re-Opening Application was prepared after, I accept, Mr. Woolley consulted with the Law Society given the *prima facie* privileged nature of the communications which the plaintiff obtained access to. Upon being notified that the Trial Reasons were going to be delivered the following day, the Re-Opening Application materials were promptly provided to Supreme Court Scheduling with a request that they be brought to Justice Crossin's attention. This did occur and the Re-Opening Application was, as I already described, heard and dismissed by Justice Crossin. This order was upheld on appeal.

[84] The same can be said for the allegation that Mr. Woolley failed to object to the removal of evidence from the record during the trial. This allegation arises out of a peculiar strategic decision made by Ms. Breidt's counsel at trial which Justice

Crossin discusses at the conclusion of the Trial Reasons: see paras. 184-197. To summarize briefly, as part of Ms. Breidt's case, her counsel attempted to read-in a small portion of the plaintiff's evidence from her examination for discovery even though the plaintiff had not been asked this question (for the purposes of possible impeachment) during her cross-examination. Justice Crossin correctly queried the appropriateness of this approach and Ms. Breidt's counsel sought to withdraw the admission. Mr. Woolley prepared written submissions opposing the withdrawal of the admission on the basis that it supported the merits of the plaintiff's case and that it ought to remain as part of the record, to be weighed, for this purpose. A copy of Mr. Woolley's written submissions are included in the application record before me. Justice Crossin concluded that there was no prejudice and allowed the withdrawal. The plaintiff's disagreement with Justice Crossin's conclusion does not support an allegation that the defendants breached the standard of care. Significantly, that disagreement also does not tether the allegation to any purported loss suffered by the plaintiff.

[85] With respect to the assertion that the defendants failed to amend the plaintiff's notice of civil claim in the Estate Action to seek relief upon the existence of mutual wills, that is correct. The notice of civil claim, which was drafted by the plaintiff's current counsel, did not seek that relief. Mr. Woolley probably, I accept for the purposes of these reasons even without expert evidence, ought to have amended the pleadings based upon certain comments made by Mr. Justice G.P. Weatherill in dismissing Ms. Breidt's summary trial application: see 2017 BCSC 1345 at paras. 29-34 and 37. However, notwithstanding that such an amendment was not made, as was noted by Justice Crossin, the "mutual wills" argument was raised in closing submissions and was substantively considered in the Trial Reasons: see paras. 135-156. Accordingly, any breach of the standard of care is not causally connected to any loss.

[86] The final allegations as against the defendants that I must specifically address in the most detail given its particular significance to Mr. Woolley's professional reputation are that Mr. Woolley appeared to fall asleep or lose

consciousness while laying his head down during the presentation of evidence at trial and that this was exacerbated by the defendants refusal to allow the plaintiff to participate in the trial in the manner she wished to. The evidence of the plaintiff regarding Mr. Woolley's state of wake/consciousness is based her observations from sitting behind Mr. Woolley in the gallery because Mr. Woolley did not permit her to sit at counsel table with him.

[87] Starting with the latter proposition, it is possible for counsel to request leave for a party to sit at the counsel table during a trial. However, the reason why leave is required is because this is not the normal practice. To the very best of my recollection, such leave has only been sought in one trial over which I have presided since I was appointed to the bench. I recall that instance because it was based upon the acoustics of a particular courtroom combined with the party's hearing difficulties. I will accede that it is possible it has occurred on other occasions, but it is not the norm. The fact that Mr. Woolley did not seek leave to have the plaintiff sit at counsel table is thus of no import, in my view, except for its connection to the allegation that he was proverbially "asleep at the wheel".

[88] This allegation, as I already noted, is very serious. It is supported only by the affidavit of the plaintiff. There is, very importantly, no corroborating evidence. Specifically, there is no corroborating evidence from any other person in the courtroom during the trial that they witnessed this (or even conduct which might be consistent with or even suggestive of this). Nor, very importantly, has the plaintiff pointed me to any portion of the transcripts from the trial (which the plaintiff likely has because of the appeals that were filed but in any event were available to her to obtain since the defendants have referred to portions of them) in which Justice Crossin made any comment regarding Mr. Woolley's state of attention to the proceedings.

[89] In this regard, trial judges have a multi-faceted role during a trial. The judge must be, *inter alia*, listening to counsel asking the questions, watching and listening to the witness giving evidence, potentially reviewing exhibits and, usually, making

contemporaneous notes. It is, of course, very possible that something might occur in the courtroom that a trial judge did not personally observe.

[90] However, what is asserted by the plaintiff was not a fleeting moment of inattention. It is alleged Mr. Woolley spent the better part of two days with his head down either asleep or losing consciousness at the counsel table. That is not something, in my view, that would be easily missed. Accordingly, in the absence of corroborating evidence, I find that the bald allegations made by the plaintiff based upon her observations of Mr. Woolley from behind are not proven. Further, there is no suggestion that any better evidence would be available if this matter proceeded to a conventional trial from other witnesses. Moreover, if the plaintiff had obtained any admission(s) from Mr. Woolley that there was merit to these allegations in his examination for discovery, such admission(s) would presumably have been tendered as part of the plaintiff's case in opposing the Application. They were not.

Conclusion and Costs

[91] In conclusion, for the reasons set out herein, I am satisfied that the defendants are entitled to the relief sought in the Application, namely the dismissal of all claims made by the plaintiff in both contract and tort for professional negligence, as against the defendants in this proceeding. The plaintiff has not established, on the balance of probabilities, that any of the conduct of the defendants fell below the standard of care, and even if it did, that it is causally connected to a proven loss. Compounding this is the lack of evidence adduced by the plaintiff to support her alleged damages (some of which are not recoverable at law in any event).

[92] Costs, pursuant to the *SCCR*, are awardable at the discretion of the presiding justice. Subject to said judicial discretion, the general principle is that costs are awarded to the successful party: see R. 14-1(9). "Success", as it is defined for the purposes of costs, means substantial success. This is the same for trials, summary trials and petitions.

[93] In *Tisalona v. Easton*, 2017 BCCA 272, the Court of Appeal stated the law regarding costs as follows:

> [71] [Rule 14-1(9)] … grants unqualified discretion to depart from the *prima facie* rule that the successful litigant should be awarded its costs.

[94] This discretion must of course be exercised judicially, not arbitrarily or capriciously. An error in principle in an order departing from the usual rule will justify intervention by the Court of Appeal: see *Brito (Guardian ad litem of) v. Woolley*, 2007 BCCA 1. Subject to such an error, the discretion is very broad.

[95] Having obtained the relief sought in the Application, the defendants are presumptively entitled to their costs. I further see no reason in the circumstances to exercise my discretion to deny the defendants the benefit of a costs order.

[96] The defendants are accordingly entitled to their costs of the Action at Scale B of Appendix B of the *SCCR* on the basis that the matter was of ordinary difficulty. Offset against this award shall be the plaintiff's costs of the Dismissal Application which Justice Gibb-Carsley ordered that the plaintiff is entitled to, also at Scale B, in any event of the cause: see para. 53 of the Dismissal Reasons.

"Hardwick J."