

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Funk v. McLurg*,
2023 BCSC 656

Date: 20230424
Docket: M163160
Registry: Victoria

Between:

Nicole Funk

Plaintiff

And

Carol Jean McLurg

Defendant

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment on Costs

Counsel for the Plaintiff:

D. Juteau

Counsel for the Defendant:

T. C. Chui

Place and Date of Hearing

Victoria, B.C.
October 5, 2022

Written Submissions of the Plaintiff:

Undated

Written Submissions of the Defendant:

January 27, 2023

Place and Date of Judgment:

Victoria, B.C.
April 24, 2023

I. OVERVIEW

[1] This case was heard and decided by Justice Steeves in reasons for judgment indexed at 2022 BCSC 1345, prior to his retirement from the Court. The parties have made additional submissions regarding costs and the plaintiff argues that she is entitled to double costs.

[2] In his reasons for judgment, at paras. 174–177, Steeves J. wrote:

174 The defendant's negligence caused the August 9, 2014 motor vehicle accident and the injuries and symptoms suffered by the plaintiff from that accident.

175 The plaintiff's injuries and symptoms justify damages in the following amounts (each to be reduced by 20% as described below):

Non-pecuniary	\$125,000.00
Past income loss	\$130,000.00
Future income loss	\$950,000.00
Future care	\$66,663.06
Special damages	\$32,274.00
Total	\$1,303,937.06

176 As a result of a previous accident in 2008, the plaintiff suffered injuries similar to the ones in the 2014 accident (including treatment for the 2008 injuries months before the 2014 accident). The 2008 injuries would have continued regardless of the 2014 accident. Each head of damages will be reduced by 20% to reflect that fact.

177 The plaintiff has been substantially successful and, subject to any application made within 60 days of this judgment (or appeal judgment), she is entitled to her costs at scale B against the defendant.

[3] The award for special damages was incorrect, and has been amended from the figure of \$32,274 to \$37,274.

[4] 80 percent of the damages amounts to the sum of \$1,047,149.65.

[5] Although the parties failed to apply to argue the matter of costs within the 60 days set out in the reasons of Steeves J., I abridged the time within which they could do so. I have now received their submissions, and the time for a response submission by the plaintiff has expired.

II. BACKGROUND

[6] On September 20, 2021, the plaintiff offered to settle her claim for the sum of \$1,680,000 plus taxable costs and disbursements, so long as the offer was accepted prior to the commencement of the trial.

[7] On November 25, 2021, the plaintiff offered to settle her claim for the sum of \$1,200,000 plus taxable costs and disbursements, so long as the offer was accepted prior to the commencement of the trial.

[8] On November 26, 2021, the plaintiff offered to settle her claim for the sum of \$950,000 plus taxable costs and disbursements, so long as the offer was accepted prior to the commencement of the trial.

[9] The trial in this matter began on November 29, 2021.

[10] On December 14, 2021, the plaintiff offered to settle her claim for the sum of \$1,250,000 plus taxable costs and disbursements, and continued Part 7 Benefits. The offer was left open until 4:00 p.m. on December 24, 2021.

[11] For her part, the defendant also made a number of offers to settle the case.

III. DISCUSSION

[12] Rule 9-1(5)–(6) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*], provides direction with respect to offers to settle civil claims, and provide the court with considerable discretion if such offers are made.

[13] The plaintiff contends that her November 26, 2021 offer to settle her claim for the sum of \$950,000 plus taxable costs and disbursements ought to have been accepted by the defendant because:

- a) it was made a day after the parties had exchanged offers to settle, and required no fresh analysis;

- b) the defendant was fully insured, and well positioned to afford the risk of proceeding to trial, and had sufficient time to evaluate the offer to settle, which was lower than the amount that the plaintiff recovered following the trial; and
- c) she should receive double costs from her offer of November 26, 2021 until the date of judgment to accomplish the object of Rule 9-1.

[14] The defendant contends that the plaintiff should recover her costs at the normal Scale B of Appendix B of the *Rules*, or alternatively increased costs only until the plaintiff's offer to settle of December 14, 2021, which was more than \$200,000 greater than the amount awarded by Steeves J.

[15] Parties who give or receive an offer to settle are expected to assess the risk of doing better or worse than the settlement offer at trial: *Jackson v. Yusishen*, 2014 BCSC 406 at para. 28.

[16] As discussed in *Bailey v. Jang*, 2008 BCSC 1372 at para. 18, the Court's discretion is constrained by the considerations outlined in Rule 9-1(6):

- 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; and
- d) any other factor the court considers appropriate.

[17] In *Brewster v. Li*, 2014 BCSC 463 at paras. 15–16, Justice Voith explained:

15 The regime in Rule 9-1 can advance various important objects: see for example *Lakhani v. Elliott*, 2010 BCSC 281 at paras. 11-16; *Bailey* at para. 18. Its dominant and overarching object, however, is to promote reasonable settlements and to attach some consequence to the failure of a

party to accept a reasonable settlement: *Bennett* at para. 28, *Gonzales v. Voskakis*, 2013 BCSC 675 at para.13.

16 This dominant object was summarized in *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16, where the court said at para. 16:

It seems to me that the trend of recent authorities is to the effect that the costs rules should be utilized to have a winnowing function in the litigation process. The costs rules require litigants to make careful assessments of the strength or lack thereof of their cases at commencement and throughout the course of litigation. The rules should discourage the continuance of doubtful cases or defences. This of course imposes burdens on counsel to carefully consider the strengths and weaknesses of particular fact situations. Such considerations should, among other things, encourage reasonable settlements.

[18] The plaintiff relies on the decision in *D. (J.) v. Chandra*, 2014 BCSC 1272, where the plaintiff was awarded double costs after both parties exchanged what were determined to be uncomplicated offers to settle, the last of which was delivered by the plaintiff late on a Friday preceding the start of the trial the following Monday. One of the factors relied upon by Justice Griffin was the fact that the defendant in the case was represented by counsel retained by ICBC whom she considered were able to evaluate and respond to the plaintiff's offer to settle within hours.

[19] The plaintiff also refers to *Bennett v. Scanlan*, 2010 BCSC 50, where Justice Dardi found that a period of two days was sufficient to allow a plaintiff to assess whether or not to accept a defendant's second offer to settle, having had the time to consider the first offer.

[20] The defendant argued that determining whether the plaintiff's offer of November 26, 2021 should have been accepted depends heavily upon the plaintiff's credibility, particularly with respect to the expert evidence that relied upon her own report of her injuries and condition. While this was a consideration that went into Justice Mayer's reasoning in *Mitchell v. Fonseca*, 2020 BCSC 395, I am not persuaded that it should determine the outcome in this case. The plaintiff's credibility being at issue does not distinguish this case from the vast majority of personal injury claims that come before this Court.

[21] Of greater importance is the fact that there were a number of relevant factors in the assessment of the plaintiff's losses that were unrelated to the accident in which the plaintiff and the defendant were involved. These considerations include the factors that led to the award for loss of future income earning capacity at para. 137 of the reasons for judgment of Steeves J. and the 20 percent reduction in the plaintiff's award at para. 176 of those reasons.

[22] While there may, and often can be reasons why multiple offers to settle can and should be made, parties who engage in the creation of a moving target for their opponents must accept that such offers may affect their entitlement to costs.

[23] The principles of offer and acceptance dictate that an offer to settle may, if not must, mean that each prior offer is revoked by a subsequent offer. I find that the plaintiff's offer of December 14, 2021 revoked all prior offers in this case.

[24] Serial offers such as were made in this case suggest that neither party was able to accurately assess the value of a plaintiff's claim. To penalize the defendant when the plaintiff altered her offer to settle to a far higher figure during the trial would improperly ignore the requirement in Rule 9-1(6)(a) that the offer was one that ought reasonably to have been accepted, when it was made, or on any later date.

[25] The plaintiff's offer to settle of November 26, 2021 was only made three days before trial, and was not open for acceptance after the trial began. The fact that further offers followed it persuades me that it was not unreasonable for the defendant not to have rushed to accept the offer over the weekend when it remained open for acceptance.

[26] I find that the plaintiff is not entitled to increased costs in this case. I agree with Steeves J. and award the plaintiff costs at Scale B of Appendix B of the *Rules*.

“The Honourable Chief Justice Hinkson”