IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fryer v. Village of Nakusp,* 2023 BCSC 478

Date: 20230328
Docket: M55017
Registry: Vernon

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Between:

Douglas Charles Fryer

Plaintiff

And:

Marilyn Anne Massey and Village of Nakusp

Defendants

Before: The Honourable Madam Justice Morellato

Reasons for Judgment - Costs

Counsel for the Plaintiff:	M.J. Yawney, K.C. A.V. Jaquish
Counsel for the Defendant M.A. Massey:	D.M. Daman R.L. LaGroix
Place and Dates of Hearing (VIA TEAMS):	Vernon, B.C. June 21, 2022 September 2, 2022 September 29, 2022
Place and Date of Judgment:	Vancouver, B.C. March 28, 2023

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I. INTRODUCTION

[1] Mr. Fryer was seriously injured when he was struck by the defendant's car while walking to a friend's home one evening ("Accident'). Following the issuance of my Reasons for Judgment on March 28, 2021, in which Mr. Fryer was substantially successful, he brought this application for double costs. Counsel for the defendant also brought an application seeking deductions of Mr. Fryer's damage award pursuant to s. 83 of *the Insurance (Vehicle) Act* ("s. 83 Application"). The two applications were heard together.

[2] These reasons on the issue of double costs are being released simultaneously with my reasons on the defendant's s. 83 Application.

II. BACKGROUNG FACTS

[3] Mr. Fryer's damages were assessed as follows:

	Item	**Amount**
(a)	Non-Pecuniary Damages:	$265,000
(b)	Cost of Future Care:	$469,474
(c)	Special Damages:	$100,058.80

[4] Mr. Fryer's damages were reduced by 10% as a result of my finding that he was contributorily negligent, resulting in a total award of $751,079.60.

[5] I should note that there was a typographical error in my original decision, indexed as 2022 BCSC 497*,* which stated that the Special Damages were $110,058.80, rather that the $100,058.80 that were claimed and proven. This inadvertent error was acknowledged by the defendants and was corrected by court order dated September 2, 2022. The parties also agreed to a consent order on September 2, 2022 that the plaintiff was entitled to prejudgment interest on non-pecuniary damages of $3,138.54.

[6] Two letters were issued by the plaintiff, prior to the commencement of trial, that contained formal settlement offers. The first letter was sent on January 14,

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2021, approximately two weeks prior to the trial date that at that point was scheduled to commence on February 1, 2021. This January 14, 2021 offer to settle stated, in part:

> 1) The Plaintiff will be entitled to payment by the defendant of $250,000 (the "Settlement Payment"); and
>
> 2) The Plaintiff will be entitled to costs and disbursements in accordance with the *Rules of Court* and this offer to settle (the "Settlement Costs").
>
> The Settlement Payment
>
> 1) Is offered excluding any advances paid to date including Part 7 benefits paid
>
> 2) Includes court order interest; and
>
> 3) Exclude the Settlement Costs.
>
> The Plaintiff reserves the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgement on all other issues in this proceeding.
>
> *This offer is open for acceptance until the Friday before trial, January 29, 2021 at 4 pm., at which time it is withdrawn.*
>
> [Italics in the original]

[7] The trial of did not proceed as originally scheduled on February 1, 2021. After the plaintiff issued his January 14, 2021 settlement offer, the defendant, Ms. Massey, requested that she be permitted to appear at trial remotely, by video-link. She had not been vaccinated against COVID-19, was elderly, and had given-up driving after the Accident. Accordingly, she could not drive herself from her home in Nakusp to the courthouse, which was miles away. However, counsel for Mr. Fryer was concerned about Ms. Massey appearing by video-conference, rather that in-person for her cross-examination. Counsel for Ms. Massey suggested the trial be adjourned to a later date and the parties agreed.

[8] On February 2, 2021, the trial was adjourned by consent to July 5, 2021. Counsel agreed at the hearing of this application that the parties were prepared to proceed to trial on February 1, 2021 but for Ms. Massey not being able to appear in person at that time. The pleadings were closed, document discovery and examinations for discovery were complete, and expert reports had been exchanged.

[9] On July 2, 2021, the plaintiff issued a second letter, which offered to settle the apportionment of liability between the parties. That letter stated, in part:

> This letter is without prejudice to and expressly does not alter or revoke any offers previous or subsequent to quantum in this matter.
>
> The Plaintiff offers to settle the apportionment of fault of his injuries on the following basis:
>
> 1) The Plaintiff's degree of fault is 25%; and
> 2) The Defendant Massey's degree of fault is 25%.
>
> This offer is not intended to resolve any issues concerning costs and disbursements in this action, which issues will be resolved at trial concerning the quantum of damages.
>
> The Plaintiff reserves the right to bring this offer to the attention of the court for consideration in relation to costs after the court has rendered judgment on all issues in the proceeding. This offer is open for acceptance at any time before 9:00 a.m. Pacific Standard Time on the first day of the trial in this proceeding, after which the offer expires.

[10] Counsel for Ms. Massey received this "liability offer" at 11:42 a.m., on a Friday and the trial was scheduled to commence the following Monday, July 5, 2021. Counsel for the defendant points out that this provided him with 0.5 business days to consider Mr. Fryer's liability offer.

[11] The defendant agrees that Mr. Fryer's total damages award at trial, excluding any deduction awarded pursuant to s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, was $751,079.60.

III. LEGAL FRAMEWORK AND DISCUSSION

[12] Rule 9-1(4) of the *Supreme Court Civil Rules* provides that a court may award double costs in the exercise of its discretion to award costs. Rule 9-1 (5) provides considerable options and guidance to the Court in the exercise of its discretion:

> Cost options
>
> (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
>
> (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps

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> taken in the proceeding after the date of delivery or service of the offer to settle;
>
> (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
>
> (c) award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
>
> (d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle.

[13] Furthermore, Rule 9-1(6) of the *Supreme Court Civil Rules* outlines a number of considerations which inform the exercise of the Court's discretion in awarding double costs where an offer to settle has been made pursuant to the *Rules*:

> (6) 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.

[14] In *Hartshorne v. Hartshorne,* 2011 BCCA 29, our Court of Appeal affirmed the punitive element underlying a double costs award, and reasoned:

> [25] An award of double costs is a punitive measure against a litigant for that party's failure, in all of the circumstances, to have accepted an offer to settle that should have been accepted. Litigants are to be reminded that costs rules are in place "to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer" [cites omitted]. In this regard, Mr. Justice Frankel's comments in *Giles* are apposite….

[15] In *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282, Justice Frankel reasons, at para. 74, that the purposes the costs rule exists must be kept in mind; in addition to indemnifying a successful litigant, those purposes include:

> a) deterring frivolous actions or defences;
>
> b) encouraging conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect;
>
> c) encouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases;
>
> d) facilitating a winnowing function in the litigation process by requiring litigants to make a careful assessment of the strength or lack thereof of their cases at the commencement and throughout the course of the litigation", and by "discourag[ing] the continuance of doubtful cases or defences" …

[16] Of significance, the Court in *Hartshorne* also reasoned, at para. 27, that in assessing whether the offer to settle was one that ought reasonably to have been accepted, the Court must not have regard to the award that was ultimately made; rather, the Court must consider whether, at the time the offer was open for acceptance, it would have been reasonable for the offer in question to have been accepted: see also *Bailey v. Jang,* 2008 BCSC 1372 at para. 24; *A.E. v. D.W.J.*, 2009 BCSC 505 at para. 55. The reasonableness of the offer may be informed by such factors as the timing of the offer, whether it could be easily evaluated, and whether some rationale for the offer was provided: see *Hartshorne* at para 27.

[17] I am also mindful that while the double costs rule should only be a penalty for unreasonable litigation and not simply a penalty for an inaccurate prediction or assessment of the outcome: see *Anderson v. Kozniuk*, 2016 BCSC 783 at paras. 5-6; *Fan (Guardian at litem of) v. Chana*, 2009 BCSC 1497 at para. 19. This is a key factor in the context of this case.

[18] Judges clearly have the discretion in such cases to consider a broad range of factors and there is no mandatory or prescriptive list that necessarily informs the

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assessment of double costs. Our discretion must, of course, be exercised in a just and principled manner.

[19] Having carefully considered the parties respective submissions coupled with the applicable Supreme Court *Civil Rules* and jurisprudence, I am not persuaded that it would be appropriate to exercise my discretion to award double costs in this case.

[20] By the time the trial began on July 5, 2021, the formal offer made on January 14, 2021, had expired months earlier on January 29, 2021. Accordingly, at the time the trial commenced, there was no formal settlement offer outstanding: see *Bergen v. Gaetz,* 2016 BCSC 896. This created some ambiguity as to whether the January offer was still in place.

[21] Moreover, this was a challenging case for both parties, requiring the examination and cross-examination of witnesses and a judicial determination. I cannot conclude that this litigation was unreasonable or unnecessary. As such, given the unique circumstances of this case, even in light of the January 2021 settlement offer, I decline to penalize the defendant simply for an inaccurate prediction or assessment of the outcome of this case.

[22] I am mindful of the decision of the Court in *ICBC v. Patko*, 2009 BCSC 578. I accept that there are cases where a Court may exercise its discretion to award to double cost even though the time frame-frame for accepting the offer has elapsed, particularly where the party considering the offer has had ample time to consider it. Although I am of the view that the two week time-frame in the instant case was sufficient for the defendant to consider the plaintiff's January 14, 2021 settlement offer, the ambiguity relating to its continued application is of concern, particularly in light of the challenging factual matrix before me, which did not, in my view, suggest a clear outcome *prior to trial* warranting a double costs penalty. Accordingly, I am not persuaded that *Patko* is determinative on the facts before me.

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[23] Regarding the July 2, 2021 offer that referred to the apportionment of liability, it is significant that it was made on the eve of trial, providing the defendant with about half a business day to consider the offer. I agree with counsel for the defendant that this time restriction did not provide a reasonable opportunity to consider the offer or obtain the necessary instructions. Therefore, the defendant should not be penalized for declining this offer: see *Parker v. Martin*, 2017 BCSC 1161 at para. 26.

[24] Nevertheless, it is clear that Mr. Fryer is entitled to his costs, having been substantial successful. His costs shall be at Scale B but shall be reduce by 10% to reflect my finding of Mr. Fryer's contributory negligence. I see no basis in this case to depart from the usual rule that costs should be awarded in the same proportion as the parties' respective liability, according to s. 3(1) of the *Negligence Act,* R.S.B.C.1996, c. 333.

[25] The parties shall bear their own costs of this application.

"MORELLATO J."

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