IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wilson v. Koch,*
2025 BCSC 2185

Date: 20251105
Docket: S212996
Registry: Vancouver

Between:

Matthew Timothy Wilson

Plaintiff

And

Doreen Koch, Colin Jenkins (Deceased) aka Collin Jenkins, Woody Kuraoka, and Century 21 Executives Realty Ltd.

Defendants

And

Colin Jenkins (Deceased) aka Collin Jenkins, Woody Kuraoka, Steven Tate, and Century 21 Executives Realty Ltd.

Third Parties

Before: Associate Judge Hughes

Reasons for Judgment

Counsel for Penny Anne Treen, Personal Representative of the Estate of Doreen Koch, Deceased:	J.D. Keeley
Counsel for Defendants and Third Parties:	S.J. Gladders
Place and Date of Hearing:	Kamloops, B.C. July 14, 2025
Place and Date of Judgment:	Vancouver, B.C. November 5, 2025

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Introduction

[1] By notice of application filed April 11, 2024, the applicant Penny Anne Treen, in her capacity as the personal representative of the Estate of Doreen Koch (the "Estate"), seeks two orders:

a) the style of cause be amended to add Penny Anne Treen as the personal representative of the Estate; and

b) the Third Party Notice originally filed by Doreen Koch ("Ms. Koch") on May 25, 2021 (the "TPN") be amended in the form attached as Schedule A to the notice of application.

[2] The first order sought is unopposed. Most of the proposed amendments to the TPN are opposed by the third parties Woody Kuraoka ("Mr. Kuraoka"), Steven Tate and Century 21 Executives Realty Ltd. (collectively the "Realtors"). The plaintiff has filed an application response in which he takes no position on the application.

[3] The delay in having this application heard is no fault of the parties or their counsel. Counsel advised that this application has been "bumped" six times due to lack of judicial resources before finally getting on for hearing on July 14, 2025.

Background

[4] This action was commenced March 26, 2021, and has a somewhat convoluted background. That background is set out in detail in a decision of this court indexed as *Wilson v. Koch*, 2025 BCSC 782, in which Associate Judge Robertson determined the scale of costs to which the defendant Doreen Koch (now deceased and represented by her Estate) is entitled following the plaintiff's discontinuance of his claims against her. I adopt that background and will not repeat it here.

[5] Some additional background is important to set the current application in context.

[6] In the TPN filed May 25, 2021, Ms. Koch claims contribution and indemnity from the third parties, as well as indemnification or contribution for her costs of defending the action on the basis that the third parties were negligent and that Mr. Jenkins and Mr. Kuraoka breached their fiduciary duties to Ms. Koch.

[7] On July 11, 2023, Ms. Koch served a notice to mediate. One week later, on July 18, 2023, Ms. Koch provided her proposed amended TPN to the plaintiff and the third parties for their consent. The third parties did not consent to the proposed amendments.

[8] The mediation took place on December 18, 2023, and resulted in the plaintiff settling his claims against all defendants except for Ms. Koch. The details of that settlement are unknown to the Estate. On April 24, 2024, the plaintiff obtained an order discontinuing the action, with costs to Ms. Koch in an amount to be determined. That determination was the subject of the hearing before Associate Judge Robertson.

The proposed amendments

[9] The disputed amendments fall into three categories:

a) Adding a claim of knowing assistance as against Mr. Kuraoka;

b) Amending the relief sought to claim damages, including aggravated, punitive and special damages, directly against the Realtors for negligence and, in the case of Mr. Kuraoka, breach of fiduciary duty and knowing assistance; and

c) Adding a claim for aggravated damages for mental anguish and emotional distress suffered by Ms. Koch.

[10] Additional amendments consequent to substituting Ms. Treen as the representative of the Estate are not contested.

[11] The Realtors say that the claim of knowing assistance raises a new cause of action without pleading the necessary material facts in support and after the expiry of the limitation period. With respect to the claims for aggravated, punitive and special damages, the Realtors say that there is no basis for such claims, and that the claim for special damages is really a claim for special costs based on pre-litigation conduct which is bound to fail. Finally, they submit that the claim for damages for non-pecuniary losses is also bound to fail.

Legal Framework

[12] Rule 6-1(b) provides that, after a notice of trial is served, a party may amend the whole or any part of a pleading with the written consent of the parties or with leave of the court.

[13] The parties agree that the general principles regarding applications to amend pleadings are those set out in *Beruschi v. British Columbia*, 2020 BCSC 1531:

> [56] The legal test on an application to amend pleadings is not controversial. The general principles governing amendments were summarized in *Peterson v. 446690 B.C. Ltd.*, 2014 BCSC 1531 at para. 37 as follows:
>
> > [37] Finally, the general principles arising on an application to amend pleading can be summarized as follows:
> >
> > (a) Amendment to pleadings ought to be allowed unless pleadings fail to disclose a cause of action or defence: *McNaughton v. Baker*, [1988] 24 B.C.L.R. (2nd) 17 [(C.A.)].
> >
> > (b) Amendments are usually permitted to determine the issues between the parties and ought to be allowed unless it would cause prejudice to party's ability to defend an action: *Levi v. Petaquilla Minerals Ltd.*, 2012 BCSC 776.
> >
> > (c) The party resisting an amendment must prove prejudice to preclude an amendment, and mere, potential prejudice is insufficient to preclude an amendment: *Jones v. Lululemon Athletica Inc.,* 2008 BCSC 719.
> >
> > (d) Costs are the general means of protecting against prejudice unless it would be a wholly inadequate remedy.
> >
> > (e) Courts should only disallow an amendment as a last resort*: Jones, McNaughton, Innoventure S & K Holdings Ltd. et al. v. Innoventure (Tri-Cities) Holdings Ltd. et al.,* 2006 BCSC 1567.

[14] The decision to grant leave to amend pleadings is discretionary. In exercising this discretion, the court must ultimately consider what is just and convenient to all parties: *Eastern Platinum Limited v. Cameron*, 2020 BCSC 1353 [*Eastern Platinum*] at para. 36.

[15] Where the proposed amendments raise a new cause of action and it is possible that the limitation period has expired, the court should determine whether it is just and convenient to allow the amendments despite the expiry of the limitation period: *Eastern Platinum* at para. 37.

[16] The key question in determining whether a new cause of action is being pleaded is not whether a new remedy is sought but rather whether the underlying matrix of material facts entitling one person to obtain a remedy is new: *Eastern Platinum* at para. 45.

[17] If the pleadings disclose a new cause of action, whether it is just and convenient to allow the amendment in any event involves a consideration of the following factors:

a. the length of the delay in applying for the amendments;
b. the reasons for the delay;
c. the expiry of the limitation period;
d. the prejudice or absence of prejudice to an opposing party; and
e. the extent of the connection between the proposed amendments in the existing claims.

Eastern Platinum at para. 68.

Analysis

Knowing assistance

[18] A claim for knowing assistance with a breach of fiduciary duty is a claim of fraud. It is a serious wrong that requires actual and not constructive knowledge by the participant: *DBDC Spadina Ltd. v. Walton*, 2018 ONCA 60 [*DBDC Spadina*] at para. 237 (dissent), aff'd *Christina DeJong Medicine Professional Corp. v. DBDC Spadina Ltd.*, 2019 SCC 30.

[19] If the party pleading relies on fraud, full particulars, with dates and items if applicable, must be stated in the pleading: Rule 3-7(18). The court will not sanction amendments which violate the rules governing pleadings: *Kwikwetlem First Nation v. British Columbia (Attorney General),* 2021 BCCA 311 at para. 166.

[20] The elements of knowing assistance in a breach of fiduciary duty are (1) a fiduciary duty; (2) a fraudulent and dishonest breach of the duty by the fiduciary; (3) actual knowledge by the stranger to the fiduciary relationship of both the fiduciary relationship and the fiduciary's fraudulent and dishonest conduct; and (4) participation by or assistance of the stranger in the fiduciary's fraudulent and dishonest conduct: *DBDC Spadina*, para. 211.

[21] In the case at bar, Ms. Koch pleads that her son, Mr. Jenkins, owed her a fiduciary duty by virtue of a power of attorney granted to him. She further alleges that Mr. Jenkins fraudulently and dishonestly breached that fiduciary duty by entering into a contract to sell property owned by Ms. Koch, without her knowledge, consent or authorization. The "stranger" in this knowing assistance scenario is the listing realtor, Mr. Kuraoka.

[22] The proposed pleading does not provide any particulars of actual knowledge on the part of Mr. Kuraoka, nor does the further amended response to civil claim ("FARCC") filed by Ms. Koch on May 10, 2023, which is incorporated by reference in the TPN.

[23] The Estate argues that para. 55 of the FARCC pleads constructive fraud, and that the material facts pleaded in support of the claim of constructive fraud also support a claim of wilful blindness on the part of Mr. Kuraoka, which is equivalent to actual knowledge of the fiduciary's fraud: *Gold v. Rosenberg*, [1997] 3 S.C.R. 767 at para. 32.

[24] The material facts pleaded in the FARCC that the Estate says also support the claim of knowing assistance are set out in paras. 22, 24, 51, 52 and 54. The key portion is para. 24:

> 24. Despite visiting with Ms. Koch at her home on a regular basis, at no time did Mr. Kuraoka:
>
> (a) discuss with Ms. Koch the prospect of listing or selling her Property;
>
> (b) present the Listing Agreement to Ms. Koch for her signature;
>
> (c) verify with Ms. Koch that Mr. Jenkins was authorized to act on her behalf concerning the sale of her Property;
>
> (d) ask Ms. Koch to view or obtain a copy of the POA.

[25] While wilful blindness might possibly be inferred from the foregoing paragraph, it is not specifically pleaded in the FARCC or in the TPN. As noted previously, fraud must be specifically pleaded, with particulars, and cannot be inferred. The facts pleaded in para. 24 could just as easily be interpreted as Mr. Kuraoka being sensitive to the fact that selling the property was difficult for Ms. Koch and that she didn't want to talk about it, which was why she entrusted the task to her son.

[26] The proposed pleading states that Mr. Kuraoka had actual knowledge or was recklessly or wilfully blind to Mr. Jenkins' breaches of his fiduciary duty, but no material facts are specifically pleaded to support such statements. There are no facts pleaded setting out how Mr. Kuraoka was specifically aware of Mr. Jenkins' fraudulent conduct, by way of conversation or otherwise.

[27] Accordingly, I agree with the Realtors' submissions that the proposed pleading does not include the material facts required to support a claim of knowing assistance, and therefore the proposed amendment in this respect must be disallowed for failure to disclose a cause of action.

Special damages

[28] The proposed amendment also seeks to add a claim for special damages, specifically the litigation costs incurred in defending the plaintiff's claim. The Estate acknowledges that this claim is somewhat novel but submits that it is not bound to fail.

[29] The Estate's submission is that Ms. Koch's only recourse, when served with the notice of civil claim, was to vigorously defend the plaintiff's claim for specific performance. In doing so, she necessarily incurred legal costs. The Estate says that, but for the wrongful actions of the Realtors, Ms. Koch would not have been put in a position where she was forced to incur such costs. She therefore seeks full indemnity from the Realtors for her legal costs.

[30] The Estate draws an analogy between this situation and that of the plaintiff in *Wilson v. Saskatchewan Government Insurance*, 2012 SKCA 106. In *Wilson*, the defendant, a government insurer, notified Ms. Wilson that it had decided to terminate her "no-fault" benefits six months into the future, but it then retracted that decision after Ms. Wilson had commenced litigation and before the benefits stopped. The trial judge found that the insurer had breached its duty of good faith to Ms. Wilson, and to remedy the breach the judge awarded punitive damages and costs.

[31] On appeal, the court overturned the award of punitive damages but substituted an award in the same amount for reasonable mitigation expenses being the legal fees and disbursements incurred by Ms. Wilson. In doing so, the court said:

> [57] This is not an instance of "mitigate or litigate" (see: *Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation and Baud Corporation, N.V.*, 1978 CanLII 16 (SCC), [1979] 1 S.C.R. 633, at p. 664). Here, the nature of the contract of insurance and the statutory regime set out in *The Automobile Accident Insurance Act*, R.S.S. 1978, c. A-35, required that Ms Wilson litigate to mitigate the loss of benefits she rightly anticipated would flow from SGI's decision to terminate her benefits. Simply put, in these peculiar circumstances, litigation was the sole means of mitigation available to Ms Wilson, and she was entirely successful in that respect. By her efforts, she fully mitigated or avoided any loss or damage resulting from SGI's anticipatory breach of the express terms of the contract.
>
> [58] Nevertheless, as a general rule, reasonable expenses incurred by an innocent party in the mitigation of a breach of contract are recoverable from the breaching party (see: Pitch and Snyder, *Damages for Breach of Contract*, 2nd ed., loose-leaf (Toronto, ON: Carswell, 1989), at para. 8-15). Here, Ms Wilson's mitigation expenses were her legal fees and the disbursements she incurred in the course of litigation, which include the cost of the medical reports her counsel obtained and used in his efforts to cause SGI to reverse its decision. These expenses are allowable, in my opinion, as damages flowing from SGI's breach of the duty of good faith because there is a direct link between SGI's wrong and the litigation expenses Ms Wilson incurred in mitigation, it was reasonable for Ms Wilson to attempt to mitigate SGI's

> anticipatory repudiation of the insurance contract in the manner in which she did and, therefore, the expenses were foreseeable as damages and must be paid by SGI (see: *Farish v. National Trust Co. Ltd.* (1974), 1974 CanLII 1102 (BC SC), 54 D.L.R. (3d) 426 (B.C.S.C.) at paras. 60-61.)

[32] While *Wilson* dealt with breach of contract, the Realtors did not provide any authority for the proposition that special damages cannot be sought against a third party in a claim for contribution and indemnity on the basis of negligence. The Realtors' submissions focussed on special costs, which would only be claimable in relation to a party's conduct during the litigation: *Smithies Holding Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at para. 134.

[33] The Realtors submit that every defendant who files a third party claim is alleging that someone else is responsible for any losses suffered by the plaintiff, and that Scale B costs are the appropriate award. This submission does not address the argument raised by the Estate with respect to legal costs as reasonable mitigation expenses.

[34] Amendments should be allowed generously, with the question being whether it is plain and obvious that the proposed amendments are bound to fail. In assessing that question, it is not determinative that the law has not yet recognized a particular claim. The court must be generous and err on the side of permitting an arguable claim to proceed to trial: *British Columbia (Director of Civil Forfeiture) v. Violette*, 2015 BCSC 1372 at para. 40.

[35] With respect to the amendments regarding a claim for special damages, no new material facts are pleaded or necessary. This is not a new cause of action, but rather a claim for a new remedy based on already-pleaded facts. As such, no limitation issue arises.

[36] Although somewhat novel in this context, I am not convinced that the claim for special damages is bound to fail and therefore allow such amendments.

Non-pecuniary damages

[37] The final amendment in dispute is that set out in para. 25(c) of Part 1: Statement of Facts of the proposed amended TPN. That claim is for “Aggravated damages related to the mental anguish, emotional distress and other intangible injuries suffered by Ms. Koch in having to defend the plaintiff’s claim, which includes the threat and fear of losing her home.”

[38] Section 150 of the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13,allows a proceeding to continue notwithstanding the death of a party. However, s. 150(4)(a) provides that recovery in such a proceeding does not extend to damages in respect of non-pecuniary loss.

[39] Accordingly, the proposed amendment seeking aggravated damages for Ms. Koch’s non-pecuniary losses is bound to fail and is therefore disallowed.

Result

[40] The style of cause is amended to substitute Penny Anne Treen as the personal representative of the Estate in place of Doreen Koch.

[41] The proposed amendments to the TPN are allowed with the exception of any amendments relating to the claims of knowing assistance and non-pecuniary loss.

[42] As success has been somewhat divided, the applicant and respondents shall each bear their own costs of this application.

“Associate Judge Hughes”