

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ortega v. Burley*,  
2023 BCSC 806

Date: 20230201  
Docket: S188751  
Registry: Vancouver

Between:

**Victor Ortega, Mila Ortega, an Infant by her Litigation Guardian Victor Ortega,  
Alejandro Anthony Coto, an Infant by his Litigation Guardian Michael Coto,  
Maria Eugenia Otalora, Erain Ebuardo Sanchez, and Michael Coto  
as all person entitled to advance a claim arising from  
the death of Carolina Sanchez, Deceased**

Plaintiffs

And

**Robert Luke Burley dba Rocky Mountain Riders Snowmobile Tours and  
Rentals and also dba Rocky Mountain Riders Rentals,  
Raymond Jake Burley dba Rocky Mountain Riders Rentals,  
Fairmont Hotels Inc. Hotels Fairmont Inc. dba The Fairmont Chateau Lake  
Louise, Christopher De Sousa, Kicking Horse Mountain Development  
Corporation, dba Kicking Horse Mountain Resort Limited Partnership,  
John/Jane Doe 1, John/Jane Doe 2, John/Jane Doe 3,  
White N Wild Snowmobile Tours Ltd.,  
His Majesty The King In Right of the Province of British Columbia  
as represented by The Attorney General of British Columbia**

Defendants

And

**Robert Luke Burley dba Rocky Mountain Riders Snowmobile Tours and  
Rentals and also dba Rocky Mountain Riders Rentals,  
Raymond Jake Burley dba Rocky Mountain Riders Rentals,  
Rocky Mountain Riders Snowmobile Tours and Rentals Ltd.**

Third Parties

Before: Master Krentz

## Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs appearing by  
videoconference:

R.L. Wishart

Counsel for the Defendant and Third Party  
Robert Luke Burley dba Rocky Mountain  
Riders Snowmobile Tours and Rentals  
appearing by videoconference:

J. Corbett

Counsel for the Defendant Fairmont Hotels  
Inc. appearing by videoconference:

J. O'Leary

No other appearances

Place and Date of Trial/Hearing:

Vancouver, B.C.  
January 26, 2023

Place and Date of Judgment:

Vancouver, B.C.  
February 1, 2023

[1] **THE COURT** (by videoconference): This is my decision on this matter.

[2] On March 28, 2018, near Golden, British Columbia, the Ortega family from Florida went on a snowmobiling tour that was guided by the defendant Robert Burley, doing business as, Rocky Mountain Riders. The family arranged the tour through a representative of Fairmont Hotels. I will refer to the defendant Robert Burley as either "Rocky Mountain" or "the applicant".

[3] During this tour, Carolina Sanchez drove her snowmobile into a tree bank with a minor, Elise Ortega, as a passenger. Both died as a result of this accident.

[4] The plaintiffs advance this action alleging they have suffered various injuries, loss of enjoyment of life and earning capacity as a result of the accident, which includes claims under the *Family Compensation Act*, R.S.B.C. 1996, c. 126 [FCA]. The plaintiffs filed their notice of civil claim on August 10, 2018.

[5] In a separate action, the plaintiffs commenced proceedings for the same relief against the Province, as the accident was allegedly on Crown land.

[6] The plaintiffs allege the applicant was negligent for various reasons, including failing to properly instruct and supervise Carolina in the operation of a snowmobile and allowing her to have a passenger on her snowmobile.

[7] Following a bus ride of approximately 90 minutes, the Ortega family arrived at the snowmobiling location where they were asked to sign an agreement releasing the tour operators, the hotel, its employees and the Province from any liability arising from their operation of the snowmobiles and a waiver of claims, including for any alleged negligence on the part of the defendants.

[8] The waiver and releases were signed by each of the Ortegas. It is the position of the plaintiffs that they should not be bound by the waiver for various reasons, including they were signed without instructions from the applicant as to its terms and there was a cancellation policy in place so they would lose their money if they declined the waiver.

[9] I will now review the history of this litigation.

[10] On August 10, 2018, the plaintiffs filed the notice of civil claim against the applicant, along with Raymond Burley, Fairmont Hotels, Christopher De Sousa (an employee of the hotel) and Kicking Horse Mountain Development.

[11] On October 10, 2018, Fairmont and De Sousa filed a response to the civil claim. In their response, they did not plead the waiver as a defence.

[12] On November 7, 2018, Kicking Horse filed a response and they did plead the waiver as a defence.

[13] On February 25, 2019, the defendants Robert Burley and Raymond Burley filed their response. They did not plead the waiver as a defence.

[14] On May 22, 2019, the same defendants Robert and Raymond Burley filed an amended response to the civil claim. In the amended response, they still did not plead the waiver as a defence.

[15] On July 22, 2019, an order was made that White N Wild Snowmobile Tours be added as a defendant.

[16] On August 1, 2019, the plaintiffs filed an amended notice of civil claim adding that party as a defendant.

[17] On January 20, 2020, White N Wild filed a response. They pled the waiver as a defence.

[18] On December 17, 2021, Matthew Bujar, counsel for Rocky Mountain, filed a notice of change of lawyer advising he would also be representing the defendant Province.

[19] On March 25, 2022, an order was entered consolidating this action with the separate action against the Province.

[20] On April 6, 2022, the plaintiffs filed a second amended notice of civil claim in this action, adding the defendant Province as a defendant.

[21] On September 6, 2019, in the separate action the Province denied liability and pled the waiver defence.

[22] On February 2, 2021, the plaintiffs filed a notice of trial for 25 days commencing on June 6, 2022. The plaintiffs prepared and circulated an amended list of documents in that action. Included in that list were the waivers signed by Victor, Mila, Alejandro, Carolina and Elise. These same documents had already been listed in the applicant's list of documents, even though the defence of waiver had not been pled.

[23] The plaintiffs commenced their examination of Robert Burley on November 29, 2021. The applicant's discovery did not conclude.

[24] The commencement of Victor's discovery was scheduled for January 26, 2022. In preparation for his discovery, counsel for the applicant realized that they had inadvertently failed to include a pleading asserting reliance on the waiver as a full defence to the plaintiffs' claim.

[25] On January 25, 2022, applicant's counsel wrote to plaintiffs' counsel identifying, among other things, this inadvertence and that the waivers had already been produced in the action by the parties and that other parties had pled reliance on the waivers so they were a live issue. Counsel advised that Mr. Burley would be available for a continuation of his discovery, so the plaintiffs could question him on any issues related to the waiver. Therefore, applicant's counsel sought plaintiffs' counsel's agreement to permit the amendment.

[26] Victor's discovery proceeded on January 26, 2022. At his discovery, his counsel noted that there was an issue as to whether the waivers were relevant, given the status of the pleadings. Nonetheless he was questioned and gave evidence about the waiver. He provided, among other things, the following evidence: Ms. Sanchez exited the tour operator facility with waivers for them to sign. She

advised him that he needed to sign the paperwork and he did. However, he testified that he did not read the document because he felt rushed going through the waiver process.

[27] On February 16, 2022, counsel for the applicants filed a notice of application to adjourn the June 6, 2022 trial. That hearing did not have to proceed, as counsel for the plaintiffs ultimately agreed to the adjournment.

[28] On March 10, 2022, this action was dismissed as against the defendants Raymond Burley, Kicking Horse Mountain Development and White N Wild Snowmobile.

[29] On May 19, 2022, the plaintiffs had not provided their position in response to the applicant's January 25 letter requesting their consent to amend the response in order to plead the waiver. As a result, on the former date the applicant again wrote to the plaintiffs' counsel requesting their position.

[30] On October 26, 2022, the applicants again wrote to plaintiffs' counsel requesting they provide their position on the proposed pleading amendment.

[31] On November 1, 2022, the plaintiffs provided the applicant with their position that they would not consent to the amendment of the pleadings.

[32] The trial is scheduled in this action for 25 days commencing on June 26, 2023.

[33] In this application, Rocky Mountain seeks leave pursuant to Rule 6-1 of the *Supreme Court Civil Rules* to amend their response to include as a defence to the plaintiffs' claim the waivers signed by the plaintiffs. Although Fairmont supports this application, they are not at this time seeking to amend their pleadings to include the waivers. However, they argue that the waiver defence has been pled since November 2018, when it was first pled by Kicking Horse and subsequently pled by other defendants, including the Province. As the actions were consolidated, until

such time as the claim against the Province is dismissed, the waiver remains a live issue in this proceeding.

[34] Fairmont also notes there is no real prejudice to the plaintiffs, even with the trial set for June, as a continuation of Victor's examination for discovery is expected, along with the initial examinations for discovery of Mila, Eduardo and Alejandro.

[35] In support of their application, Rocky Mountain submits the following. Relying on decisions such as *Navarro v. Doig River* 2016 BCSC 2006, they say the court routinely takes a generous approach to pleading amendments. They further argue the threshold on applications for leave to amend is low. Amendments should be permitted where necessary to determine the real issues between the parties. The application should be granted where the proposed pleading discloses a reasonable cause of action or, in this case, would assert a reasonable defence.

[36] In determining whether there is prejudice, they argue the test is whether the amendment would cause actual and meaningful prejudice, that cannot otherwise be dealt with through costs: *Fengyun v. He*, 2017 BCSC 110 [*Fengyun*].

[37] On an application for leave to amend, they argue that the question for the court to consider is whether it is plain and obvious that the proposed amendment is bound to fail. The applicant further submits that the proposed pleading amendment sets out specific factual allegations and a legal basis upon which the applicant asserts the plaintiffs have contractually waived the right to sue the applicant.

[38] Although an applicant is not required to adduce evidence to support its proposed pleading amendment on an application of this nature, they argue the evidence on this application supports that Victor executed his waiver and observed Carolina execute her waiver. They further argue that the plaintiffs can challenge the adequacy of the presentation or contents of the waiver but that is a dispute for trial and is irrelevant to this application.

[39] They argue that the proposed amendment does not:

- (a) advance a claim beyond a limitation period; or
- (b) settle pleadings and a defence which is invalid at law.

[40] They submit that waiver defences are often advanced in recreational activity injury actions and, if successful, will result in a defence to the entirety of the plaintiffs' claim.

[41] The applicant submits that with respect to the extent of the delay, the issue was first raised when Victor had not yet been examined for discovery and the applicant's discovery had commenced but not completed. They say there has been little delay in bringing this application. Indeed, the applicant for several months sought the plaintiff's position on the proposed amendment. Once the position was provided by the plaintiffs, they moved quickly to bring this application before the court.

[42] With respect to the reason for the delay, they say it was not until January 25, 2022, that counsel for the applicant realized their response to the civil claim did not include the waiver defence.

[43] Further, this was through the inadvertence of counsel. At all times, the applicant had intended to rely on the waiver defence. Indeed, the waiver documents were produced at an early date and questions were posed of Victor at his discovery respecting the execution of the waiver.

[44] The applicant submits it should not be prejudiced in its ability to advance a waiver defence, merely by virtue of the inadvertence of counsel.

[45] Finally, with respect to the issue of whether there is any prejudice caused by the delay, the applicant says there isn't any for the following reasons.

[46] As early as 2018 when Kicking Horse filed its response, the plaintiffs had notice that the parties would be asserting a waiver defence.

[47] Next, the waivers were disclosed at an early stage to the plaintiffs. In 2019, the applicant listed the waiver on his list of documents. Subsequently, in March 2021, the plaintiffs themselves listed the waivers on their list of documents.

[48] Furthermore, the Crown pled a waiver defence and the actions have been consolidated. The proposed amended pleading is the same pleading and language that Kicking Horse had used in its pleading. Consequently, this proposed amendment is the same allegations and pleadings that the plaintiffs have known and even responded to as early as November 2018.

[49] While the plaintiffs acknowledge that the threshold on these applications may be low and an amendment should be granted if it asserts a reasonable defence, the plaintiffs submit that amendments should not be granted if it is clearly invalid at law or undue prejudice will be caused to the other party. When considering prejudice, they argue that the extent of and the reason for delay and the degree of prejudice by the delay are factors (*Coburn and Watson's Metropolitan Home v. Bank of America Corporation*, 2016 BCSC 2021).

[50] The plaintiffs further argue that the evidence of the applicant as to when instructions were provided to counsel to raise the waivers as a defence is lacking, as we only have the affidavit of counsel referring to his inadvertence. There is no evidence as to when he may have been instructed to raise that defence.

[51] I accept that, given the nature of the releases that were signed and the purpose of those releases, that it would always have been the intention of the applicant to raise that defence, otherwise, why would steps be taken to obtain waivers in these circumstances?

[52] Accordingly, I find the failure is solely due to the inadvertence of counsel.

[53] The plaintiffs further submit that the question for the court is whether it is plain and obvious that the proposed amendment as a defence is bound to fail. As for that question, the plaintiffs invite the court at this juncture to consider the validity of the waiver and they note the following, relying upon the case of *Apps v. Grouse*

*Mountain Resorts Ltd.*, 2020 BCCA 78 [*Apps*]. They submit that the waiver's enforceability depends on whether reasonable steps have been taken to bring the terms and conditions to the attention of the plaintiff. The factors relevant to determining whether reasonable steps have been taken to draw attention to the waiver are as follows (in *Apps* at para. 31):

- 1) The more onerous the exclusion clause the more explicit the notice must be;
- 2) A waiver of an occupier's own negligence is among the most onerous of clauses;
- 3) The form, location and architecture of the notice are factors to be considered when assessing the reasonableness ... of the notice; and
- 4) Although reasonableness of the notice is an objective test, the circumstances of the plaintiff[s] are to be taken into consideration.

[54] The plaintiffs submit that a waiver of an occupier's own negligence is among the most onerous of clauses. The more onerous the exclusion clause, the more explicit the notice must be.

[55] While I agree that the Court of Appeal did set out these guidelines in the *Apps* case, I do not find it to be of much assistance in this application. The alleged waiver in *Apps* was an exclusion of liability on a sign at a ticket booth and on the back of a ticket that the plaintiff received. The appeal followed a summary trial wherein the judge considered the merit of the defence and had dismissed the claim.

[56] I find the *Apps* case is clearly distinguishable for those reasons. In fact, the applicant acknowledges that the validity of the waiver is an issue that can be fully advanced by the plaintiffs at the trial, such as was done in *Apps*.

[57] In *Fengyun*, the court noted the following:

[48] The test for amending pleadings is identical to the test for striking pleadings ... it is only in "the clearest cases" that a pleading will be struck as disclosing no reasonable claim:

... where there is doubt on either the facts or law, the matter should be allowed to proceed for determination at trial ... .

[58] The court in that case also referred to a decision of the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, in which the Court confirmed the test governing striking out a pleading is whether it is “plain and obvious” that the plaintiff’s statement of claim discloses no reasonable cause of action or whether the plaintiff has presented a case that is “fit to be tried”.

[59] I find that the same principles apply in determining whether or not there is a reasonable defence that is fit to be tried.

[60] In this application, I cannot find that it is plain and obvious the assertion of the waivers as a defence is bound to fail.

[61] In concluding that the assertion of the waivers is not bound to fail, I note that in *Loychuk v. Cougar Mountain Adventures Ltd.*, 2011 BCSC 193, the court at a summary trial dismissed the plaintiff’s action for injuries arising from a zipline accident. The plaintiff had signed a release and waiver and although the defence admitted the accident was caused by the negligence of one of its employees, the court found the release signed by the plaintiff to be valid and enforceable and that there is a well-established line of authorities holding that exclusions of liability in the context of hazardous activities is not unconscionable.

[62] In my view, ultimately it will be left to the trial judge to determine the validity of the waiver.

[63] Accordingly, I am satisfied that the applicant has met the test for amending his pleadings so they can assert the waivers as a defence. Accordingly, the application as set out in paragraph 1 is allowed.

[64] I further order, pursuant to R. 7-2(3), that the plaintiffs' discovery of Mr. Burley may be extended to a total of 12 hours so that they have sufficient opportunity to examine him on the issue of the waivers. I also grant the plaintiffs liberty to apply for a further extension, if needed.

[65] Are there submissions on costs? Mr. Corbett?

[66] CNSL J. CORBETT: Costs in the cause, Your Honour.

[67] THE COURT: Ms. Wishart?

[68] CNSL R. WISHART: That is agreeable.

[69] THE COURT: Anything, Ms. O'Leary? Okay. Yes, I agree. The applicant was successful. The costs of the application should be in the cause.

“Master Krentz”