IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *David v. Song,* 2025 BCSC 704

Date: 20250415
Docket: S223541
Registry: Vancouver

Between:

Cindy David, also known as Qian Ma and Cindy Ma, and Richard David
Plaintiffs

And:

Jing Song, also known as Tracey Song, and Zuquan Liu, also known as George Liu
Defendants

Before: The Honourable Mr. Justice Funt

Reasons for Ruling – Special Costs

Counsel for the Plaintiffs:	M.T. Wolf S. MacDonald, Articled Student
The Defendants, appearing in person:	J. Song G. Liu
Place and Date of Hearing:	Vancouver, B.C. March 28, 2025
Place and Date of Judgment:	Vancouver, B.C. April 15, 2025

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1. Introduction

[1] These are my reasons for costs related to the hearing of this action. The reasons for judgment dated February 11, 2025 are indexed as *David v. Song*, 2025 BCSC 231 (the "Trial Reasons").

[2] The plaintiffs, who were the successful parties in the trial, seek an award of special costs.

[3] For the reasons that follow, the plaintiffs are awarded special costs for all but one day of the trial, for which there will be no award of costs for any of the parties.

2. *Supreme Court Civil Rules* - Costs

[4] Our *Supreme Court Civil Rules* provide that costs must be awarded to the successful party unless the court otherwise orders: Rule 14-1(9).

[5] With respect to success, our Court of Appeal in *Marquez v. Zapiola*, 2014 BCCA 35, stated:

> [16] Success in the event has been interpreted as "substantial success": see *Fotheringham v. Fotheringham,* 2001 BCSC 1321, 13 C.P.C. (5th) 302, leave to appeal ref'd 2002 BCCA 454. In *Fotheringham,* Mr. Justice Bouck described this standard as follows:
>
> > [45] *Gold* now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when [looking] at all the disputed matters globally.

[6] As a general rule, costs "must be assessed as party and party costs in accordance with Appendix B": Rule 14-1(1).

[7] The general rule is subject to certain exceptions. One exception is where the Court orders that the “costs of the proceeding be assessed as special costs”: Rule 14-1(b)(i).

[8] The *Rules* do not define or otherwise provide any specific meaning to the phrase “special costs”.

[9] The word special is used in its common meaning of “better, greater or otherwise different from its usual”: Angus Stevenson and Maurice Waite, ed, *Concise Oxford English Dictionary*, 12th ed (New York: Oxford University Press, 2011).

[10] Our jurisprudence sets forth the rules developed for granting special (greater) costs.

3. Jurisprudence on Special Costs

[11] Recently, in *Parker Cove Properties Limited Partnership v. Gerow*, 2024 BCCA 316, our Court of Appeal stated:

> [57] The test for granting special costs is set out in *Smithies* at paras. 56–57:
>
> …
>
> > [57] The leading authority on special costs is this Court’s decision in *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.). There, Mr. Justice Lambert, writing for the Court, set out that the threshold for special cost awards is “reprehensible conduct”. He noted the continuum of circumstances in which special costs could be awarded, ranging from “milder forms of misconduct deserving of reproof or rebuke” to “scandalous or outrageous conduct”:
> >
> > > [17] Having regard to the terminology adopted by Madam Justice McLachlin in *Young v. Young*, [[1993] 4 S.C.R. 3], to the terminology adopted by Mr. Justice Cumming in *Fullerton v. Matsqui* [*(District)* (1992), 74 B.C.L.R. (2d) 311 (C.A.)], and to the application of the standard of “reprehensible conduct” by Chief Justice Esson in *Leung v. Leung* [(1993), 77 B.C.L.R. (2d) 314 (S.C.)] in awarding special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous, but could only be categorized as one of the “milder forms of misconduct” which could simply be said to be “deserving of reproof or rebuke”, it is my opinion that the single standard for the awarding of

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> special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

[12] As may be seen, the focus is upon whether the conduct in question may "be categorized as 'reprehensible'".

[13] In *Hu v. Dickson*, 2015 BCSC 218, Justice Warren, as she then was, provided a useful review regarding the characterization of reprehensible conduct:

> [46] Special costs are awarded where a party's litigation conduct can be characterized as "reprehensible". In this context the word reprehensible encompasses both scandalous and outrageous conduct and also milder forms of misconduct deserving of reproof or rebuke: *Garcia,* para. 17. This does not mean that all forms of misconduct justify a special costs order – rather, the misconduct must be such as to be deserving of reproof or rebuke: *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at paras. 32 and 73.
>
> [47] The purpose for this high level of costs is punitive and intended to express the court's disapproval of the party's conduct. It is not necessary that all aspects of a party's conduct in the litigation be reprehensible in order to make an award of special costs that applies to the entire action: *Bradshaw v. Stenner*, 2012 BCSC 237 at para. 9, leave to appeal ref'd 2012 BCCA 481. However, pursuant to Rule 16-1(14) of the *Supreme Court Family Rules*, the court has the discretion to award costs that relate to only certain aspects of a proceeding and may do so where it would be disproportionate to award special costs of the entire proceeding: *Gichuru* [*v. Smith,* 2014 BCCA 414], para. 91.
>
> [48] The court must exercise restraint in awarding special costs and as such the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order: *Westsea,* para. 73.
>
> [49] In *Kim v. Hong*, 2013 BCSC 2248, Justice Griffin quoted extensively from the judgment of Justice Williams in *Schwabe v. Dr. Lisinski*, 2005 BCSC 1284, where he summarized a number of cases in an effort to discern the kinds of conduct that had been characterized as reprehensible and thus warranting an award of special costs. Justice Griffin also categorized the conduct that had been found to justify an award of special costs in a number of family cases. From her reasons, it is apparent that the kinds of conduct that warrant an award of special costs include the following:

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- acting with an improper motive, such as to intimidate, exhaust or financially drain the other party in the hopes that they will give up or soften their position in the litigation;
- dissipating and/or not disclosing assets;
- abusing the court's process by, among other things, failing to disclose documents, delaying in disclosing documents, failing to respond to reasonable requests, causing unnecessary interlocutory applications, and breaching the Rules of Court in a manner that prejudices the other party;
- misleading the court, through outright fabrications or through evasive and/or equivocal responses; and
- disobeying a court order.

[My emphasis.]

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4. Application

[14] From the outset, April 1, 2022, when Mr. Liu started to dig the trench where the Easement Driveway borders Ms. David's property, the defendants operated with the improper motive of trying to get the plaintiffs to pay the full cost for the repavement of the subject driveway (the Easement Driveway and Ms. Song's apron portion).

[15] Mr. Liu's defamatory statements were fueled by the same improper motive.

[16] In the Trial Reasons, I stated:

> [220] On April 6, 2022, Mr. David and Mr. Liu met on the driveway to discuss damage to the driveway. Mr. David offered to pay the majority of the cost to repair.
>
> [221] After speaking to Ms. Song, Mr. Liu stated that the only acceptable percentage was 100 percent.
>
> [222] Mr. David testified that if Ms. David did not agree, Mr. Liu said he would say on social media that Ms. David and Mr. David were tax and immigration cheats.
>
> [223] Mr. Liu denies that he made the threat.
>
> [224] The 100 percent demand was unreasonable. Mr. Liu knew that the driveway was an older driveway. In Mr. Liu's and Ms. Song's Amended Counterclaim they plead that the driveway "would not need immediate repair if not damaged" by the construction/renovation related to Ms. David's home (my emphasis).
>
> [225] In short, Mr. Liu and Ms. Song were willing to replace an older driveway with a new driveway, but wanted Ms. David (Mr. David) to pay the

> full costs even though Ms. Song (Mr. Liu) would benefit from the replacement of the older driveway.
>
> [226] The ready inference is that Mr. Liu (and Ms. Song) wished to force upon Ms. David (Mr. David) an extracted bargain.
>
> [227] I find that Mr. Liu's April 7, 2022 WeChat posts are consistent with his April 6, 2022 threat.

[17] Earlier in the Trial Reasons, I had found:

> [136] During the trial, Mr. Liu "practice[d] to deceive by deliberate falsehood or gross exaggeration" (as Southin J. describes in [*Le (Guardian ad litem of) v.*] *Milburn*, [1987] B.C.J. No. 2690, 1987 CarswellBC 1589 (S.C).

[18] My findings at trial reflect that the defendants acted with the improper motive "to intimidate, exhaust or financially drain [Ms. David and Mr. David] in the hopes that they [would] give up or soften their position in the litigation". Such is consistent with the defendants' demand that the plaintiffs pay entirely for the repavement of the subject driveway, and is then further consistent with the defendants' conduct and the tactics they engaged to repel Ms. David's and Mr. David's defamation claims.

[19] As I described in the Trial Reasons, Mr. Liu's postings were highly defamatory:

> [3] On April 7, 2022, in a WeChat forum serving Chinese-speaking residents in the area of the Village of Lions Bay, British Columbia, the defendant, Mr. George Liu, libelled (in Chinese) Ms. David with the defamatory stings that she is a tax evader, a fraudster, a public resource abuser and, staggeringly, the vile sting that she uses her cancer for personal gain.
>
> [4] Mr. Liu also libelled Mr. Richard David, the second plaintiff, as an illegal immigrant.

[20] I recognize that the defendants were self-represented litigants. That said, legal training is not required to know that describing an individual as a tax evader, a fraudster, a public resource abuser, an illegal immigrant, or a person with cancer using their cancer for personal gain, in a public forum, will harm their reputation.

[21] In the case at bar, as may be seen at paras. 253 to 256 of the Trial Reasons, the defendants counterclaimed that Ms. David had defamed Mr. Liu as a person who would "bring shame to the Chinese people". I dismissed the claim.

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[22] The defendants' amended counterclaim shows that they understood the law that making untrue statements in a public forum could give rise to a claim in defamation.

[23] With respect to Mr. Liu's *modus operandi* in his April 7, 2022 WeChat post, I stated in the Trial Reasons:

> [236] I find that Mr. Liu wished to target Ms. David and Mr. David while trying to construct some legal deniability.

[24] For example, in their written closing submissions at trial, the defendants stated (in part):

> 1. Denial of Allegations and Claims of Defamation
>
> The defendants categorically deny all allegations of defamatory statements made against the plaintiffs. The plaintiffs' claims are based on exaggerated and unsubstantiated assertions that fail to meet the legal standard for defamation. Specifically: <u>The alleged statements made by Mr. Liu in a private WeChat group did not include the plaintiffs' names, addresses, or photos, making it impossible for any reasonable third party to identify the plaintiffs as the subjects of the posts</u>. The WeChat group consisted of only 24 members, including Ms. David and Mr. Liu. If Mr. Liu had any intention to defame Ms. David, he could have posted in the much larger Lions Bay Facebook group, which has over 1,000 members and would have reached a broader audience. This demonstrates that there was no intention to defame or harm Ms. David. The plaintiffs have not provided clear and convincing evidence to demonstrate that the alleged statements caused actual harm to their reputation or business.
>
> [My emphasis.]

[25] The defendants' written closing submissions at trial are consistent with an attempt to exhaust or financially drain the plaintiffs using, in this instance, a tactic of constructed deniability. In this regard, the Trial Reasons read:

> [232] In reviewing Mr. Liu's complete April 7, 2022 WeChat post I see that the following is also disclosed:
>
> a) the author is "George";
>
> b) George is referring to his neighbour;
>
> c) his former neighbour was a "department head professor at UBC";
>
> d) "During the intensive construction over the past whole year, without asking for permission, she had all kinds of construction vehicles drive through my driveway frequently, such as excavators, bulldozers, earth-

moving trucks, trailer trucks, delivery trucks, garbage trucks and so on”; and

e) “Those who live on this street, on your way home, should be able to feel that the curb of the lower [street name] is constantly occupied by renovation vehicles for her family”.

[233] The foregoing is in the context of Chinese-speaking residents in the Lions Bay community concerning highly libellous statements. I am satisfied that the curiosity of many readers would have been prompted.

[234] In a word game, most of the letters of a word or phrase may be known. Often one or more players will know or guess the correct answer.

[235] I find that one or more readers would have correctly determined that Mr. Liu was the author of his first April 7, 2022 post, and Ms. David and Mr. David, the subjects.

[236] I find that Mr. Liu wished to target Ms. David and Mr. David while trying to construct some legal deniability.

[237] On the last day of submissions (February 7, 2025), Mr. Liu continued to assert that his identity was disclosed (and his privacy rights infringed) by Ms. David’s April 7, 2022 post responding to Mr. Liu’s earlier April 7, 2022 post.

[238] In his December 20, 2024 written submissions Mr. Liu stated:

> The plaintiffs’ claims for defamation damages and injunctive relief are without merit and should be dismissed in their entirety for the following reasons:
>
> The alleged posts did not contain the plaintiffs’ names, addresses, or photos, making it impossible for a reasonable person to identify the plaintiffs as the subject…

And again,

> 1. The posts do not identify the plaintiffs:
>
> Mr. Liu’s posts did not include the plaintiffs’ names, addresses, photographs, or any other identifying details. Without such identification, the plaintiffs cannot establish that the posts were referring to them or that any reputation harm occurred.
>
> …

[239] Further, in the December 20, 2024 written submissions, Mr. Liu stated:

> Ms. David posted in the group, stating, “During the entire process of our application in 2021 to the renovation, the neighbor at [actual civic address] displayed the utmost hatred and discontent.” In doing so, she exposed the defendants’ address and identity while using derogatory language. If anyone in the chat group inferred that the post referred to Ms. David, it was solely because she had exposed Mr. Liu’s address and identified herself as his neighbor. It was her own actions, not the content of Mr. Liu’s post, that led others to associate her with it…

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> [240] In his February 7, 2025 oral submissions, Mr. Liu wished the Court to find that Ms. David is the one who caused the defamatory harm by identifying herself in her April 7, 2022 WeChat post.
>
> [241] In lay terms, Mr. Liu wishes the Court, colloquially speaking, to “blame the victim”. This the Court will not do. There is no merit in Mr. Liu’s argument. A victim of defamation has the right to defend oneself and oneself’s reputation.

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[26] With respect to the trench Mr. Liu started to dig on April 1, 2022 (and the related signage), resulting in the obstruction of the Easement Driveway in relation to ingress and egress for Ms. David’s residence, I wrote in the Trial Reasons:

> [172] The Easement Agreement is clear: the easement “shall not be obstructed, in any way, […] without the express written consent in writing of both [Ms. Song] and [Ms. David]”.
>
> [173] Ms. Song (Mr. Liu) did not obtain Ms. David’s written consent to Mr. Liu’s trench digging and signage prior to Mr. Liu commencing his work on April 1, 2022.
>
> [174] The work was undertaken without any professional advice as to the need for a trench, its design, or possible effectiveness. Mr. Liu apparently assumed that Ms. David’s drain was not working because water would flow over its grate.
>
> [175] Ms. David and Mr. David hired Mr. R. Kirk, a plumber/gas-fitter, to determine if there was any blockage in the underground drainage, and its nature. Mr. Kirk, using a powered snake, concluded that the blockage was located just below where the two arms of a “Y-looking” configuration of piping join. Looking up the driveway, the left arm serviced Ms. David’s property and the right arm serviced Ms. Song’s property.
>
> [176] The nature of the blockage was not determined, other than it was a hard blockage which forced the power snake to turn up into the right arm of the “Y” after having travelled from Ms. David’s property down the left arm of the “Y”. The cause of the blockage could have been as simple as roots, rocks, a broken tile or pipe, or some combination thereof.
>
> [177] From the foregoing, it appears that Mr. Liu’s efforts would, in any event, be fruitless. Ms. David’s drain may have overflowed, not because it did not work, but because the shared “Y” drain system was blocked just below where the arms of the Y join.
>
> [178] Ms. Song’s (Mr. Liu’s) remedy to undertake the trench work, absent Ms. David’s approval, was to apply to court to show that Ms. David was unreasonably withholding her consent to cooperate to facilitate the workings of the drainage, largely located under the Easement Driveway serving both properties. Ms. Song (Mr. Liu) did not apply to court for relief.

[27] Mr. Liu only stopped his trench work upon the plaintiffs applying to court and obtaining a mandatory injunction requiring him to stop.

[28] With respect to the Easement Driveway, the defendants' conduct aligns with their motive to exhaust or financially drain the plaintiffs.

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[29] In their written closing submissions at trial, they stated (in part):

> 2. Plaintiffs' Intentional Fabrication of Harm
>
> Prior to March 24, 2022, the plaintiffs did not reside on the property.
>
> After receiving emails informing them of the planned trench work starting April 1, 2022, the plaintiffs rushed to move back to the property on March 24, 2022, attempting to create the false impression that the defendants' repair work was obstructing their access.
>
> This timing strongly suggests the plaintiffs were aware of the repairs and deliberately acted to fabricate a claim of obstruction to bolster their meritless demands.

[30] Then further, in their written closing submissions in support of their amended counterclaim, and in challenging both Ms. David's and Mr. David's credibility, the defendants stated (in part):

> The plaintiffs' claim that Cindy David faced a health emergency on April 1, 2022, is unsupported by credible evidence. <u>The doctor's affidavit is rife with contradictions, including the admission that she does not specifically recall providing emergency advice and that this advice was not reflected in the medical notes. The clinic notes from March 31, 2022, confirm Cindy David's stable health and the negative status of her liver tumor</u>. Furthermore, her documented participation in high intensity physical activities, including Black Diamond-level hiking trails, 10-kilometer frozen hikes, and inviting others to join her for physical activities, invalidates any claim of a sudden health crisis. The inconsistencies in the affidavit, the lack of supporting documentation, and the possibility of influence on the doctor's testimony demonstrate that <u>the plaintiffs exaggerated Cindy David's health condition to create a false pretext for stopping the defendant's lawful driveway repairs</u>. These actions constitute a misuse of emergency services and undermine the plaintiffs' credibility. I [r]espectfully request the court to reject their claims, as they lack any substantive basis in fact or evidence.
>
> [My emphasis.]

[31] The defendants confused and hindered matters by challenging the straightforward evidence at trial.

[32] As noted, under the Easement Agreement, Mr. Liu's digging of the trench was in breach of the terms of the Easement Agreement "without the express written consent of [Ms. Song] and [Ms. David]".

[33] In the Trial Reasons, I stated:

> [67] On April 1, 2022, Mr. David called 9-1-1 for the RCMP. He made it clear it was not an emergency. He was not sure which detachment covered his area. He was then either put through to the Squamish detachment or given its phone number to call.
>
> [68] Mr. David was concerned that if, in the future, Ms. David required emergency help, the barricades would impede access.
>
> [69] An RCMP officer attended later that morning. The officer assessed the situation as a civil matter.

[34] Further, the defendants' assertions with respect to Ms. David's medical oncologist, Dr. A. Tinker, were spurious. Their submissions that "the plaintiffs exaggerated Cindy David's health condition to create a false pretext for stopping the defendant's lawful driveway repairs" were also spurious.

[35] The straightforward facts are:

a) Dr. A. Tinker is a recognized medical oncologist serving Ms. David as a patient of the BC Cancer Agency;

b) Ms. David was fighting serious ovarian cancer for which the defendants knew Ms. David had received a diagnosis several years earlier; and

c) ovarian cancer is a serious, often life-threatening, disease.

[36] Ovarian cancer is such a serious disease it is hard to contemplate possible exaggeration.

[37] With respect to Dr. Tinker's affidavit (Exhibit #21), the defendants' assertion that it is "rife with contradictions", is wholly unfounded.

[38] As the Court would expect of a recognized medical professional, Dr. Tinker's affidavit is plainly stated and clear. She attaches as exhibits the relevant and detailed clinical notes prepared by either herself or one of her colleagues, Dr. A. Smrke.

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[39] With respect to Dr. Tinker's March 31, 2022 meeting with Ms. David and Mr. David, Dr. Tinker swears:

> In the spring of 2022 Cindy reported symptoms of right sided flank and back discomfort that were investigated by CT scan and blood tests. On March 31, 2022 I met with Cindy and her husband and told her that the testing indicated that a tumour on her liver had increased in size. We discussed at that time the possibility of further surgery and/or chemotherapy. …

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[40] The defendants' closing written submissions at trial, that "the clinical notes from March 31, 2022, confirm Cindy David's stable health and the negative status of her liver tumour", distort the clear and readily acceptable evidence that the defendants chose to ignore.

[41] With respect to the defendants' submission that Dr. Tinker "does not specifically recall providing emergency advice and that her advice was not reflected in the medical notes", Dr. Tinker swears:

> Although my note of the March 31, 2022 meeting with Cindy does not reflect that I told her then that if she experienced severe pain, shortness of breath, fevers, chest pain or other severe or significant symptoms, she should seek urgent medical care, and I do not specifically recall that I gave Cindy that advice on March 31, 2022 it was my practice in 2022 and currently to give patients that advice and I likely gave that advice to Cindy on that visit.

[42] Again, Dr. Tinker's explanation is clear, readily acceptable, sworn evidence that the defendants chose to ignore or distort.

[43] Rule 1-3, the object of the Rules of Court, reads:

> **Object**
>
> (1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.
>
> **Proportionality**
>
> (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
>
> (a) the amount involved in the proceeding,
>
> (b) the importance of the issues in dispute, and
>
> (c) the complexity of the proceeding.

[44] While the defendants are self-represented litigants, licence is not given to self-represented litigants to frustrate the object of the Rules by taking senseless positions. Legal training is not needed to recognize a senseless position.

[45] If a party with counsel took similar senseless positions serving to frustrate the object of the Rules, an award of special costs would almost certainly follow.

[46] The foregoing are examples of obfuscation and hinderance in the context of the defendants' improper motive which wasted court time at the expense of the public (which funds a significant portion of the costs of running our courts). Without an award of special costs, an unnecessary and unjustified financial burden would also be placed on the plaintiffs.

[47] I will say that even if Ms. David did not have cancer, the trench digging and related signage could have delayed the arrival of emergency services. As described in the Trial Reasons, having regard to the topography, the only practical ingress and egress was the Easement Driveway leading to Ms. David's home.

[48] While I realize the delay may have been a minute or two, a minute or two may be significant where, for example, one is suffering a heart attack, or is choking. Similarly, where a fire has started, time is usually of the essence. The timing of such emergencies is unpredictable.

[49] Mr. Liu's focus on Ms. David's cancer and Dr. Tinker's affidavit (with its clinical notes) to support his closing written submissions that the "plaintiffs exaggerated Cindy David's health condition to create a false pretext for stopping the [defendants'] lawful repair" is obfuscation, which wasted considerable court time.

[50] Again, the trench work was in breach of the Easement Agreement, and various types of emergencies may arise without notice, especially where time is of the essence. Such straightforward facts do not require the assistance of counsel to understand.

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[51] Counsel for the plaintiffs, Mr. Wolf, submitted that the defendants advanced many “trivial and meritless” issues which wasted court time. One example is Mr. Liu’s assertion that Mr. David used a drone to take certain photographs. Mr. Liu seemed unwilling to accept Mr. David’s testimony that he took the photographs using a camera (iPhone) from the upper balcony of Ms. David’s home.

[52] With respect to the Construction Damage to the driveway, in the Trial Reasons, I stated:

> [189] Mr. Liu and Ms. Song, in their June 9, 2023 Amended Counterclaim, plead:
>
> > By comparing the condition of the Driveway before the Plaintiffs’ Construction Project on October 28, 2020 to its present state, it is evident that there has been severe Construction Damage.
>
> [190] The actual age of the driveway is not known but certainly it was laid at least some years before Ms. Song bought her property in 2013.
>
> [191] In 2013, Ms. Song took two photographs which show portions of the driveway (Exhibit 27 and Exhibit 54, Tab A, pg. 2). At trial, from these two photographs there were also four digitally enhanced screenshots of portions of the driveway (Exhibits 32 to 35). The two photographs and the digital enhancements show visible cracks in the driveway as of 2013.
>
> [192] The October 28, 2020 photos of the upper part of the driveway (Exhibits 54, A3, and A4) and a March 29, 2021 picture looking down the driveway show a tired driveway with cracks and unevenness (Exhibit 1).
>
> [193] Mr. B. Lawry is the owner of Kombi Construction Co. Ltd. (“Kombi”). Ms. David and Mr. David hired Kombi for the construction and renovation. Mr. Lawry described the condition of the driveway before the start of the project, including: “looked old”; “a good number of cracks”; “water coming out of the driveway” (seepage 1/2 to 3/4 way up the driveway); and “looked like a driveway needed to be replaced”.
>
> [194] My examination of the relevant photos and videos aligns with Mr. Lawry’s description.
>
> [195] An old worn suit may warrant buying a new suit, but the old suit can often still be worn for a few more years.
>
> [196] I also note that the project was primarily a renovation with relatively little excavation and fill required.
>
> [197] Some years before Ms. David purchased her property, Mr. Liu had used a power saw to cut lines into the lower part of the driveway. His thinking was to help drain water which apparently seeped from under the driveway and then (when cold) froze, making the driveway slippery. He undertook the sawcuts without any professional advice as to the possible effectiveness or the possible consequences to the driveway’s structural integrity.

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> [198] In an April 1, 2022 email, Mr. Liu, with respect to the driveway, said (in part):
>
> > After the lines were cut, it is not supposed to have any bulldozers, excavators, trailers, or pick up trucks to use the driveway at such a high frequency.
>
> [199] With respect to the construction and renovation activities, Mr. David took steps, such as using skid-steers when a load of gravel was delivered for the back-filling of the carport/deck posts to transport the gravel up the driveway in smaller loads.
>
> [200] Mr. Liu directed me to photos taken after the construction and renovation (Exhibit 54, E-2, E-3, and E-8). I can see that the driveway looks more tired. That said, I am not satisfied, on a balance of probabilities, that the construction and renovation activities caused any change beyond that of normal wear and tear.

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[53] The defendants’ evidence concerning the Construction Damage and the associated damage to the driveway consumed many days of trial despite the relatively low estimated cost of replacement (approximately $20,000).

[54] In circumstances such as these, where one party is represented and the other party is not, involving a relatively small claim, absent special costs, there is a financial incentive for the self-represented litigant not to proceed expeditiously knowing that his or her opponent is incurring significant legal fees.

[55] Without an award of special costs in the case at bar, self-represented litigants may be encouraged to purposely thwart and frustrate matters as they present their case or defence.

5. Improper Motive

[56] I find that the defendants acted with the improper motive “to intimidate, exhaust or financially drain” the plaintiffs so that they would “give up or soften their position”.

[57] The key aspects upon which I ground my finding are:

a) Mr. Liu digging the trench contrary to the terms of the Easement Agreement;

b) Mr. Liu only stopped the trench digging after the plaintiffs had gone to the legal expense of obtaining a mandatory injunction;

c) Mr. David's offer to pay the majority of the cost to repair the driveway but the defendants insisted that the plaintiffs pay the total costs;

d) Mr. Liu telling Mr. David on April 6, 2022 that without the plaintiffs agreeing to pay 100% for the driveway repavement, Mr. Liu would post on social media that Ms. David and Mr. David were tax and immigration cheats;

e) the following day, April 7, 2022, Mr. Liu made his defamatory posts;

f) the driveway was an old and worn driveway even before construction started. The defendants' insistence that the plaintiffs pay 100% for the driveway repair cannot be supported on a commercial or financial basis;

g) the defamatory statements were clearly defamatory and were without any reasonable basis to support a defence;

h) the defendants spent considerable trial time on extraneous matters (e.g., alleging Ms. David's ovarian cancer was exaggerated);

i) the defendants' wholly unfounded allegation that Dr. Tinker's affidavit was "rife" with contradictions;

j) the defendants' cruel, verbal abuse of Ms. David, shortly after the amendment to the notice of civil claim to include Ms. David's and Mr. David's claims for defamation; and

k) Mr. Liu continuing to argue he could not be identified as posting the defamatory statements (while conceding that the WeChat posts were his posts).

6. Award of Special Costs

[58] I find that the plaintiffs are entitled to special costs in relation to the action with the exception of the December 20, 2024 day of trial.

[59] The December 20, 2024 day of trial was not effectively used as a result of my oversight in not raising and discussing the *Apology Act*, S.B.C. 2006, c. 19.

[60] I find that no costs should be assessed for December 20, 2024.

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7. Joint and Several Liability

[61] I find the defendants, Mr. Liu and Ms. Song, are jointly and severally liable for special costs.

[62] Ms. Song was involved in several ways which supports my finding that she should be jointly and severally liable with Mr. Liu. These ways include:

a) the subject property is owned by Ms. Song with its driveway, a large portion of which is the Easement Driveway;

b) it was Ms. Song who insisted that she and Mr. Liu would only accept the plaintiffs paying 100% for the repair of the driveway;

c) Ms. Song was the key participant in the cruel, verbal abuse of Ms. David; and

d) Mr. Liu and Ms. Song, in their amended counterclaim, both sought relief, including various injunctions, general damages, special damages, aggravated damages, and punitive damages.

8. The Quantum of Special Costs will be Assessed by the Registrar

[63] The general rule is that the Registrar and not the trial judge should assess the quantum of a special costs award.

[64] In *Gichuru v. Smith*, 2014 BCCA 414, our Court of Appeal stated:

> [154] We would briefly summarize the principles as discussed above. The decision to fix the quantum of costs under R. 14-1(15) is a matter of judicial discretion that should be sparingly exercised. The court officer best placed to conduct an assessment is usually the registrar, whose knowledge and experience in assessing legal bills is extensive and seldom matched by that of a trial judge. An exception may arise in cases when the judge is intimately familiar with the litigation or the time and cost of a registrar's hearing cannot be justified or where the parties consent. The fact that a judge has heard the trial does not necessarily lead to the conclusion that the best use of judicial resources is for the judge to assess costs. A concern that a party who might have to pay costs will prolong the costs assessment by requiring a microscopic review of the services provided by counsel must be balanced against the right of that party to challenge the reasonableness of the proposed costs.
>
> [155] When assessing special costs, summarily or otherwise, a judge must only allow those fees that are objectively reasonable in the circumstances. This is because the purpose of a special costs award is to provide an indemnity to the successful party, not a windfall. While a judge need not

> follow the exact same procedure as a registrar, the ultimate award of special costs must be consistent with what the registrar would award in similar circumstances. Thus, a judge must conduct an inquiry into whether the fees claimed by the successful litigant were proper and reasonably necessary for the conduct of the proceeding as set out in R. 14-1(3)(a), taking into account all of the relevant circumstances of the case and with particular attention to the non-exhaustive list of factors in R. 14-1(3)(b).
>
> [156] A special costs assessment, whether before a judge or a registrar, cannot proceed in absence of evidence of the amount of legal fees incurred. Usually this will be provided in the same form as a bill between a solicitor and client under the *Legal Profession Act*. This is necessary to allow a court to inquire as to the objective reasonableness of the fees claimed by a litigant, as the fact that a solicitor has billed a certain sum does not necessarily make the fee reasonable. Where production of a bill of special costs would lead to a loss of solicitor-client privilege, the party seeking special costs must either waive privilege or can elect to preserve privilege by having its costs assessed after all appeals are exhausted.

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[65] In the case at bar, there are not special circumstances to cause me to assess the quantum of special costs. The Registrar is better placed to conduct the assessment. I ask the Registrar to conduct the assessment.

[66] The assessment should also include the one day costs hearing.

[67] With respect to the one day of trial for which I have not awarded any costs, December 20, 2024, I will leave the assessment of the best approach to exclude the costs associated with that one day of trial to the Registrar.

9. Pre-litigation Conduct

[68] The law is clear that special costs must not be awarded for pre-litigation conduct: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177.

[69] I recognize that the defendants' improper motives were first evident on April 1, 2022 upon Mr. Liu's trench digging, which was before the filing of the plaintiffs' notice of civil claim. That said, the defendants' improper motives to intimidate, exhaust, and financially drain Ms. David and Mr. David permeated and persisted throughout the litigation.

[70] For the purposes of determining my award of special costs, I have only considered the defendants' motives during the course of the litigation.

[71] By way of example, the defendants' challenge as to evidence arising before the filing of the notice of civil claim say, for example, Ms. David's health at the time Mr. Liu started his trench digging, is not pre-litigation conduct. The defendants' challenges were within the litigation, and as I have found, were improperly motivated to intimidate, exhaust, and financially drain Ms. David and Mr. David.

[72] I further note that, in any event, Mr. Liu and Ms. Song, in their amended counterclaim, made claims related to on or after October 28, 2020. On October 28, 2020, Ms. David and Mr. David first had a tree service "to cut the bushes in front of the Plaintiff's Garage for the preparation for the construction of a new carport": amended counterclaim at para. 24.

[73] In sum, the Court's award of special costs does not relate to pre-litigation conduct.

10. Conclusion

[74] The plaintiffs are awarded special costs for the trial (including the costs hearing) with the exception of the December 20, 2024 day of trial.

[75] For the December 20, 2024 day of trial, the parties will bear their respective costs.

[76] The defendants are jointly and severally liable for special costs.

[77] The Registrar is best placed to conduct the assessment of the quantum of the special costs. At their earliest convenience, I ask the parties to schedule the hearing before the Registrar for the assessment of the quantum of the special costs.

"Funt J."

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