IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kingston v. Warden,*
2017 BCSC 2023

Date: 20171108
Docket: M137932
Registry: Vancouver

Between:

Lynn Kingston

Plaintiff

And

Terry Lee Warden and Erin Mae Warden

Defendants

Before: The Honourable Madam Justice Duncan

Reasons for Judgment re Costs

Counsel for the Plaintiff:	J. Van Netten
Counsel for the Defendants:	K. Jamieson S. Walker
Place and Date of Trial:	Vancouver, B.C. October 19, 2017
Place and Date of Judgment:	Vancouver, B.C. November 8, 2017

Introduction

[1] In reasons for judgment released May 15, 2017 I awarded the plaintiff, Lynn Kingston, $126,486.19 in damages resulting from a collision on February 27, 2013: *Kingston v. Warden*, 2017 BCSC 794. The award was reduced to $124,986.19 by consent of the parties to take into account the plaintiff's access to her husband's extended medical plan which reduced the cost of care award.

[2] The trial commenced on Monday, October 17, 2016. The plaintiff seeks an award of costs at Scale B for steps taken up to and including Thursday, October 13, 2016 and double costs thereafter or, in the alternative, costs at Scale B up to and including Friday, October 14, 2016 and double costs thereafter, as a result of an offer to settle.

[3] The plaintiff made three formal offers to settle the action. On September 14, 2016 the offer to settle was in the amount of $623,711.83 plus costs. Mr. Van Netten, counsel for the plaintiff, candidly agreed this was a best case scenario offer. The plaintiff's examination for discovery was not completed until October 6, 2016 and the defendants were not in the best position to assess the plaintiff's case until at least that date.

[4] The plaintiff's second offer to settle was made on October 13, 2016 in the amount of $150,000 plus costs. A third offer to settle was made on the following day in the amount of $125,000 plus costs.

[5] Ms. Jamieson, counsel for the defendants, acknowledges the offers were in the proper form but opposes the award for double costs.

The Double Costs Rule

[6] Rule 9-1(4), (5) and (6) of the *Supreme Court Civil Rules* provides:

> **Offer may be considered in relation to costs**
>
> (4) The court may consider an offer to settle when exercising the court's discretion in relation to costs.

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 taken in the proceeding after the date of delivery or service of the offer to settle;
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> (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;
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> (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;
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> (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.

Considerations of court

(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;
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> (b) the relationship between the terms of settlement offered and the final judgment of the court;
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> (c) the relative financial circumstances of the parties;
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> (d) any other factor the court considers appropriate.

[7] The purpose of the double costs rules and its guiding principles were set out in *Hartshorne v. Hartshorne*, 2011 BCCA 29:

> [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" *(A.E. v. D.W.J.*, 2009 BCSC 505, 91 B.C.L.R. (4th) 372 at para. 61, citing *MacKenzie v. Brooks*, 1999 BCCA 623, *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 (C.A.), *Radke v. Parry*, 2008 BCSC 1397). In this regard, Mr. Justice Frankel's comments in *Giles* are apposite:
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> > [74] The purposes for which costs rules exist must be kept in mind in determining whether appellate intervention is

> warranted. In addition to indemnifying a successful litigant, those purposes have been described as follows by this Court:
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> - "[D]eterring frivolous actions or defences": *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 37 B.C.L.R. (2d) 2 at 25 (C.A.), leave ref'd, [1988] 1 S.C.R. ix;
> - "[T]o encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect": *Skidmore v.* Blackmore (1995), 2 B.C.L.R. (3d) 201 at para. 28 (C.A.);
> - "[E]ncouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases: *Bedwell v. McGill*, 2008 BCCA 526, 86 B.C.L.R. (4th) 343 at para. 33;
> - "[T]o have a winnowing function in the litigation process" by "requir[ing] 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": *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16, 88 B.C.L.R. (4th) 17 at para. 16.

[8] Mr. Van Netten maintains that at the time the third offer was made, all of the expert reports had been served. The orthopedic experts for both sides were virtually *ad idem* concerning the plaintiff's neck injury. The defendants were represented by experienced counsel and the second and third offer were both reasonable in all the circumstances and should have been accepted.

[9] Ms. Jamieson notes that there were significant credibility issues concerning the plaintiff, ranging from her inconsistent reports to various medical practitioners, her failure to disclose her home sewing business during discovery, her failure to advise one of her experts about her sewing business, the lack of disclosure of complete medical and business records and the failure to disclose complete expert files until very shortly before trial. In one instance there was disclosure of aspects of an expert's file during the trial.

[10] While the judgment very closely accords with the third offer, I am not satisfied the plaintiff should recover double costs after it was made. Counsel for the

defendants is correct to note in my reasons I found the plaintiff's evidence revealed some significant contradictions, both internally and externally:

> [120] First, there were contradictions between what the plaintiff said in her evidence and what she told some of the experts while treating her or examining her. While it is not unusual for there to be some differences between a plaintiff's evidence and what a doctor records, there are so many differences in this case that this factor alone calls into question the accuracy of the plaintiff's evidence.
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> [121] When the plaintiff was caught in a contradiction, where for example she told Dr. Hirsch she was exercising most days, she would downplay the improvement by saying it was a very recent one. She also told Dr. Hirsch that she had resumed most of her pre-accident domestic activities by the summer of 2013, she was sleeping well and taking very few medications for pain or to assist her with sleeping, which contrasted with the bleak picture of her life she attested to on direct examination.
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> [122] Second, the plaintiff portrayed herself in direct examination as a very healthy individual before the accident. She significantly downplayed the seriousness of her shoulder issues. She significantly downplayed the effect that peri-menopausal hormone fluctuations had on her energy level, sleep patterns and other conditions in the months before the accident. The plaintiff also downplayed the frequency and nature of the headaches she was having prior to the accident as compared to those she had after the accident.
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> [123] Third, the plaintiff did not disclose her sewing venture either to Mr. Hosking [her expert] or to opposing counsel at the first examination for discovery, despite the fact that she was in the process of meeting with someone to design a custom figure suit and has made efforts to promote her brand. I accept that the plaintiff's sewing venture does not present as particularly profitable, but the questions she was asked at examination for discovery about sources of income were not difficult ones. Nor were the questions Mr. Hosking asked about what kinds of activities she engaged in. Those omissions are troubling.
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> [124] Fourth, the plaintiff's record keeping in relation to her personal training business was difficult to reconcile with her evidence that she worked 50 to 55 hours per week prior to the accident. I accept that the plaintiff did not mean she trained clients 50 to 55 hours per week. She was likely at the gym for that number of hours per week, training clients, doing her own training and planning sessions for clients. The calendars she produced showed her best two months as January and February 2012, with 25 hours with clients in each of those two weeks. Those are also, by the plaintiff's evidence as well as Ms. Cowie's evidence, two of the busiest weeks of the year. There was no evidence that 25 hours of client training time would require the same amount of hours of planning.

[11] Some of these contradictions were foreshadowed at the plaintiff's examination for discovery where she resisted the suggestion that her home sewing

business was anything more than a hobby, despite the fact that she advertised her services and charged for her work. There were also triable issues respecting the plaintiff's breast surgery and whether or not it was causally connected to the accident. The plaintiff did not produce the records of a doctor, Dr. Rai, who she had consulted about breast surgery prior to seeing Dr. Malpass, the doctor who ultimately did the surgery. The defendants served Dr. Rai with a *subpoena duces tecum* to compel his attendance at trial with his chart, but ultimately did not call him as a witness.

[12] Whether or not the plaintiff's breast revision surgery was causally connected to the accident was a live issue. In my reasons I observed:

> [101] Based on the plaintiff's reports of breast discomfort following the accident, and despite no evidence of implant rupture, Dr. Malpass was of the opinion that the soft tissue envelope (both the scar capsule and retaining fascia ligamentous support) would have been stressed and could have become traumatically modified by the force of the collision that caused her seatbelt to compress and shear across her chest. He opined it was likely that her post-injury discomfort was soft tissue strain or tearing around the implant.
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> [102] Dr. Malplass found the plaintiff's left breast inframammary crease scar was slightly displaced, which may have resulted from the soft tissue trauma and may indicate underlying traumatic implant pocket soft tissue trauma. Dr. Malpass referred to photographs in his expert report which demonstrated this slight displacement, but those photographs were not produced for defence counsel until trial.
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> [103] Following the revision surgery, which included soft tissue pocket revision and reinforcement, the plaintiff did not complain to him of persistent or recurrent pain.
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> [104] On cross-examination, Dr. Malpass confirmed that he relied on the plaintiff's report to him of a motor vehicle accident with seatbelt compression of her left breast, demonstrated tenderness on palpation and a difference in symmetry which he identified in photographs which were not part of his expert report. He did not know if the left breast discomfort started immediately following the accident or days or weeks later. Dr. Malpass did not document the clinical finding of mild tenderness in his expert report.
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> [105] Dr. Malpass agreed an inframammary crease scar can become displaced without trauma. He knew the April 2014 ultrasound showed no abnormalities, but an ultrasound does not address the symmetry of an implant, which is related to appearance. Dr. Malpass agreed he did not find tearing around the implant capsule during surgery, but he did not expect to, given that the accident was two years earlier.
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> [106] Dr. Malpass did not mention the plaintiff's goals of elevated nipples and larger breasts in his report. He acknowledged that she decided on

> surgery before the ultrasound in April 2014, but an ultrasound was a requisite step as implant companies want to know if their products rupture.

[13] While I found the plaintiff established the accident caused an injury to her left breast which necessitated surgery, the cross-examination of Dr. Malpass revealed the plaintiff had reasons other than the accident for undergoing revision/augmentation surgery.

[14] In my view, this is not an appropriate case for an award of double costs. To so order would punish the defendants for being justifiably wary of the plaintiff's ability to make her case at trial, given her evidence at examination for discovery, the documentary gaps in her ability to prove her earnings and the lingering questions about whether the breast surgery was causally connected to the accident.

[15] I am mindful of the fact that the defendants were represented by counsel funded through the Insurance Corporation of British Columbia but the plaintiff was not hampered in making her case as a result.

[16] The plaintiff is entitled to her costs at Scale B. The defendants are entitled to the costs of this application at Scale B.

"Duncan J."

The Honourable Madam Justice Duncan