

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Leung v. Gill*,
2023 BCCA 465

Date: 20231129
Docket: CA48902

Between:

Silja Leung

Appellant
(Plaintiff)

And

Interdeep S. Gill

Respondent
(Defendant)

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Stromberg-Stein
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated
February 14, 2023 (*Leung v. Gill*, 2023 BCSC 953,
New Westminster Docket S244735).

Oral Reasons for Judgment

The Appellant, appearing in person: S. Leung

Counsel for the Respondent: J. Milligan

Place and Date of Hearing: Vancouver, British Columbia
November 29, 2023

Place and Date of Judgment: Vancouver, British Columbia
November 29, 2023

Summary:

The appeal is from the dismissal of the appellant's claim in negligence against the lawyer appointed by ICBC to defend her in a motor vehicle action against her. She says the lawyer was negligent and committed fraud because he asserted in the response to civil claim that he filed statements that were not true, such as the plaintiff was impaired. She says he never spoke to her before making these false claims on her behalf and takes exception to words being said on her behalf she knew were not true. Held: Appeal dismissed. The pleadings were not evidence, and the result of the complaint about them is not one which can support a damages award. Nor is there error in the judge's handling of the communication issue. ICBC was aware of the appellant's position when it settled this case, and so no damages flowed from the communication issue. As damages are a requirement for a finding of negligence, the claim was properly dismissed.

[1] **SAUNDERS J.A.:** Ms. Leung appeals the order of Justice Riley made February 14, 2023, dismissing her claim against the respondent lawyer who was appointed by the Insurance Corporation of British Columbia (ICBC) to represent her in defence of an action arising from a motor vehicle accident. By the order, Justice Riley awarded costs to the respondent, Mr. Gill.

Background

[2] As noted by the judge, the basic facts of the case are not in dispute:

[2] Although the parties do not see eye to eye on the facts, there is no controversy as to the basic facts of the case, in particular:

- a) Ms. Leung was the driver of a vehicle that was involved in a collision on North Road and Gatineau Place in Burnaby on 6 August 2018.
- b) There was one other vehicle involved in the collision. The driver of the other vehicle was Mr. Shamtanis.
- c) On 28 July 2020, Mr. Shamtanis commenced an action against Ms. Leung in the Supreme Court of British Columbia at New Westminster, which I will call the Shamtanis action.
- d) Ms. Leung was served with the notice of civil claim in the Shamtanis action on or about 15 September 2020, meaning that the deadline for filing a response was 6 October 2020.
- e) Ms. Leung's insurer, ICBC, exercised its authority to assume conduct of the defence under s. 74.1 of the *Insurance (Vehicle) Regulation*. On 29 September 2020, ICBC appointed Mr. Gill's firm, Gautam & Associates, to defend Ms. Leung in the Shamtanis action.

- f) On 1 October 2020 a lawyer from Gautam & Associates sent a letter to Ms. Leung advising that they had been retained to defend Ms. Leung in the Shamtanis action. The letter explained that ICBC had a duty to defend the claim under the terms of Ms. Leung's insurance coverage and that ICBC would have exclusive conduct of the defence including the right to appoint and instruct a lawyer, admit or deny liability, and take any action deemed necessary in defending the case. The letter further advised that under the terms of her insurance coverage Ms. Leung had a duty to cooperate with ICBC and counsel in this regard, and if she did not cooperate this could be a breach of the terms of coverage which could make her responsible to reimburse ICBC for any damages paid by ICBC to the plaintiff.
- g) Meanwhile, on 6 October 2020 Ms. Leung filed her own response to civil claim in the Shamtanis action, denying liability. The evidence indicates that Ms. Leung took this step because she had not yet received the letter from Gautam & Associates. Accordingly, Ms. Leung believed that 6 October 2020 was the deadline to file her response to civil claim and at that time she was unaware that ICBC had assumed conduct of the defence and had appointed a lawyer.
- h) The next day, 7 October 2020, Ms. Leung received the 1 October 2020 letter that had been sent to her by Gautam & Associates.
- i) Ms. Leung subsequently contacted Gautam & Associates and made efforts to speak personally with the lawyer appointed to act for her but was unsuccessful in speaking directly with the lawyer.
- j) On 27 October 2020 Ms. Leung filed a counterclaim in the Shamtanis action.
- k) On 13 December 2020 the defendant, Mr. Gill, filed a separate response to civil claim on Ms. Leung's behalf in the Shamtanis action. Ms. Leung was notified of this by way of a letter dated 19 January 2021.
- l) The 19 January 2021 letter once again advised Ms. Leung that ICBC had a duty to appoint a lawyer to defend the claim but under the terms of Ms. Leung's insurance coverage ICBC had exclusive conduct of the defence, that Ms. Leung had a duty to cooperate with Mr. Gill, and that a failure to do so would result in a breach of Ms. Leung's insurance contract that could make her responsible to reimburse ICBC for any damages paid to the plaintiff, Mr. Shamtanis. Finally, the letter advised Ms. Leung that her actions in personally filing a response to civil claim and a counterclaim could affect her insurance coverage and invited Ms. Leung to contact Mr. Gill directly to discuss.
- m) Ms. Leung complained to ICBC about the appointment of Mr. Gill as her counsel in the Shamtanis action and about the response to civil claim that Mr. Gill filed on her behalf. Among other things, Ms. Leung complained that Mr. Gill did not consult with her before

filing the response to civil claim and that his response to civil claim made allegations or assertions that were not accurate and did not reflect her position. Ms. Leung says ICBC did not listen to her complaints and did not respond to her efforts to communicate with them.

- n) More specifically, Ms. Leung alleges that on 20 January 2021 she spoke with a claims representative at ICBC. Ms. Leung asked for a different lawyer but was told that she had "no right" to change the lawyer.
- o) On 21 January 2021 Ms. Leung filed a notice of withdrawal with respect to the response to civil claim that had been filed by Mr. Gill. Ms. Leung asserts that she did so because she did not believe the assertions in the response were accurate or true and she did not want to compromise her position.
- p) Upon reviewing Ms. Leung's notice of withdrawal of the response to civil claim that his firm had filed on her behalf, Mr. Gill took no further action in the case.
- q) ICBC subsequently settled the claim brought by Mr. Shamtanis against Ms. Leung. Mr. Gill was notified of this on 11 May 2022. ICBC also decided to hold Ms. Leung in breach of the insurance contract and notified Mr. Gill of this on 9 June 2022. Mr. Gill deposes that he had no involvement in ICBC's decision finding Ms. Leung in breach of the terms of her coverage and was not made aware of it until several months after the fact.
- r) On 3 June 2022 Ms. Leung filed a notice of civil claim against Mr. Gill alleging that he was guilty of negligence and professional misconduct in his representation of her in the Shamtanis action.
- s) On 14 December 2022 Mr. Gill filed an application for summary trial of Ms. Gill's claim against him under Rule 9-7.
- t) Ms. Leung did not file a response to Mr. Gill's application. However, on 6 January 2023 she filed an amended notice of civil claim that included some additional paragraphs responding to the summary trial application and alleging among other things that Mr. Gill's effort to have the claim dismissed was an attempt to obstruct justice.

Application Below

[3] The judge assessed the merits of Ms. Leung's claim. He accepted that, by agreeing to act as counsel for Ms. Leung in the motor vehicle claim, Mr. Gill owed her a duty of care. However, the judge noted that the scope of that duty is informed

by the special tripartite relationship between a lawyer, an insured, and an insurer, as well as s. 74.1 of the *Insurance (Vehicle) Regulation*. That section reads:

Rights of corporation

- 74.1 Subject to section 79 of the Act, on assuming the defence of an action for damages brought against an insured, the corporation shall have exclusive conduct and control of the defence of the action and, without limiting the generality of the foregoing, the corporation shall be entitled to
- (a) appoint and instruct counsel to defend the action,
 - (b) admit liability, in whole or in part, on behalf of the insured,
 - (c) participate in any non-judicial process which has as its goal the resolution of a claim, and
 - (d) compromise or settle the action.

In these circumstances, Mr. Gill was counsel for Ms. Leung but took instructions from ICBC.

[4] The judge then considered whether Mr. Gill breached the standard of care required of him in these circumstances. He said:

[5] That brings me to the merits of the claim. With respect to the elements of a claim of professional negligence against a solicitor, I am guided by the test described by Justice Adair in *Fong v. Lew*, 2015 BCSC 436. It is clear that in accepting a retainer or agreeing to act as counsel for Ms. Leung in the defence of the Shamtanis claim Mr. Gill owed Ms. Leung a duty of care. However, the particular scope of that duty of care is a function of the context which includes the terms of the retainer as informed by s. 74.1 of the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83. This provision makes it clear that ICBC had the authority to assume conduct of Ms. Leung's defence in the Shamtanis action, to appoint counsel on Ms. Leung's behalf, and to instruct that counsel in the conduct of the case on her behalf.

[6] To quote from the leading case of *Mara (Guardian ad litem of) v. Blake* (1996), 23 B.C.L.R. (3d) 225 (C.A.), at paragraph 10, “[t]he courts have on many occasions recognized the unique nature of the insured-insurer relationship, in which the insurer, although bound to deal with the insured in good faith, is ultimately entitled as a matter of contract to decide upon what course is to be taken in the conduct of an action, notwithstanding that the insured may vigorously object.”

[7] Thus, while Ms. Leung may have objected to the appointment of Mr. Gill as her counsel, and the manner in which Mr. Gill handled the case, the fact is that in this particular context Mr. Gill's obligation was to act on the instructions given to him by ICBC.

[5] Justice Riley accepted that Mr. Gill filed the response to civil claim past the deadline set out in the *Supreme Court Civil Rules*. On the record before him, the judge was unable to conclude whether this alone constituted a breach of the requisite standard of care. However, he found that Ms. Leung was not prejudiced by the late filing because Mr. Gill's response was filed before the opposing party took any steps to obtain default judgment. There were no damages. Where there are no damages, there can be no award in a negligence claim and the negligence claim cannot succeed.

[6] Aside from the late response to civil claim, the judge determined there was no evidence before him that Mr. Gill had breached the standard of care in his conduct of Ms. Leung's defence, as directed by ICBC. As a result, the judge concluded that Ms. Leung had failed to prove the elements of her claim.

[7] Ms. Leung appeals the order dismissing her claim and ordering costs in favor of Mr. Gill. Before us, she said she was not disputing the judge's order on the negligence aspects but considered that she had also claimed in fraud on the part of Mr. Gill's by his filed pleadings asserting facts she knew not to be true, for example, that the plaintiff in that action was intoxicated.

Issues on Appeal

[8] In her factum, Ms. Leung submits that the judge erred by:

- a) dismissing her entire claim on the basis that she failed to prove the necessary elements of professional negligence, without also considering whether she had proven the elements necessary to establish fraud; and
- b) dismissing her claim for professional negligence without considering whether Mr. Gill's failure to communicate with her was a breach of his duty of care or was professional misconduct.

[9] Looking at these two grounds, Mr. Gill submits that the judge made neither of these errors. He says that Ms. Leung's claim was properly framed in negligence, not fraud, and the judge was not required to engage in a fraud analysis.

[10] He also further submits that he was not obliged to consult Ms. Leung before filing his response to civil claim.

Analysis

[11] Considering these grounds separately, I do not see either of them can succeed. The first ground is about the pleading filed in defence of the claim against Ms. Leung. She says that the response to civil claim set out untrue facts and so put her in the position of lying to the court. She has taken great exception to the idea that as a truthful person she would advance a pleading that was untrue in some averments.

[12] I will say, for myself, I understand how a pleading can overstate the facts known to the party. They should not do so. However, the pleading is not evidence, and I can say confidently a court would not attribute dishonesty to Ms. Leung from these averments in the pleading. This cannot amount to fraud. That means, Ms. Leung, that these misstatements would not have been taken as truth by the court, or rebound against you. This is not a basis on which you could succeed in obtaining damages. If you cannot obtain damages, as I have said, you cannot succeed in negligence, and that claim would have to be dismissed.

[13] The second ground is about the lawyer's failure to communicate with you. Importantly, the claim against you has been settled by ICBC, and ICBC knew your position that the other driver was at fault. Again, this complaint is not one on which you could establish damages, in the circumstances. Thus, in my view, there was no claim in fraud that should be pursued in court.

[14] I understand you wanted to tell Mr. Gill that some of the pleading was wrong, but I have explained that would not, in my opinion, have changed the outcome.

[15] So, Ms. Leung, I must say to you that I see no basis on which we may set aside the order. I would dismiss the appeal.

[16] **STOMBERG-STEIN J.A.:** I agree.

[17] **SKOLROOD J.A.:** I agree.

[18] **SAUNDERS J.A.:** The appeal is dismissed.

“The Honourable Madam Justice Saunders”