

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kler v. Kumar*,
2023 BCSC 1515

Date: 20230829
Docket: M209631
Registry: New Westminster

Between:

Karambir Singh Kler

Plaintiff

And

Raj Kumar and T. Kumar Sweets Restaurant

Defendants

Before: The Honourable Justice Lamb

Reasons for Judgment

Counsel for the Plaintiff:

R. Bhogal
E.H.W. Lay

Counsel for the Defendants:

L.G. Harris, K.C.
D.P.L. Evans

Place and Dates of Trial:

New Westminster, B.C.
February 6-9; 13-15, 2023

Place and Date of Judgment:

New Westminster, B.C.
August 29, 2023

Table of Contents

OVERVIEW 3

BACKGROUND..... 3

 The accident and aftermath..... 4

 Credibility 5

FINDINGS REGARDING INJURIES FROM THE ACCIDENT 6

 Symptoms 6

 Symptoms are caused by the accident..... 6

 Prognosis 9

DAMAGES FOR ACCIDENT-RELATED INJURIES..... 10

 Loss of earning capacity..... 10

 Forever Destiny: from house builder to property developer 12

 Past loss of earning capacity 16

 Future loss of earning capacity 19

 Loss of housekeeping capacity 21

 Non-pecuniary damages 23

 Plaintiff has failed to mitigate his loss..... 25

 Future cost of care 27

 Special damages..... 28

CONCLUSION..... 29

Overview

[1] Karambir Kler was injured when his vehicle was rear-ended on August 24, 2017. He claims damages against the defendants, including a large claim for past and future loss of earning capacity.

[2] The defendants admit liability for the accident, and they acknowledge that Mr. Kler was injured as a result of the accident. However, they dispute the cause of his ongoing low back pain, and they say he is either exaggerating his pain complaints or he has failed to mitigate his loss because he has not had back surgery as recommended. They challenge the quantum of damages claimed.

[3] A key issue at trial was the cause of Mr. Kler's low back pain and the neurological symptoms he experiences in his legs and feet. The neurologist who testified at the request of the defendants says Mr. Kler's condition is caused by degenerative changes in his vertebrae and that it would have occurred irrespective of the accident. The neurosurgeon who testified at the request of the plaintiff says his back pain is caused by an isthmic spondylolisthesis (a vertebrae slipping out of place due to a pre-existing pars defect) at L5-S1. The neurosurgeon says the pre-existing pars defect likely would have remained asymptomatic but for the accident. For the reasons that follow, I prefer the expert evidence tendered by the plaintiff on the issue of causation, and the award of damages reflects the contingencies offered by the neurosurgeon.

[4] On the whole of the evidence, I accept that Mr. Kler's complaints of pain are not exaggerated; however, he has failed to mitigate his non-pecuniary losses by failing to have the recommended surgery. The award for non-pecuniary damages reflects this failure to mitigate. The defendants failed to prove that his other losses would have been reduced if he had had the surgery when it was recommended by his doctor.

Background

[5] Mr. Kler was 47 years old at the time of the accident. He is married with one adult son. Mr. Kler has a close relationship with his parents and his younger brother.

Before the accident, he and his wife had an active social life that included travel with his wife's sister and her husband and social outings with his brother and his brother's wife.

[6] Prior to the accident, Mr. Kler had no history of back pain. As a younger man, Mr. Kler was active in grass hockey, track, cricket and *kabaddi* (a team sport described as tag wrestling). He continued to play badminton – his passion – until shortly before the accident; he often challenged his son and younger brother to try to beat him. In the years before the accident, he enjoyed walking, biking and other outdoor activities. He weight-trained four or five times per week. He tried golf with his son on a few occasions.

[7] At the time of the accident, Mr. Kler was working as a general contractor building single-family homes and selling them for profit through his company, Forever Destiny Homes Ltd. ("Forever Destiny"). Mr. Kler organized Forever Destiny's projects by finding the building lots, securing financing, obtaining plans and permits, and overseeing subtrades. He also worked hands-on to assist or supplement work done by subtrades in order to save money and keep building projects on schedule. He enjoyed adding creative touches like feature walls to the houses he built.

The accident and aftermath

[8] At approximately 11:30 a.m. on August 24, 2017, Mr. Kler's vehicle was struck from behind as he was making a right turn at an intersection. He stopped his vehicle and tried to figure out what had happened because the defendants' vehicle left the scene without stopping. Another driver confirmed to Mr. Kler that he had been rear-ended.

[9] Right after the accident, Mr. Kler was in shock. He felt discomfort and stiffness in his knee and his neck. He drove from the scene of the accident to his wife's office, which was close by. She recommended that he see a doctor, so he went to a walk-in clinic.

[10] On the day of the accident, Mr. Kler had neck stiffness and knee pain. By the evening, he had neck pain and back pain and a funny sensation in his big toe. Within the first week, he had stiffness and pain in his low back, pain radiating into his leg, pain in his big toes, and pins and needles in his feet. The knee pain resolved within a few days.

[11] In the first year and a half following the accident, Mr. Kler had physiotherapy, massage therapy and chiropractic treatments. After a three-and-half-year gap, Mr. Kler resumed physiotherapy in August 2022, and he continues to attend on a weekly basis. He receives intramuscular stimulation at the physiotherapy clinic and intends to continue with that treatment. Post-accident, Mr. Kler took Gabapentin and Lyrica for a short period, but he now takes Advil a few times per day when his symptoms flare.

[12] At the time of the accident, Mr. Kler and his wife lived in rental accommodation in White Rock. They moved to Kelowna in the fall of 2020 because Forever Destiny had a project there and Mr. Kler's in-laws lived in Kelowna.

Credibility

[13] The defendants argue that Mr. Kler presented with some serious credibility issues. However, I accept that his complaints of pain are genuine and that his activities and function are limited due to back pain. His limitations and change in activity level were corroborated by family members who testified at trial. His physical symptoms are consistent with the radiological evidence. His reports of pain have been generally consistent throughout his medical care and on examination by medical legal experts.

[14] That said, I do not accept all of Mr. Kler's evidence, especially with respect to a contract he had to build a house for his in-laws. Both Mr. Kler and his wife under-reported the travelling they do now: neither mentioned a recent three-day trip to Ireland they took with Ms. Kler's sister and brother-in-law.

Findings regarding injuries from the accident

Symptoms

[15] In the five-and-a-half years since the accident, Mr. Kler has had persisting low back pain. He describes it as a roller coaster ride with good days and bad days, with more good days than bad. He has learned to avoid certain activities that aggravate his pain. His low back pain is manageable if he stretches, does physiotherapy and avoids twisting his low back. If his low back pain is aggravated, then he needs a day or two of rest to get back to a manageable pain level.

[16] When standing, Mr. Kler has a little bit of pain in his low back, tingling in his left leg, and left toe numbness. He is not able to sit in low cars. His legs get tight, which limits his tolerance for walking to less than 10 minutes at times. Cooking and uneven walking surfaces aggravate his low back pain. He avoids vacuuming and yard work.

[17] In addition to his low back pain, I accept that Mr. Kler had soft tissue neck pain that resolved within a few months of the accident and a soft tissue injury of his right knee that resolved within a few days after the accident.

Symptoms are caused by the accident

[18] I accept the opinions of the experts tendered by the plaintiff that the accident caused Mr. Kler's asymptomatic pre-existing low back condition to become symptomatic.

[19] Dr. Harpreet Sangha, physiatrist, opined that the accident aggravated a previously asymptomatic condition into a painful condition with functional impairment.

[20] Dr. Navraj Heran (neurosurgeon who offered expert evidence at the plaintiff's request) and Dr. John Falconer (neurologist who offered expert evidence at the defendant's request) agree that Mr. Kler had a pre-existing pars defect, which is a defect in the bone that connects the vertebrae to the joints on the back of the spinal column. The pars defect may have been caused by a stress fracture (possibly as a

result of the contact sports Mr. Kler played in his youth) or the defect may have been there from birth. Either way, Mr. Kler's pars defect was asymptomatic before the accident.

[21] Dr. Heran and Dr. Falconer agree that Mr. Kler now has pain with movement in his low back because the L5-S1 vertebrae have slipped at least in part due to the pars defect, and the nerves between L5 and S1 are now compressed. Where they differ is in regard to the likelihood this pain would have happened but for the accident.

[22] Dr. Heran says the onset of low back pain shortly after the accident supports the conclusion that the accident made a vulnerable area symptomatic. He also says the change in the amount of vertebrae slippage since the accident is more than can be explained by age-related degeneration. Dr. Heran opined that Mr. Kler "likely would have remained well in the long-term without any further progression at least from a symptomatic standpoint as this is the course that most patients [with a pars defect] follow". In other words, Dr. Heran says that Mr. Kler's pars defect likely would not have resulted in pain had the accident not happened. Based on the research literature reviewed by Dr. Heran, there was a small chance (5% to 20%) that Mr. Kler would have become symptomatic over time even if the accident had not occurred.

[23] Dr. Heran is a very experienced neurosurgeon. He performs more than 400 spinal surgeries per year on average.

[24] In his written report, Dr. Falconer diagnosed Mr. Kler with chronic degenerative spinal osteoarthritis (moderate) for which the "natural history is for back pain to develop at some point". He also diagnosed L5-S1 grade 2 spondylolisthesis (slipping of the vertebrae) with spondylolysis (a chronic fracture, which in this case is the pars defect), for which the natural history is "the slippage becomes enough that the pinching of the nerves becomes painful". Dr. Falconer wrote that pain was "destined to happen absent a car accident at all", or at worst "the car accident jarred this enough to bring on symptoms slightly earlier than they would have occurred anyway". Dr. Falconer says the surgery now recommended for

Mr. Kler's condition would have been required at some point even absent the accident.

[25] In cross-examination, Dr. Falconer initially agreed that Mr. Kler's spondylolisthesis was the spondylotic type. Later in cross-examination, Dr. Falconer said that both spondylolysis and degenerative changes contributed to Mr. Kler's spondylolisthesis, which is different from what he wrote in his report. This apparent evolution in Dr. Falconer's opinion followed cross-examination on an article he cited on the progression of degenerative spondylolisthesis.

[26] Dr. Falconer was firmly of the view that Mr. Kler inevitably would have had pain based on his "advanced premature degenerative changes at L5-S1. He reached his conclusion based on 30 years of experience with many patients like Mr. Kler. Dr. Falconer was not able to offer an opinion on *when* Mr. Kler likely would have started to experience pain had the accident not occurred.

[27] On balance, I prefer the opinion of Dr. Heran, as he founded his opinion in part on his experience as a neurosurgeon and in part on empirical studies. Dr. Falconer based his opinion on his personal experience of treating patients like Mr. Kler, which he described as "more art than science". However, scientifically rigorous studies provide evidence that may not be obvious from one practitioner's caseload. For example, Dr. Falconer opined that the "natural history" of individuals with spondylotic spondylolisthesis is for the slippage to continue to the point where the pinching of nerves is painful; however, this prediction is inconsistent with the research literature, which indicates that only a small percentage of patients with spondylotic spondylolisthesis develop pain. Further, Dr. Heran was not challenged on his statement that many patients with severe spondylolisthesis do not need surgery because they have no symptoms. Similarly, neither Dr. Heran nor Dr. Sangha were cross-examined on whether Mr. Kler's condition could be explained by degenerative changes.

[28] In any event, Dr. Falconer was not able to predict when Mr. Kler might have developed symptoms in the absence of the accident. In particular, Dr. Falconer did

not opine that Mr. Kler would likely be experiencing his current symptoms by this time even if the accident had not happened. To that extent, his opinion is not particularly helpful in determining how to assess damages in this case.

[29] That said, I accept that certain damage awards must be discounted to reflect the real and substantial possibility that Mr. Kler would have developed low back pain as a result of his pre-existing pars defect even if the accident had not occurred. Where there is a measurable risk that a pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, this can be taken into account in reducing the overall award: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at para. 35. This is sometimes referred to as the "crumbling skull" rule: *Athey* at para. 35.

[30] The specific discount will be addressed in the context of each head of damage. The plaintiff argued that any deduction should be at the lower end of the range offered by Dr. Heran because Mr. Kler was very physically fit prior to the accident. However, the plaintiff conceded there was no evidence to suggest that physical fitness made it less likely that his pre-existing condition would have become symptomatic absent the accident. On the other hand, there was also no evidence to suggest that his pre-accident physical work and activities put Mr. Kler at a higher risk of injuring his low back and causing his pre-existing condition to become symptomatic.

Prognosis

[31] I accept Dr. Heran's opinion regarding prognosis. Dr. Falconer agrees with Dr. Heran's recommendation for surgery.

[32] According to Dr. Heran, Mr. Kler's persisting low back pain, radiation of pain into his left leg, and paresthesia into both legs may not have plateaued. He is at risk of exacerbations of his low back pain and left leg pain and of developing right leg pain and more paresthesia. Mr. Kler's functional limitations are expected to continue indefinitely and will likely worsen over time unless he has surgery.

[33] Dr. Heran says that stretching, medications and therapies (including steroid injections) will only result in temporary relief of symptoms.

[34] The definitive treatment for Mr. Kler's low back pain is L5-S1 fusion surgery, which Dr. Heran recommends Mr. Kler undergo sooner rather than later. Dr. Heran opined on the outcome as follows:

The likelihood of [surgery] resulting in substantial benefit in his pain state is probably on the order of 90% or 95% or more. The anticipation is 70% or more reduction in his pain, but he will not ever be pain-free in the long term.

[35] According to Dr. Heran, L5-S1 fusion surgery would require three to six months of recovery before a return to usual activities. During the recovery period, Mr. Kler would have limited mobility, and he would be precluded from heavy lifting, bending and twisting. Even with surgery, it would be better to avoid repetitive heavy lifting to reduce the risk of increased wear and tear.

[36] I accept that Mr. Kler's symptoms will persist and may get worse if he does not have the recommended spinal surgery. I accept that his symptoms will most likely improve if he has surgery, but he will still not be symptom-free or fully functional.

Damages for accident-related injuries

[37] I will review the various heads of damage claimed, and apply a discount to reflect the likelihood that Mr. Kler's asymptomatic condition would have become symptomatic without the accident. I will then review the defendants' failure to mitigate argument before addressing the claims for future cost of care and special damages. The future cost of care award is not affected by the failure to mitigate argument. The parties agreed on special damages (save for two items) with no argument that the award should be reduced for failing to mitigate.

Loss of earning capacity

[38] In order to assess whether Mr. Kler suffered a loss of earning capacity as a result of the accident, it is necessary to assess both what his earning capacity was prior to the accident and what impact the accident had on that capacity. It is

challenging to assess Mr. Kler's pre-accident earning capacity because he changed careers from retail manager to general contractor two years before the accident. It is challenging to assess Mr. Kler's post-accident earning capacity because Forever Destiny's business model changed after the accident and up-to-date financial records were not in evidence.

[39] Forever Destiny had a limited earnings history at the time the accident happened in August 2017. As of August 2017, Forever Destiny had completed and sold two single-family homes and had almost completed a third. According to the company's annual financial statements, these three initial projects were profitable. However, there was no breakdown of costs incurred on a project-by-project basis.

[40] After the accident, Forever Destiny built a fourth single-family home. Mr. Kler said that project took longer and required more outside labour to make up for what he could not do himself as a result of his low back pain. However, he conceded that it was difficult to identify additional expenses Forever Destiny incurred as a direct result of the accident.

[41] Before this final single-family home was completed, Forever Destiny started its first multi-unit townhouse on Richter Street in Kelowna. It is not clear whether Mr. Kler's spending time in Kelowna on the Richter Street project contributed to the cost and delay of the final single-family home.

[42] In any event, Forever Destiny has now evolved from a single-family home builder in Surrey to a property developer and construction management company in Kelowna. Forever Destiny's profits and in turn Mr. Kler's earning capacity have increased significantly from what they were pre-accident.

[43] Despite these complexities, I am satisfied that Mr. Kler has established a past loss of earning capacity as a result of having to hire replacement labour. On the other hand, aside from a loss of capacity for an anticipated post-surgical recovery period, I find that Mr. Kler has not established that his ongoing back pain will result in a future pecuniary loss.

[44] Before turning to the analysis of his loss of capacity claim, I will review Forever Destiny's business model and earnings before and since the accident. The defendants concede that Forever Destiny's earnings provide the evidentiary foundation for the assessment of Mr. Kler's personal loss of earning capacity.

Forever Destiny: from house builder to property developer

[45] Mr. Kler started building houses full-time in 2015. Mr. Kler learned the construction business by helping to build his own house many years ago. He then took on building projects on the side while running other businesses and later working as a retail manager.

[46] Between 2015 and the date of the accident, Forever Destiny built three houses:

- a) Forever Destiny bought one lot in South Surrey, sold it and then acted as general contractor to build a house on that lot;
- b) Forever Destiny bought a second lot in South Surrey then built a house on that lot that was unsold as of the date of the accident; and
- c) Forever Destiny bought a large lot on 0 Avenue in South Surrey and was building a home on that lot that was largely complete as of the date of the accident.

[47] Each of these three houses was constructed in less than 12 months.

[48] Prior to the accident, Mr. Kler would do some of the physical labour on the construction site, including supply pick-up, site clean-up, removing foundation molds and back framing. Mr. Kler enjoyed doing some cosmetic finishing work on the projects, including painting feature walls and trim.

[49] Mr. Kler found his hands-on work as a building contractor to be rewarding. He enjoyed bringing his creativity to the projects and adding value. Mr. Kler says his plan prior to the accident was to build and sell as many houses as he could.

[50] Forever Destiny's financial statements were admitted into evidence for the truth of their contents. The company had no revenue in the corporate years ending January 31, 2014, January 31, 2015 and January 31, 2016. In the corporate year ending January 31, 2016, Forever Destiny bought its first two lots in South Surrey for a total of \$1,004,607.

[51] In the corporate year ending January 31, 2017, Forever Destiny had revenue of \$847,825 (for the sale and construction of the pre-sold house on the first South Surrey lot), and Mr. Kler paid himself a management salary of \$52,306. It is not clear when the company purchased the 0 Avenue property, but Forever Destiny's inventory of property held for development increased to \$1,760,217 in the corporate year ending January 31, 2017 despite selling the first South Surrey lot.

[52] Forever Destiny sold the second South Surrey lot in 2017. The company had completed construction on the 0 Avenue project subject to deficiencies when the accident happened on August 24, 2017.

[53] In the corporate year ending January 31, 2018, Forever Destiny had revenue of \$2,609,524 from the sale of the second South Surrey lot and the 0 Avenue project. There was no evidence as to the exact sale price for either of these projects. Mr. Kler took a management salary of \$108,165 in the corporate year ending January 31, 2018.

[54] From mid-2015 until January 31, 2018, Mr. Kler and Forever Destiny earned approximately \$365,000.

[55] In late 2017, shortly after selling the 0 Avenue project, Forever Destiny purchased a property on 139 Street in Surrey. Mr. Kler recalls that the property cost approximately \$1.2M. This purchase price is consistent with Forever Destiny's balance sheet, which showed inventory of \$1,276,769 as of January 31, 2018.

[56] Mr. Kler planned to demolish the small old house on the 139 Street property and build a new house. Because of his injuries, he delayed the start of the 139 Street project, and he and his wife moved into the old house for six months. In

March or April 2018, Mr. Kler and his wife moved out of the 139 Street property, and demolition of the old house began.

[57] The 139 Street project completed in late 2019 and sold for \$2,142,847. This sale price is significantly higher than the sale price for the other single-family homes built by Forever Destiny. Mr. Kler says the 139 Street project took longer and cost more to construct because he was not able to do smaller physical tasks on the job site that he did pre-accident, which increased subcontracting and financing costs. However, he also acknowledged that it was difficult to calculate how much he spent hiring replacement workers for tasks he would have done himself prior to the accident.

[58] As mentioned, Forever Destiny's financial statements are prepared annually rather than on a project-by-project basis, which means they are not overly helpful in comparing Mr. Kler's pre-accident and post-accident earning capacity. Forever Destiny's income statement showed an annual loss before recovered income taxes of \$200,042 for the corporate year ending January 31, 2020. However, according to the general ledger, by August 2019, Forever Destiny was paying expenses to develop a townhouse project on Richter Street in Kelowna. In other words, not all of the expenses for the corporate year ending January 31, 2020 reflect costs for the 139 Street project. It is not clear that Forever Destiny lost money on the 139 Street project.

[59] Developing the Richter Street townhouse project in Kelowna represented a change of direction for Forever Destiny. Mr. Kler had difficulty remembering when Forever Destiny purchased the Richter Street property, and his best recollection was that it was in 2018. Consistent with this recollection, Forever Destiny's general ledger first showed property tax payments to the City of Kelowna in 2019. In any event, Mr. Kler sought and obtained rezoning to build a seven-unit townhouse on the Richter Street property. Development of the Richter Street project was underway by at the latest August 2019, because by then Forever Destiny was paying architects and engineers.

[60] Mr. Kler learned about property development and construction management through the Richter Street project. He oversaw construction of the townhouse project without doing any physical labour. He hired people to do the smaller, creative tasks that he once did on the single-family dwellings built by Forever Destiny.

[61] In the corporate year ending January 31, 2021, Forever Destiny had revenue of \$1,740,679 from pre-sales of some of the seven townhouses in the Richter Street project and net earnings of \$436,420. Mr. Kler did not draw a salary that year.

[62] Financial statements for the corporate year ending January 31, 2022 were not available at trial, but Mr. Kler estimated that Forever Destiny earned approximately \$600,000 to \$700,000 on the Richter Street project. He did not specify whether this figure was net or gross or whether it included earnings from pre-sales included in the 2021 financial statements.

[63] Forever Destiny now does land assembly, rezoning, property development and construction management. Mr. Kler remains the only employee. His job now focuses on paperwork and meetings.

[64] In addition to the Richter Street project, between 2019 and 2022, Forever Destiny assembled three lots on Clement Avenue in Kelowna, succeeded on a rezoning application, and sold the lots for development at a profit in the range of \$2M. Mr. Kler cautioned that there are no guarantees in property development, and his business model relies on finding investors interested in developing projects through a joint venture.

[65] More recently, Mr. Kler was hired as construction manager to build three single-family dwellings for \$35,000–\$50,000 per house. In his current work as a construction manager, he is generally paid a flat fee with no opportunity to increase his profitability by using his own physical labour. If he had been general contractor for those same houses, he testified that he could earn double or triple the construction management fee. However, based on his evidence of his hours of work as a general contractor pre-accident, I do not accept that he would have been able

to work as a general contractor for three houses and simultaneously undertake the more profitable property development work Forever Destiny does now.

[66] Although financial statements for the corporate year ending January 31, 2022 and January 31, 2023 were not available at trial, I am satisfied based on Mr. Kler's testimony that Forever Destiny is far more profitable as a property developer and construction manager than it was as a general contractor. As a result, I find that Mr. Kler's earning capacity is significantly higher five-and-a-half years post-accident than it was pre-accident.

Past loss of earning capacity

[67] I accept that Mr. Kler's earning capacity was initially reduced post-accident due to his inability to do physical tasks for Forever Destiny construction projects. However, once the company pivoted from single-family home construction to project development and land assembly, his earning capacity was no longer restricted by his physical limitations, and any loss of earning capacity due to the accident effectively terminated.

[68] Compensation for past loss of earning capacity is based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30. When assessing damages for past loss of earnings, I may consider hypothetical events that may have happened in the past provided there is a real and substantial possibility they would have occurred but for the injuries Mr. Kler suffered: *Athey* at para. 27. Hypothetical events are to be given weight according to their relative likelihood: *Athey* at para. 27.

[69] The defendants say that Mr. Kler failed to prove that he would have earned more income between the date of the accident and trial if the accident had not happened. However, I accept that Mr. Kler and Forever Destiny would have earned more by spending less on contractors if Mr. Kler had not been precluded from working on the 139 Street project due to his back pain.

[70] I accept that Mr. Kler hired others to do physical tasks he was no longer able to do on the 139 Street project. From Forever Destiny's general ledger, Mr. Kler identified two subcontractors and a cleaning company that he says he hired post-accident to do tasks he would have done himself pre-accident. The amounts paid to those companies between August 2017 and the sale of the 139 Street project total \$20,674. With his low back pain, Mr. Kler was not able to remove foundation molds, do back framing or do site clean-up.

[71] Forever Destiny paid the second subcontractor an additional \$26,000 in late 2020 (i.e., after the 139 Street project was sold). As such, I infer that expense was incurred for the Richter Street project. However, Mr. Kler failed to establish there was a real and substantial possibility that, but for his injuries, Forever Destiny would not have incurred that expense when building the Richter Street townhouses. The Richter Street project was different in kind from the projects that Forever Destiny built before the accident, and I am not satisfied that there was a real and substantial possibility that Mr. Kler would have contributed his own physical labour to the Richter Street project even if the accident had not happened.

[72] I accept that Mr. Kler delayed starting construction on the 139 Street project while he rested and pursued treatment to try to recover from the accident. Forever Destiny incurred carrying costs for an additional few months that it would not have incurred but for the accident. However, the actual amount of such carrying costs is not proven on the evidence at trial. Further, at least some of these additional financing charges were off-set by Mr. Kler and his wife saving on rent by moving into the old house at 139 Street for a few months.

[73] Mr. Kler says that, as a result of the accident, he lost the opportunity to work as a general contractor on single-family homes and the potential to profit through his own hands-on efforts and the efficiencies he was able to create through his own labour. However, I am satisfied that Mr. Kler's earning capacity substantially increased post-accident once Forever Destiny changed its business model from capitalizing on Mr. Kler's manual labour to capitalizing on his property development and construction management skills. Once Forever Destiny's business model had

changed, Mr. Kler's earning capacity was no longer restricted by his accident-related injuries. Based on the earnings from the Richter Street project and the Clement Avenue land assembly, Forever Destiny is more profitable post-accident than it was pre-accident even though Mr. Kler is no longer physically able to do certain construction tasks. Further, it is unlikely that (as a single-employee operation) Forever Destiny would have been able to act as a general contractor on a number of properties simultaneously, which is something Forever Destiny is able to do as a property developer and construction manager.

[74] Finally, Mr. Kler claims a loss of \$150,000 because he says he was not able to act as construction manager for his wife's sister's custom-built home in Kelowna. I find on the evidence that Mr. Kler has not established that but for the injuries from the accident, there was a real and substantial possibility that he would have completed the contract he signed with his sister-in-law and her husband on March 3, 2020. When Mr. Kler contracted with his in-laws to oversee construction of their custom-built home, Forever Destiny was in the midst of building the Richter Street townhouse project, its first construction project of that nature and magnitude. When they entered the contract for the custom-built Kelowna home, Mr. Kler understood that his in-laws were willing to wait before starting construction on their home. However, when lumber and other construction costs jumped dramatically due to the COVID-19 pandemic, his in-laws decided to forge ahead sooner than planned. Mr. Kler says he would have taken on his in-laws' project if his back had been feeling better. However, I find it is more likely that Mr. Kler decided not to act as general contractor on his in-laws' construction project because he was simply too busy in March 2020 with the Richter Street project. As of that time, he was still living in White Rock and travelling back and forth to Kelowna to the Richter Street project and Forever Destiny's other land development projects. Forever Destiny's other projects did not leave Mr. Kler enough hours in the day to act as general contractor for his in-laws. I note that Mr. Kler did provide gratuitous construction management services to his in-laws, similar to the services he now provides to other clients.

[75] To assess Mr. Kler's past loss of earning capacity, I must consider what Mr. Kler would have earned if the accident had not happened. I accept Forever Destiny incurred additional costs of at least \$20,674 for the 139 Street project. Although Mr. Kler could not identify all of the additional expenses, I accept that Forever Destiny had to pay others to do tasks on the 139 Street project between the spring of 2018 and late 2019 that Mr. Kler likely would have done if his back pain had not prevented him from doing so. The 139 Street project was less profitable because Mr. Kler did not contribute his own physical labour. Pre-accident, Forever Destiny earned an average of \$120,000 per single family house it built. Based on the hours he spent and the range of tasks he did, I accept that approximately half of the profit for each pre-accident building project (i.e., \$60,000) was likely due to unpaid physical labour contributed by Mr. Kler. Based on its sale price, I am satisfied that the 139 Street house was likely somewhat more elaborate and required more replacement labour than Mr. Kler contributed to the pre-accident houses. To reflect the cost of this replacement labour, I assess Mr. Kler's past loss of earning capacity to be \$75,000.

[76] The award for past loss of earning capacity should be discounted by 15% to account for the likelihood that Mr. Kler's pre-existing condition would have become symptomatic even if the accident had not occurred. Dr. Heran opined that there was a 5% to 20% that Mr. Kler would have become symptomatic over time even if the accident had not occurred. A discount of 15% to account for Mr. Kler's pre-existing condition is consistent with the discount applied in similar cases: *Corness v. Ng*, 2022 BCSC 334; *Sandhu v. Peloquin*, 2019 BCSC 1333. As a result, the award for past loss of earning capacity shall be \$63,750.

Future loss of earning capacity

[77] Before an award can be made for loss of future earning capacity, a plaintiff must demonstrate "that there is a real and substantial possibility of a future event leading to an income loss": *Perren v. Lalari*, 2010 BCCA 140 at para. 32. The defendants say that Mr. Kler has failed to establish a substantial possibility that he will suffer a loss of earnings in the future as a result of the accident.

[78] I accept that Mr. Kler has an ongoing condition (low back pain) that might lead to a loss of capacity. However, aside from a loss of earnings during a period of post-surgical recovery, I am not satisfied that there is a real and substantial possibility that Mr. Kler's accident-related condition is likely to cause a pecuniary loss. In other words, the second stage in the *Rab* test is not met in this case: *Rab v. Prescott*, 2021 BCCA 345 at para. 47. For the most part, Mr. Kler's post-accident earning capacity is not dependent on his physical limitations: Forever Destiny now profits from Mr. Kler's business acumen and managerial skills rather than from his physical labour. The company is significantly more profitable post-accident than it was pre-accident by changing its business model. Without the Forever Destiny financial statements for 2022 and 2023, it is difficult to determine accurately what Mr. Kler's current earning capacity is. Based on Mr. Kler's testimony, I am satisfied that his current earning capacity is significantly higher than his pre-accident earning capacity.

[79] That said, I accept that there is a real and substantial possibility that Mr. Kler will undergo surgery, which will result in a period of post-surgical time off work. I accept that this post-surgical time off work would result in a pecuniary loss. Dr. Heran predicts a three- to six-month recovery period during which Mr. Kler will be less mobile and unable to do his usual activities. I accept that there would likely be an initial post-surgical period when he is completely off work; however, it is not obvious that Mr. Kler would be unable to continue with paperwork and meetings for the full three to six months.

[80] The defendants say that Mr. Kler has failed to show any post-surgical recovery time would necessarily result in pecuniary loss because Mr. Kler has shown he is adept at managing his workload and that he would be able to organize around any surgery. While Mr. Kler does have some flexibility in terms of the timing of Forever Destiny projects, I accept that there is a real and substantial possibility that Mr. Kler would lose an opportunity to earn income in his early post-surgical recovery. It is difficult to predict what that opportunity might be given the unpredictable nature of Forever Destiny's business. In the circumstances, I accept

that there is a reasonable likelihood that Forever Destiny would have to forego one to two construction management projects during Mr. Kler's recovery period. After accounting for the relative likelihood of a future pecuniary loss during the post-surgical period, I assess the loss to be \$50,000.

[81] Mr. Kler's claim for future loss of earning capacity must be discounted by 15% to reflect the possibility that his back condition would have become symptomatic and required surgery even without the accident. Based on my assessment, a reasonable award for future loss of earning capacity is \$42,500.

Loss of housekeeping capacity

[82] Mr. Kler seeks an award of \$140,000 to compensate him for loss of future housekeeping costs. I accept that his capacity for yard work and heavy housekeeping is reduced as a result of the accident, and he has suffered a pecuniary loss as a result. However, an award of \$45,000 is a fair assessment of his loss.

[83] A loss of housekeeping capacity may be compensated by a pecuniary or non-pecuniary award: *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 2; *Liu v. Bains*, 2016 BCCA 374 at para. 26. While not seeking to create an inflexible rule in answer "to the somewhat vexing issue of valuing loss of housekeeping capacity" (at para. 27), the Court of Appeal in *Kim v. Lin*, 2018 BCCA 77 endorsed the following approach:

[33] ... [W]here a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work — i.e., where the plaintiff has suffered a true loss of capacity — that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. ...

[84] If a plaintiff is paying for services or if family members are providing equivalent services gratuitously, a pecuniary award is generally more appropriate: *Riley v. Ritsco*, 2018 BCCA 366 at para. 101.

[85] Prior to the accident, Mr. Kler was responsible for yard work. He assisted with vacuuming and other housework.

[86] Since the accident, Mr. Kler no longer does any yard work or housework. He has learned to avoid these activities to manage his symptoms.

[87] I accept that Mr. Kler is no longer able to do yard work or vacuuming, and he has replaced his lost capacity with paid service providers or his wife's gratuitous services. That said, the plaintiff over-estimates his loss of capacity.

[88] The plaintiff submitted that he incurred \$2979.72 in yard work expenses over five months in 2022, i.e., an average of \$595 per month, which he then projected over a year (\$7151) and rounded down to account for reduced yard work required for much of the year due to weather. However, after accounting for duplicate entries on the invoices, Mr. Kler actually incurred approximately \$2100 in yard work services over five months. Given the seasonal nature of yard work, I find that a more reasonable estimate of annual costs for such services is \$3000.

[89] The plaintiff's average annual cleaning expenses are \$3000 since moving to Kelowna. While I accept that some of those expenses replace vacuuming and other housekeeping tasks that Mr. Kler might have done before the accident, the evidence does not prove on a balance of probabilities that the entire cost of housekeeping relates to such services. Mr. Kler hired someone to do housekeeping once per week when they moved to Kelowna "to give his wife some time". I accept that half of the housekeeping expense (i.e., \$1500 per annum) likely arises due to Mr. Kler's loss of housekeeping capacity.

[90] In calculating Mr. Kler's claim for loss of housekeeping capacity, the plaintiff used the CIVJI present value multiplier to age 75. In my view, it is more realistic to use a present value multiplier that reflects housekeeping capacity to age 65 or 70, a more realistic age to anticipate that Mr. Kler might have otherwise stopped mowing a large lawn. Further, the CIVJI discount rate does not include the risk of mortality, which is a negative contingency that must be considered. The expert report prepared by Peter Sheldon, economist, includes survival probability rates that should

be factored in to the assessment. Finally, the award should be discounted by 15% to account for the likelihood that Mr. Kler's pre-existing condition would have become symptomatic even if the accident had not occurred.

[91] Taking all of these arithmetic anchors into account, a reasonable award for Mr. Kler's loss of housekeeping capacity falls in the range of \$37,209 to \$47,385. I find that \$45,000 is a reasonable award to compensate Mr. Kler for his future loss of housekeeping capacity.

Non-pecuniary damages

[92] Mr. Kler's accident-related injuries have caused ongoing low back pain and associated symptoms, which have had an impact on his lifestyle. An award of \$119,000 is reasonable compensation for his non-pecuniary loss after factoring in his pre-existing condition.

[93] An award for non-pecuniary loss is intended to compensate a plaintiff for his pain and suffering, his loss of enjoyment of life, and his loss of amenities, both to the date of trial and into the future. In assessing Mr. Kler's loss, I have considered the factors set out in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45–46, leave to appeal to SCC ref'd, 31373 (19 October 2006).

[94] Mr. Kler's chronic low back pain has changed his day-to-day life. His physical activities are now constrained. He used to enjoy cooking on the weekends; now, he is not able to cook without aggravating his low back. He is limited to walking slowly on even surfaces for short periods of time. In place of the intense weight-training he did before the accident, Mr. Kler now focuses on light weights and more repetitions as well as core strengthening and stretching to reduce his low back symptoms. He avoids more vigorous exercise, including his beloved badminton. He feels more aged than his 82-year-old father. He misses feeling physically strong and active.

[95] Mr. Kler's relationship with his wife has changed as a result of the accident: he has become more irritable and withdrawn as a result of his pain, and has become less interested in doing things together. His social life has generally become more

limited as he avoids activities and focuses on staying home and getting comfortable. That said, Mr. Kler has continued to vacation with family, more than he acknowledged in his testimony.

[96] There is a non-pecuniary loss arising from Mr. Kler's inability to do the same work he did before the accident. He enjoyed the hands-on aspects of his work as a general contractor. He is no longer able to do this physical work. Mr. Kler took great satisfaction in contributing his labour when building single family homes and using his creativity to improve the projects. His current work does not utilize the same skills.

[97] Dr. Heran opined that spinal fusion is inevitable for Mr. Kler. However, even if surgery is successful, Mr. Kler can anticipate ongoing functional limitations and residual pain. Surgical recovery will last three to six months. The surgery itself has risks, including the potential for revision surgery.

[98] The plaintiff submits that \$160,000 is a fair and reasonable award for his non-pecuniary loss before making a deduction for his pre-existing condition. The defendants submit the appropriate range for non-pecuniary damages is \$75,000 to \$100,000 after factoring in the plaintiff's pre-existing condition but before factoring in a failure to mitigate. Both sides provided cases to justify their submissions. For example, *Corness v. Ng*, 2022 BCSC 334 involved similar injuries that resulted in a non-pecuniary award of \$150,000 before deducting \$30,000 to account for the plaintiff's pre-existing condition; however, in *Corness*, the plaintiff was a younger man, and he did not receive a separate award for loss of housekeeping.

[99] In this case, I find that \$140,000 is a reasonable award to compensate Mr. Kler for his non-pecuniary loss. This award should be discounted by 15% to account for the likelihood that Mr. Kler's pre-existing condition would have become symptomatic even if the accident had not occurred.

Plaintiff has failed to mitigate his loss

[100] I am satisfied that the defendant has proven on a balance of probabilities that Mr. Kler has failed to mitigate his losses by declining to have spinal fusion surgery as recommended by Dr. Heran and Dr. Falconer in January 2021. His non-pecuniary damage award shall be discounted to reflect his failure to mitigate.

[101] Mr. Kler understands that, in reports prepared in January 2021, both Dr. Heran and Dr. Falconer recommend that he undergo fusion surgery. He has chosen to manage his symptoms through conservative measures, including stretching, regular physiotherapy, weight loss and avoiding aggravating activities. Mr. Kler is reluctant to proceed based on his concern about risks and failure rates. He has done his own research and spoken to others who have had the surgery. His wife has advised him not to pursue it. As of February 2019, his treating orthopaedic surgeon found his symptoms were well-managed with conservative measures.

[102] In *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, 1985 CanLII 62, the Supreme Court of Canada noted that “the so-called ‘duty to mitigate’ derives from the general proposition that a plaintiff cannot recover from the defendant damages which he himself could have avoided by the taking of reasonable steps” (at 166–67). In deciding whether to reduce damage awards for failure to pursue recommended medical treatment, the first question is whether the reasonable patient would undergo the treatment, and the second question is whether the plaintiff’s damages would have been reduced by the treatment: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56. With respect to the second question, the defendant must prove on a balance of probabilities that the foregone treatment would ameliorate the plaintiff’s condition: *Haug v. Funk*, 2023 BCCA 110 at para. 78.

[103] In this case, I am satisfied that a reasonable patient would have followed the January 2021 recommendations for spinal surgery. Dr. Heran opined that spinal surgery has a 90% likelihood of reducing Mr. Kler’s symptoms by 70%. By comparison, the risk of complication is fairly minimal given the potential benefits of surgery:

[Mr. Kler's] potential for complications is under 5%. This is inclusive of, but not limited to infection, bleeding, nerve damage, any anesthesia risks, and CSF leakage. A small percentage of patients will need revision surgery. This is less than 5%.

[104] There is also a 5% to 10% risk every five to ten years that Mr. Kler would need surgery at a vertebra adjacent to where the fusion is done due to deterioration attributable to the fusion.

[105] Dr. Heran's prediction of a 90% likelihood of a positive surgical outcome satisfies the second branch of the mitigation inquiry on a balance of probabilities standard. If the plaintiff's pain could be reduced by 70%, then his damages for non-pecuniary loss would be lower.

[106] The defendants submitted that non-pecuniary damages should be discounted by 5% to 25% to reflect his failure to mitigate. I am satisfied 10% is a reasonable discount in the circumstances. A higher discount is not appropriate for the following reasons:

- a) at the earliest, Mr. Kler's failure to mitigate was triggered when surgery was recommended in January 2021, which means his loss prior to that date should not be reduced;
- b) successful surgery would not eliminate all of Mr. Kler's pain, and he would still be left with functional limitations;
- c) the surgery would likely include pain, loss of amenities and loss of enjoyment of life during the recovery period;
- d) there are risks that the surgery would need to be redone; and
- e) there is a risk that fusion of adjacent vertebrae would be required at a later date.

[107] Once the failure to mitigate is taken into account, the award for non-pecuniary loss is reduced to \$107,100.

[108] I am not satisfied that the future loss of housekeeping award should be discounted for failure to mitigate because the defendants have failed to prove on a balance of probabilities that his loss of capacity would be reduced if he had had the surgery. Dr. Heran confirmed that Mr. Kler would still have functional limitations post-surgery and suggested that Mr. Kler should avoid heavy labour to avoid increasing the cycle of wear and tear and increasing the likelihood of further surgery. I am not satisfied on the evidence that Mr. Kler's loss of housekeeping capacity would be reduced by surgery.

[109] Based on my assessment, the plaintiff's failure to have surgery does not affect the awards of loss of earning capacity. The past loss of earning award covers the period from the date of the accident to the point Forever Destiny changed its business model in mid-2019, i.e. before Dr. Heran and Dr. Falconer recommended surgery. The future loss of earning capacity award is premised on Mr. Kler suffering a pecuniary loss as a result of surgery, a pecuniary loss that would have happened whenever Mr. Kler had surgery after January 2021.

Future cost of care

[110] An award for future care costs is based on "what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff": *Milina v. Bartsch* (1990), 49 B.C.L.R. (2d) 33 at 78, 1985 CanLII 179 (S.C.).

[111] Mr. Kler seeks an award of \$90,000 for future cost of care based on weekly physiotherapy treatment to age 80. However, Dr. Heran opined that these treatments provide only temporary benefit and that surgery is the definitive treatment.

[112] The defendants say that an award for the cost of future care is not justified in this case given Dr. Heran's recommendation for surgery. However, Dr. Heran said passive therapies may be worth it if they improve and function for a few days. In the absence of surgery, Dr. Sangha said that physiotherapy and chiropractic therapies would be appropriate therapies when Mr. Kler has flare-ups of pain and dysfunction.

I note that Dr. Heran also said that successful surgery would not completely eradicate Mr. Kler's pain.

[113] Considering all of this evidence, I accept it is reasonable to make a future care award on the basis that Mr. Kler is expected to continue to have some pain even with surgery. There was no specific evidence on how often Mr. Kler might experience pain flare-ups post-surgery, but I am satisfied that four physiotherapy sessions per year is a reasonable assessment of the anticipated treatments he will require post-surgery. This award for future care should be discounted by 15% to reflect the likelihood that Mr. Kler would have become symptomatic and required physiotherapy even without the accident. As with the future loss of housekeeping award, the CIVJI present value multiplier must be adjusted to reflect the risk of mortality. Mr. Sheldon's report includes mortality rates only to age 70, which I have used.

[114] As a result, Mr. Kler is entitled to an award of \$5100 for future cost of care.

Special damages

[115] The parties agreed that special damages of \$3349.84 were payable by the defendants for physiotherapy, chiropractic treatment and prescriptions. However, the parties disagreed on whether the full extent of expenses incurred by Mr. Kler for yard work and house cleaning services were losses caused by the accident. The defendants say that only 50% of such expenses are recoverable because the fact that the plaintiff chose to purchase a large house with a lawn should not fall on the defendants to maintain on the plaintiff's behalf.

[116] I accept that the cost of yard work should be covered, i.e., \$2106.84. It was not unreasonable for Mr. Kler to choose to buy a home with a lawn even though the injuries from the accident prevented him from cutting his own grass. Mr. Kler did the outside chores before the accident, and I accept that it is more likely than not that he would have done these chores had he not been injured in the accident. The delay in securing lawn services reflects the different maintenance needs of the Kelowna property as compared to the parties' previous residence.

[117] On the other hand, the plaintiff has failed to show that all of the cost incurred for house cleaning services for the home he and his wife purchased in Kelowna arose due to his injuries. Consistent with my findings regarding loss of housekeeping capacity, I accept that half of the housekeeping expenses relate to services Mr. Kler might have otherwise provided. On that basis, he is entitled to \$3536.63 for house cleaning expenses incurred.

[118] There shall be no deduction for failure to mitigate. As with the claim for future loss of housekeeping, the defendants have failed to establish that Mr. Kler would have been able to carry out the lawn care and housekeeping tasks even if he had had surgery.

[119] The award for yard work and house cleaning (i.e., the special damages not subject to agreement between the parties) shall be discounted by 15% to account for Mr. Kler's pre-existing condition.

[120] As a result, the award for special damages shall be \$8147.

Conclusion

[121] To summarize, the defendants are liable to pay the following damages to Mr. Kler:

Head of Damage	Award
a. Past Loss of Earning Capacity	\$63,750
b. Future Loss of Earning Capacity	\$42,500
c. Future Loss of Housekeeping Capacity	\$45,000
d. Non-Pecuniary Damages	\$107,100
e. Future Cost of Care	\$5100
f. Special Damages	\$8147
TOTAL	\$271,597

[122] Mr. Kler is entitled to pre-judgment interest on the award of special damages. Mr. Kler is also entitled to his costs, subject to any offers or other matters that may require an adjustment to his entitlement to costs. If the parties wish to address costs or pre-judgment interest on special damages, they may arrange with Supreme Court Scheduling in the next 30 days to make submissions before me for this purpose.

Lamb J.