IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kim v. 1048656 B.C. Ltd.,*
2023 BCSC 192

Date: 20230209
Docket: S197711
Registry: Vancouver

Between:

Jungchul (Andrew) Kim

Plaintiff

And

1048656 B.C. Ltd., Vernon Active Health Clinic Inc., Kornelia Matysiak and ABC Table Manufacturer

Defendants

And

1048656 B.C. Ltd., Vernon Active Health Clinic Inc., Kornelia Matysiak and ABC Table Manufacturer

Third Parties

Before: Master Krentz

Reasons for Judgment on Reconsideration Application

In Chambers

Counsel for the Plaintiff:	No appearance
Counsel for the Defendants and Third Parties, 1048656 B.C. Ltd. and Vernon Active Health Clinic Inc.:	D.P. Jaccard
Counsel for the Defendant and Third Party, Kornelia Matysiak:	M. Chan

Counsel for the proposed Third Party, Lifetimer International, LLC:	M. Hashmi
Place and Dates of Trial/Hearing:	Vancouver, B.C. November 16, 2022 December 9, 2022
Place and Date of Judgment:	Vancouver, B.C. February 9, 2023

BACKGROUND

[1] The plaintiff, Mr. Jungchul (Andrew) Kim, filed a notice of civil claim on July 8, 2019, claiming personal injury arising out of an alleged fall that occurred on September 1, 2017, at the premises of 1048656 B.C. Ltd. and Vernon Active Health Clinic Inc. ("Vernon Active") located in Vernon, B.C. At the time of the incident, the plaintiff was undergoing a physical therapy treatment session with the defendant, Kornelia Matysiak ("Ms. Matysiak"). The plaintiff alleges that the incident occurred when Ms. Matysiak instructed him to take a position on a treatment table which collapsed and caused the plaintiff to fall.

[2] The notice of civil claim named a placeholder defendant, ABC Table Manufacturer ("ABC"), as the entity that manufactured and distributed the table. Particulars of negligence pled against ABC in the notice of civil claim included that the table was not properly designed, was defective, did not function safely and effectively, exposed users to unreasonable risk, and that ABC did not adequately disclose the risks associated with the table and/or its reasonable foreseeable use.

[3] The plaintiff made allegations of negligence against Vernon Active, in that they knew or ought to have known the table was defective or inadequate.

[4] The plaintiff made allegations of negligence against Ms. Matysiak, including that she knew or ought to have known that the table was defective and it was not suitable or appropriate for the procedure.

[5] Ms. Matysiak filed a third party notice on July 24, 2020 against Vernon Active and ABC.

[6] At all material times, the table was owned by Vernon Active.

[7] Ms. Matysiak stopped working at Vernon Active in or around June 2018 and has not worked there since.

[8] Vernon Active filed a response to the civil claim on September 1, 2020, identifying the manufacturer of the table as Lifetimer International, LLC ("Lifetimer").

[9] Counsel for Ms. Matysiak wrote to counsel for Vernon Active on March 1, 2021, requesting production of documents related to the table, including documents relating to the purchase of the table, warranties, repair, maintenance and inspection records, past incident reports and user manuals.

[10] Counsel for Vernon Active responded to these requests on July 6, 2021, noting that Vernon Active was not in possession of any of the record documents. The email noted that Mr. Cory Hewko of Vernon Active purchased the table second-hand from a former colleague.

[11] Counsel for Ms. Matysiak initially arranged for an engineering expert, Mr. Ryan Hazlett, to inspect the table on August 6, 2021. The table was located at another clinic in Nakusp. Due to wildfires and the resulting disruption of the ferry service to Nakusp, the inspection was postponed by counsel for Ms. Matysiak.

[12] The inspection was rearranged and took place on November 12, 2021. Mr. Hazlett prepared a report dated March 4, 2022, wherein he observed and opined the following:

- the table was manufactured in 2006, according to a sticker under the table top;
- the table was advertised as lightweight and exceedingly stable;
- the tipping incident was caused by Mr. Kim's centre of mass being positioned outside of the support base of the table, such that his body weight created a moment that exceeded the static stability of the table;
- the design of the table was safe under typical circumstances where a patient was located within the support structure of the table;
- the table, or review documentation regarding the table, contained no warnings about hazards associated with the tipping of the table; and

- further, there was no warning that indicated that weight placed on the cantilevered sections could result in the table tipping. According to current product literature for the table, design changes have been incorporated into the design to improve its resistance to tipping.

[13] On May 10, 2022, after having received the expert report, Ms. Matysiak filed an application seeking an order to amend her third party notice by substituting Lifetimer in place of ABC. In a separate application filed on July 20, 2022, Vernon Active also sought an order to substitute or, in the alternative, add Lifetimer as third party in place of ABC.

[14] Lifetimer retained counsel and opposed the applications. The plaintiff was served with notice of the applications and did not file a response, as they took no position.

[15] Both applications came on for hearing before me in chambers on August 19, 2022. For these applications, I will refer to both Ms. Matysiak and Vernon Active as the “applicants”.

[16] The trial of the action was scheduled for six days to commence on October 31, 2022. As bringing Lifetimer into this action would likely result in the trial date being adjourned, at the hearing I was advised by counsel for the applicants that neither they nor the plaintiff's counsel would be opposed to the trial being adjourned.

[17] At the hearing, it was also common ground that the limitation period had not expired and a separate proceeding against Lifetimer could be commenced. However, for the reasons set out below, the applicants were seeking to avoid duplication of proceedings. Accordingly, the applicants sought leave to bring Lifetimer into these proceedings as a party.

[18] Our Court of Appeal reviewed the purpose of Rule 3-5 in *Wanson (Bristol) Development Ltd. v. Sahba*, 2018 BCCA 260. At para. 48, Justice Bennett quoted the following from Justice McLachlin (as she then was) in *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 (C.A.):

> The object of permitting third party proceedings to be tried with the main action is to provide a single procedure for the resolution of related questions, issues or remedies, in order to avoid multiple actions and inconsistent findings, to provide a mechanism for the third party to defend the plaintiff's claim, and to ensure the third party claim is decided before a defendant is called upon to pay the full amount of any judgment. The avoidance of a multiplicity of proceedings is fundamental to our rules of civil procedure. …

[19] The factors which affect the court's discretion in granting leave to file a third party notice are set out in *Steveston Seafood Auction Inc. v. Bahi*, 2013 BCSC 1072 at para. 19. This includes:

> (a) The test on this application is the same as under Rule 9–5. The proposed third party must establish beyond doubt that the pleadings discloses no cause of action. The court is permitted to reject proposed claims only if the action is "bound to lose" or there is no *bona fide* triable issue.
>
> (b) Prejudice to the parties, the expiration of a limitation period, the merits of the proposed claim, any delay in the proceedings and the timeliness of the application.
>
> (c) The court is required to assume that all pleaded facts are true.
>
> (d) An important consideration is whether it is "just and convenient" in all the circumstances of the case to grant leave to file the third party notice.

[20] With respect to prejudice, Ms. Matysiak argued that the court must balance the prejudice to both parties. She argued that the prejudice caused by not permitting Lifetimer to be added as a third party outweighs any prejudice to Lifetimer by adding them as a third party at this stage of the proceedings.

[21] In his notice of civil claim, the plaintiff alleges that the incident was caused or contributed to by the defective design, defective manufacture, and failure to warn the consumer or user of the defects of the table.

[22] Allegations made against Vernon Active and Ms. Matysiak concerned the alleged defective table and alleged risk in using the table for the procedure. The applicants argued that Lifetimer's involvement in these proceedings forms an integral part in the factual matrix of the case as evidenced by the plaintiff's inclusion of ABC as a placeholder for the manufacturer of the table.

[23] They further argued that the applicants will suffer significant prejudice if leave is not granted to file the amended third party notice; in particular, their ability to demonstrate the fault of Lifetimer and to establish the appropriate share of Lifetimer's liability.

[24] Lastly, they argued that the interests of justice require Lifetimer's inclusion in the proceeding. If the applicants were required to issue separate proceedings against Lifetimer for contribution, the court will be required to make findings of fact in separate proceedings with respect to whether the table is defective, the risks associated with the table's design, and the consequences of any risk associated with the table design. Accordingly, there was a risk of potential inconsistent judicial findings if Lifetimer is not added as a party.

[25] At the hearing, counsel for Vernon Active adopted the same arguments and added that the test for correcting a misnomer is whether a reasonable person would look at the pleadings and recognize that ABC would be Lifetimer. They noted that the notice of civil claim pointed the finger at the manufacturer of the table to be negligent and that the third party notice of Ms. Matysiak adopted those same allegations against the manufacturer and that the *Supreme Court Civil Rules* allow for adding a party at any time.

[26] Vernon Active further noted that the expert report establishes a real issue against Lifetimer and there was no undue delay in bringing their application, as they were only served with the report on May 10, 2022, and their application was immediately filed.

[27] In opposing the application, Lifetimer argued the following:

(a) their logo was located on the table;

(b) the third party notice of Ms. Matysiak, filed on July 24, 2020, named ABC by adopting the notice of civil claim;

(c) the response of Vernon Active clearly identified Lifetimer as the manufacturer, the response being filed on September 21, 2020; and

(d) that same day, Vernon Active issued a third party notice against Ms. Matysiak but did not name Lifetimer in their third party notice despite their knowledge that Lifetimer had manufactured the table that was alleged to have collapsed.

[28] Lifetimer pointed out that none of the applicants have sought until now to add or substitute Lifetimer. Lifetimer further argued that this is not a misnomer, as the defendants have known for a long time that Lifetimer manufactured the table.

[29] They noted that now five years after the incident the applicants seek to add Lifetimer. In the time between the incident and the current trial date (which would have to be adjourned as Lifetimer's counsel is not available and they would need time to prepare in any event), the table has been in active use. This would have significant impact on Lifetimer's ability to obtain their own expert evidence.

[30] Lifetimer also pointed out that the plaintiff himself has not sought to amend pleadings to substitute Lifetimer. Lifetimer argued that this is essentially an application to add a party properly brought under Rule 3-5(4), although they acknowledge it is the same test as under Rule 6-2(7).

[31] Lifetimer argued that the first question is whether the third party pleadings disclose a reasonable cause of action against them. Lifetimer argued that the claims of negligent design and negligent manufacturing are bound to fail as the pleadings do not assert, for example, design flaws such as the table was not reasonably safe under normal operating conditions or that a defect arose as a result of not taking reasonable care in the manufacturing process.

[32] Lifetimer further argued that the applicants failed to properly plead a cause of action for failure to warn and that if a risk were known, a person would not have used the table in the manner that they did.

[33] Lastly, they argued there is no privity of contract with the plaintiff or the applicants, so claims of breach of warranties are bound to fail.

[34] At the conclusion of the hearing, I reserved my decision and provided oral reasons for judgment on September 7, 2022 [indexed at *Kim v. 1048656 B.C. Ltd.*, 2022 BCSC 1956].

[35] In my oral reasons for judgment, I found that there was insufficient grounds to substitute Lifetimer on the grounds of misnomer. I found that the parties had knowledge of the identity of the manufacturer, either from the logo on the table or at least at the time Lifetimer was identified in pleadings filed in September 2020; and if it was a misnomer, it should have been addressed at least two years ago.

[36] However, I did not agree with Lifetimer's submission that the applicants failed to disclose a reasonable cause of action in their pleadings. I noted, for example, that the notice of civil claim, as adopted by Ms. Matysiak, did allege that there may be a defective design and that if a body is positioned on the table in a particular manner, that may cause it to tip.

[37] In determining if the court should exercise its discretion and grant the applications, I considered the following as set out in my reasons at paragraph 56:

> (a) **Prejudice to the parties:** Lifetimer correctly points out that if added now, it may be prejudicial to them as it is on the eve of the trial, they would have no time to prepare, they would need to gather their own expert evidence, and their counsel is not available. In my view, this can be alleviated through an adjournment of the trial. Clearly, the plaintiff and the defendants know that if this application is granted, it will inevitably lead to an adjournment. Although the subject table may no longer be in possession of Vernon Active, Ms. Matysiak was able to locate it and have it examined by her own expert. I see no reason that Lifetimer could not do the same. In any event, as the manufacturer, they have access to all information related to this table and this design.
>
> (b) **Expiration of limitation period:** There is common ground that it has not expired and the claim can still be pursued against Lifetimer, either in this proceeding or in a separate action. I do not consider this to be a factor.
>
> (c) **The merits of the proposed claim:** Although the expert is of the opinion that the table was safe under normal circumstances when the

patient is located within the support structure, tipping may occur when out of position or by sudden movement. Accordingly, it may be successfully argued at a trial that such occurrences are foreseeable and that Lifetimer was negligent for reasons that I have already reviewed.

(d) **Any delay in proceedings:** As already indicated, if this order is granted the trial will likely be adjourned, which will lead to further delay. Master Elwood (as he then was), noted in *Dolden v. Vancouver General Contractors Inc.*, 2020 BCSC 492, that the plaintiff opposed an adjournment and he concluded that although there would be prejudice if the applicant had to bring on a separate action, it is outweighed by prejudice to the plaintiff if the trial is adjourned. I do not have any suggestion that the plaintiff opposes an adjournment, so I accept that prejudice to the applicants at having to start a separate action outweighs any potential prejudice delaying these proceedings. Furthermore, as set out in the *Dolden* case, the fundamental question the court must consider is whether there is greater injustice and inconvenience in permitting this application or requiring the applicant to pursue a separate action. Built into this question is the possibility of inconsistent findings and to ensure that third party claims are decided before a defendant is called upon to pay the full amount of the judgment. While an important factor in this case, I do not consider delay in proceedings as a deciding factor.

(e) **Timeliness of the application:** I agree with Lifetimer that on such an application as this, it is important to look at when the applicant knew or reasonably ought to have known that a claim for contribution or indemnity against a third party could be made, and an explanation for any delay in bringing the application. I have already reviewed the submissions for the delay and I accept that it has been known for a long time the identity of the manufacturer. While it would be preferable that this application had proceeded much earlier, I do accept that it was not until March 2022 that the expert evidence was available to put the applicants in a position to determine the merits of their claim against the manufacturer. While Lifetimer may be correct in their position that the application should have been much sooner, this is only one factor and delay in bringing the application may be addressed in another manner, and it does not outweigh the other factors that I have considered.

[38] Accordingly, I made the orders sought by Ms. Matysiak and Vernon Active but ordered that each party would bear their own costs of the applications.

[39] On September 21, 2022, counsel for Lifetimer made a request through the Supreme Court Scheduling office to appear before me in chambers for a reconsideration of my judgment. I granted leave to reappear and as a result of scheduling having to accommodate the calendars of three counsel, along with my

rota schedule, the application for a reconsideration could not come back before me until November 16, 2022.

[40] At that hearing, I was advised as to the following. Vernon Active had issued a notice to mediate to the plaintiff and Ms. Matysiak on or about June 29, 2022, and that Vernon Active had failed to include that fact in its application materials filed on July 20, 2022.

[41] Initially, the hearing of the applications was scheduled for July 26, 2022, however, the hearing was adjourned and it was agreed that the hearing would proceed, as it did before me, on August 19, 2022.

[42] Without advising Lifetimer, on August 2, 2022, the plaintiff and the applicants agreed to schedule a mediation on August 22, 2022, the first business day after the scheduled hearing of the applications.

[43] Neither Vernon Active nor Ms. Matysiak advised Lifetimer or the court that a mediation was scheduled and they did not invite Lifetimer to participate in the mediation.

[44] At the mediation on August 22, 2022, a settlement was reached between the plaintiff and the applicants. This was two weeks prior to my oral reasons for judgment being provided to the parties.

[45] After the oral judgment was delivered, Lifetimer continued to expend legal costs in considering an appeal of my order and in trial strategy. At no point, at either the time the reasons for judgment were provided or thereafter, did the applicants advise Lifetimer that the plaintiff's claim had been settled.

[46] It was not until September 15, 2022, in a response to an email from Lifetimer’s counsel to the plaintiff’s counsel requesting an adjournment of the trial, that Lifetimer was told by plaintiff's counsel that a settlement had been reached.

[47] A formal order from my oral reasons for judgment has not been entered.

APPLICATION OF LIFETIMER

[48] As there was insufficient time to hear all of the submissions on November 16, 2022, the application for a reconsideration continued on December 9, 2022. At the conclusion of the hearing, I reserved my judgment.

[49] In their notice of application filed on November 2, 2022, Lifetimer seeks the following orders:

> 1. An order dismissing the applications of Ms. Matysiak and Vernon Active seeking leave to issue Third-Party Notices against Lifetimer.
> 2. An order that the contents of the Settlement Agreement between the plaintiff, Ms. Matysiak and Vernon Active be disclosed immediately to Lifetimer.
> 3. An order for special costs, or alternatively, party and party costs with uplift at Scale B for the third-party applications that were heard on August 19, 2022 and for the within application.

[50] The application of Lifetimer is opposed by Ms. Matysiak and Vernon Active. For the purposes of Lifetimer's application, I will now collectively refer to Ms. Matysiak and Vernon Active as the "respondents".

[51] In support of their application, Lifetimer submits the following:

(a) Without notice to Lifetimer or to the court, weeks before the hearing the plaintiff and the respondents agreed to schedule a mediation on August 22, 2022, the first business day following the scheduled hearing.

(b) Not only did the respondents fail to invite Lifetimer to participate in the mediation, they did not advise Lifetimer or the court that the mediation was scheduled the day after the hearing. Lifetimer submits that the scheduling of the mediation was relevant and material to the legal and factual issues in the applications and should have been disclosed to both Lifetimer and the court.

(c) A notice to mediate had been served pursuant to the regulations and, as a step in the proceeding, it was relevant to the appropriateness of third party applications being heard on the day before the mediation. Had Lifetimer known that the mediation was scheduled, they would have sought to adjourn the applications until after the mediation or would have requested to participate in the mediation and possibly avoid the necessity and cost of the applications.

(d) The disclosure of the scheduled mediation was indispensable as the court is required to ensure the just, speedy and inexpensive determination of every dispute on its merits. They argue that had the court known that a mediation was scheduled for the next business day, the court likely would have adjourned the hearing until the conclusion of the mediation.

(e) The respondents' failure to disclose the mediation is compounded by their submissions to this Court on the third party applications. They argued that Lifetimer was already a party to the action, they had just been misnamed and that the misnomer ought to be corrected in the interests of justice. Although the court ultimately dismissed that argument, it was an acknowledgment by the respondents that Lifetimer was already a party. The regulations requires the notice to mediate to be served on every party to the action and yet the respondents did not notify Lifetimer, even though they claimed they were already a party in the action.

(f) It was an abuse of process and a tremendous waste, not only of Lifetimer's time and resources, but this Court's time and resources. The respondents' duty of complete candour and honesty to the court required that they disclose the fact of the mediation.

(g) Even if an application to adjourn may have been denied, as the respondents may argue that with the trial date only two months away,

> the timing of the application was such that they would still want to pursue adding Lifetimer as a party in case the mediation either did not proceed or was not successful, in which case they would want to have that issue resolved as soon as possible. However, if the hearing still proceeded and the matter settled, as it did while the decision was under reserve, it was essential that Lifetimer and the court be advised immediately. At a minimum, a duty to disclose arose from the moment settlement was reached on August 22, 2022.

[52] The application of Lifetimer is opposed by the respondents.

[53] In opposing the application, Ms. Matysiak submits that the threshold for a reconsideration is a high bar, as the applicant bears the burden of proving that a miscarriage of justice would occur without a reconsideration and that the evidence or argument they wish to present would probably change the result of the hearing.

[54] With respect to the allegation of the failure to disclose the settlement reached at mediation, Ms. Matysiak argues that disclosure was not necessary as a judgment against the defendants has not been rendered. She further submits that the settlement agreement does not change the landscape of the litigation.

[55] Ms. Matysiak submits that the settlement agreement is protected by settlement privilege and ought not be disclosed to Lifetimer. In reliance on the *Sable Offshore Energy Inc. v. Ameron International Corp.,* 2013 SCC 37, Ms. Matysiak submits that there is no obligation to disclose minutes of settlement between settling parties to the remaining parties in the litigation.

[56] Ms. Matysiak acknowledges that the agreement reached with the plaintiff deals with the payment of funds from the respondents and that plaintiff's counsel has indicated that they are not pursuing a claim against Lifetimer. No releases nor a consent dismissal order have been executed by the plaintiff.

[57] In reliance upon a decision of this Court in *0932053 B.C. Ltd. v. TBM Holdco Ltd.*, 2018 BCSC 368 [*TBM Holdco*], Ms. Matysiak submits that so long as third-party

proceedings are begun by a defendant before judgment is given against them, they may be continued after judgment. However, the defendant may not begin third-party proceedings after judgment has been given against them.

[58] However, I note that, as set out in paragraph 88 of that decision, the court stated that a third party claim could be pursued, even if there has been a settlement of the issues between the plaintiff and the defendant, providing the third party notice was issued prior to settlement.

[59] Ms. Matysiak submits that the defendants still have a meritorious claim against Lifetimer and it is more convenient for that claim to be litigated in this action as the existing evidence is available, such as through discoveries and disclosure of documents, and to start a new action is both unnecessary and costly.

[60] In further opposition to the application, and relying upon a decision of this Court in *C Vincent Ltd. v. Bank of Montreal*, [1993] B.C.J. No. 930, 17 C.P.C. (3d) 99 (S.C.) [*C Vincent Ltd.*], Ms. Matysiak submits that the fact the plaintiff is out of an action does not mean the defendant cannot continue its claim against the third party and must abandon that course and commence a new action in order to proceed validly against the third party. The court determined that would be a gross waste of time and a serious injustice to a defendant.

[61] With respect to the failure to disclose the settlement reached at mediation, in reliance upon a decision of our Court of Appeal in *Northwest Waste Solutions Inc. v. Super Save Disposal Inc.*, 2017 BCCA 312 [*Northwest Waste*], Vernon Active submits that it is only a ‘Mary Carter agreement’ that significantly alters the arrangements that needs to be immediately disclosed. They argue that the agreement reached is not an agreement between a plaintiff and defendant in multiparty litigation where the defendant remains an active party to the litigation, while the plaintiff's claim targets the other parties. Vernon Active argues that the principle enunciated in *Northwest Waste* was that when such agreements are entered into, the parties must act quickly to discharge their duty of disclosure.

ANALYSIS

[62] The Court of Appeal in *Sykes v. Sykes* (1995), 6 B.C.L.R. (3d) 296 (C.A.). confirms the court has the discretion to reopen a judgment when there is new evidence that was unavailable at the hearing, however, the discretion is to be exercised judicially.

[63] The Court of Appeal further confirmed in *Hodgkinson v. Hodgkinson*, 2006 BCCA 158, that the applicant bears the burden of proving that a miscarriage of justice would probably occur without a rehearing and that the evidence they wish to present would probably have changed the result of the hearing.

[64] The overarching consideration in a reconsideration application is whether it is in the interest of justice that the court reopen the case. Until an order has been entered, the court is not *functus officio* (*Dowell v. Hamper*, 2019 BCSC 1592).

[65] I am satisfied, based on the principles noted above, that the applicant has met the threshold for a reopening of this case. If the date of the mediation had been known to Lifetimer, I accept they likely would have sought an adjournment of the hearing for two purposes. Firstly, so that they could have participated in the mediation, as its success would have an impact on the outcome of the application for them to be added as a third party. Secondly, an adjournment of the hearing could have been for a relatively brief period of time and, depending on the outcome of the mediation, the hearing of the application may have been unnecessary and would reduce costs. That opportunity was not afforded to Lifetimer, as the respondents chose not to disclose any information related to the mediation to Lifetimer.

[66] Accordingly, I conclude that a miscarriage of justice would occur without a rehearing. The evidence of the agreement reached at the mediation would probably have changed the result of the hearing. Accordingly, it is in the interests of justice that this Court reconsider the applications. I do not find this an unwarranted attempt by Lifetimer to disturb the basis for a judgment or to permit a litigant to re-establish a broken down case.

[67] Although the settlement agreement has not been disclosed to Lifetimer, it is clear that the quantum of settlement funds to be paid to the plaintiff was agreed upon at the mediation. While I accept that as of the date of the hearing of the reconsideration application no formal releases or consent dismissal orders had been executed by the plaintiff, the settlement agreement remains an enforceable agreement, regardless of whether formal documents finalizing the settlement had been completed (*Kosky v. Bratkowksi*, 2022 BCSC 103).

[68] In their application response, Vernon Active confirms that a settlement of the plaintiff's claim against them had been reached and it does not restrict the respondents' ability to pursue Lifetimer for contribution and indemnity.

[69] Although Lifetimer agrees that a claim can be pursued against them for contribution, they argue that in law the respondents are unable to do so in this proceeding, as a result of their failure to immediately disclose the settlement reached at the mediation.

[70] In *Waxman Estate v. Waxman,* 2022 ONCA 311 [*Waxman*] at paragraph 24, the Ontario Court of Appeal concluded that an abuse of process may arise from a failure to disclose an agreement that changes entirely the litigation landscape:

> (i) The obligation of immediate disclosure of agreements that "change entirely the landscape of the litigation" is "clear and unequivocal" – they must be produced immediately upon their completion …
>
> (ii) The absence of prejudice does not excuse the late disclosure of such an agreement …
>
> (iii) "Any failure of compliance amounts to abuse of process and must result in consequences of the most serious nature for the defaulting party" …
>
> (iv) The only remedy to redress the wrong of the abuse of process is to stay the claim asserted by the defaulting, non-disclosing party. Why? Because sound policy reasons support such an approach:
>
> Only by imposing consequences of the most serious nature on the defaulting party is the court able to enforce and control its own process and ensure that justice is done between and among the parties. To permit the litigation to proceed without disclosure of

> agreements such as the one in issue renders the process a sham and amounts to a failure of justice.

[71] I find that the settlement agreement between the plaintiff and the respondents significantly changed the adversarial posture of the litigation. By reaching an agreement with the plaintiff on the quantum of settlement proceeds and seeking to recover that amount from Lifetimer on the basis that it is reasonable and not excessive, the respondents are no longer adverse to the plaintiff on the issue of damages and became adverse to Lifetimer on that issue.

[72] I also conclude that a third party claim for contribution and indemnity only survives settlement of the plaintiff's claim against the respondents if the third party notice was issued before settlement.

[73] In *TBM Holdco* at paragraph 88, after summarizing the law as set out in earlier decisions of this Court, such as *C. Vincent Ltd.*, and *Barclay Construction Corp*., 2007 BCSC 885, the court confirmed the principle that a third party claim could be pursued, even if there has been a settlement of the issues between the plaintiff and the defendant, providing the third party notice was issued prior to the settlement.

[74] In this case, the agreement was concluded on August 22, 2022, before my decision was rendered on September 7, 2022, which is approximately two weeks before a third party notice could be issued against Lifetimer. If this was known to the court, the third party claim would have to be dismissed for the reasons set out in *TBM Holdco* with the respondents still having the right to issue a notice of civil claim against Lifetimer seeking contribution from them, without need for a leave application.

[75] In their application responses, the respondents rely upon *Rekis Estate v. Greater Vancouver (Regional District),* [1997] B.C.J. No. 1015 (S.C.), wherein this Court in *obiter* commented that third party proceedings by a defendant can be issued by the defendant in the main action at any time before judgment in the main action has been issued.

[76] However, this decision preceded *TBM Holdco*, which concerned a settlement of the plaintiff's claim with the defendants and stands for the proposition that if the main claim is outstanding, whether because there is no judgment or because there is no settlement, if third party pleadings have been issued, then the third party claim should be allowed to proceed. However, once the main claim is settled, then third party proceedings cannot be issued.

[77] If I am wrong on this point, I also find that the settlement agreement has changed the landscape of the litigation in a significant manner. Based on the pleadings, the plaintiff and the respondents are adverse in interest. However, after settlement, not only are the plaintiff and the respondents no longer adverse in interests, the plaintiff is out of the action and it is now left to the respondents to prove that the injury occurred, to prove liability and damages against Lifetimer. By stepping into the plaintiff's shoes, this has changed the landscape of the litigation.

[78] Furthermore, the agreement affected the dynamics of the litigation between the respondents and Lifetimer. While the respondents may have pursued a claim against Lifetimer, who were therefore adverse with respect to some issues, they were not adverse in all of the issues. It was in both of their interests to have the plaintiff's damages assessed as low as possible, thus, they were both adverse to the plaintiff in respect to that issue. However, by reaching an agreement with the plaintiff on the quantum of damages and seeking contribution from Lifetimer, the respondents are no longer adverse to the plaintiff on that issue and became adverse to Lifetimer on that issue.

[79] As the Ontario Court of Appeal held in *Waxman*, once the settlement agreement changed the landscape of the litigation from that expected based on the pleadings, the obligation of disclosure arose immediately and any failure in compliance may amount to an abuse of process.

[80] In *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2014 BCSC 1560, this Court stated the following at para. 160:

> [160] Since the court must never be misled about the position of a party in the adversarial process, I conclude that it is necessary to disclose immediately any agreement which affects the party's position in a way that is different than that revealed by the pleadings. An agreement between parties who are adverse on the pleadings, such as between a plaintiff and defendant, or a defendant and third party, which contains a full or partial settlement or release or reservation of rights, or a degree of cooperation not to be expected between adverse parties, should therefore be disclosed immediately.

[81] I will now review the authorities with respect to the consequences of failure to disclose.

[82] In *Tallman Truck Centre Ltd. v. K.S.P. Holdings Inc.,* 2022 ONCA 66 [*Tallman*] the Ontario Court of Appeal rejected a submission that because no prejudice could be proved against the remaining party of the litigation that no remedy ought to be ordered. The Court made clear that prejudice is not a factor.

[83] At paragraph 28, the Court wrote:

> [28] … "Any failure of compliance amounts to an abuse of process and must result in consequences of the most serious nature for the defaulting party." Reinforcing this principle, in *Handley*, Brown J.A. confirmed that, "[t]he only remedy to redress the wrong of the abuse of process is to stay the claim asserted by the defaulting, non-disclosing party" … This remedy is designed to achieve justice between the parties. But it does more than that – it also enables the court to enforce and control its own process by deterring future breaches of this well-established rule. [Internal citations omitted.]

[84] In *Hamilton-Wentworth District School Board v. Zizek*, 2022 ONCA 638 the Ontario Court of Appeal also stated the principle is clear, as follows at para. 10:

> … The requirement that [an] … agreement must be disclosed immediately means exactly what it says. This is not a matter of discretion, nor is it a matter of "context", nor of factual analysis. More than three months passed before the existence of the … agreement was disclosed to the appellant. There was, thus, a clear failure to notify the appellant immediately. The motion judge failed to understand and apply that central principle and, thus, erred in her conclusion [in not granting] a stay.

[85] Our Court of Appeal has adopted similar principles. In *Northwest Waste*, the Court stated at paras. 58–59:

> [58] In my view, this Court has adopted the law as stated in para. 160 of *Bilfinger #1*, and none of the parties dispute this as a correct statement of the law.
>
> [59] To dispose of this ground of appeal, in my view, it is enough to conclude that, when the agreement in this case was made, the law on the duty to disclose in this province was not as clear as that in Ontario. As a result, I do not find that the judge in this case erred by failing to stay the proceedings or strike the claim as a remedy for Northwest's breach of its duty to disclose. The duty, clearly entrenched in the law and practice in Ontario, was not as clear here. It would be an unjust result to impose a stay of proceedings based on an abuse of process because of counsel's error in this case, given that the duty to disclose had not been as clearly defined in British Columbia as in Ontario and the error was corrected before trial without irreparable harm to Super Save.

[86] While *Northwest Waste* involved the disclosure of a Mary Carter-type agreement, the requirement of immediate disclosure is both necessary and reasonable in this case. Had Lifetimer's counsel not sent an email to plaintiff's counsel on September 15, 2022, they would have likely taken numerous steps to prepare for the trial set for October 31, 2022.

[87] Furthermore, as I concluded earlier in my decision, had the court been immediately advised of the settlement agreement it would have rendered the requirement of a decision on the merits of the application unnecessary, as the potential third party claim against Lifetimer was moot. This would have saved the court both its time and resources in preparing and providing reasons for judgment.

[88] According to my notes from the hearing on August 19, 2022, when counsel for Ms. Matysiak's was given an opportunity to reply to the submissions of counsel for Lifetimer, she stated that the real issue is whether Lifetimer should be added to this litigation in order to avoid duplication of proceedings or should a separate action be started against them.

[89] I find that when the settlement was reached with the plaintiff on the next business day, the issue of avoiding a duplication of proceedings was no longer a valid argument, yet neither Lifetimer nor the court were advised of the settlement.

[90] I also do not find the argument that the settlement agreement is protected by privilege and does not have to be disclosed to Lifetimer, to be of much assistance to the respondents. From the evidence before me, it is clear that the plaintiff's claim was settled on August 22, 2022. There are emails from the plaintiff's counsel that confirm a settlement of their claim was reached. In the application response of Vernon Active, they acknowledge that fact. It is not the disclosure of the content of the agreement that is pertinent, but the fact that the plaintiff's claim had been settled.

[91] In summary, I have concluded that this new evidence would have changed the result of the third-party application, if the settlement had been disclosed to the court prior to rendering its decision on September 7, 2022.

[92] Based on a number of earlier decisions of this Court, once the settlement of the issues between the plaintiff and the respondents had been reached, a third party claim against Lifetimer could not be pursued, as the decision to add Lifetimer and to allow a third party notice be issued against them, had not yet been made.

[93] If I am wrong on that point, I further conclude that, under the circumstances, failure to immediately disclose the settlement was an abuse of process that should result in consequences of a serious nature for the defaulting parties.

ORDERS

[94] The order that I made on September 7, 2022, pursuant to the application of Ms. Matysiak granting her leave to file an amended third party notice is hereby set aside.

[95] The order that I made on September 7, 2022, pursuant to the application of Vernon Active granting them leave to substitute Lifetimer as a third party is hereby set aside.

[96] The order that I made on September 7, 2022, that each party shall bear their own costs of the applications is hereby set aside.

[97] Pursuant to the notice of application filed by Lifetimer on November 2, 2022, I hereby dismiss the application of Ms. Matysiak, filed on May 10, 2022, and the application of Vernon Active, filed on July 20, 2022, wherein they sought leave to issue third-party notices against Lifetimer.

[98] As it remains open for the respondents to pursue a separate action against Lifetimer, the issue of the contents of the settlement agreement being disclosed to Lifetimer can be appropriately addressed in that action. Accordingly, I make no order requiring disclosure of the settlement agreement.

COSTS

[99] In this application, Lifetimer seeks an order for special costs or, alternatively, party and party costs with uplift at Scale B. I do not find that the actions of the respondents reached a level of reprehensible conduct worthy of rebuke, nor do I find that the conduct reached a level requiring costs with an uplift.

[100] Accordingly, the application by Lifetimer for special costs or costs with an uplift is hereby dismissed. However, I will order that Lifetimer is entitled to party and party costs at Scale B for the third party applications heard on August 19, 2022; and the reconsideration application that was heard on November 16, 2022 and December 9, 2022, such costs to be paid by the respondents in any event of the cause forthwith upon assessment.

"Master Krentz"