IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Todoruk v. Trapp***
2005 BCSC 1702

Date: 20050301
Docket: M001014
Registry: Vancouver

Between:

JACKIE TODORUK

PLAINTIFF

And:

COURTENAY DONALD TRAPP

DEFENDANT

Before: The Honourable Madam Justice Lynn Smith

Oral Reasons for Judgment
In Chambers
March 1, 2005

Counsel for Plaintiff	P. Boles
Counsel for Defendant	T. Pettit

[1] THE COURT: The defendant in this motor vehicle action seeks an order requiring disclosure of certain communications between the plaintiff and her former counsel, Mr. Hammerberg. He also seeks an order with respect to the plaintiff's list of documents.

[2] The motor vehicle accident occurred on December 22, 1999. The plaintiff commenced an action for damages against the defendant in March 2000. In June 2001, the defendant obtained leave to amend his statement of defence to allege fraud in

relation to the plaintiff's claims for reimbursement of certain expenses that she said she had incurred for child care.

[3] The trial was originally scheduled for July 2001, but was adjourned once by consent and a second time in March 2003 upon the plaintiff's application, which was opposed. The trial is now set for this coming April for three weeks before a judge alone.

[4] The defendant provided evidence on this application that the plaintiff at the time of the accident was attending Capilano College and was receiving subsidized child care from the Ministry of Social Services and Housing. The child care was provided by Sherry Yarrow who was paid directly by the Ministry at a rate of $350 per month. Nevertheless, the plaintiff submitted receipts to the adjuster through her counsel, Mr. Hammerberg, for child care expenses. She wrote up the receipts herself and did not advise Ms. Yarrow or the Ministry that she was doing so. She received reimbursement from the defendant's insurer, the Insurance Corporation of British Columbia, for the child care expenses that she claimed.

[5] The plaintiff was charged with providing the Insurance Corporation of British Columbia with false information pursuant to s. 42.1.2(a) of the ***Insurance (Motor Vehicle) Act***, R.S.B.C. 1996, c. 231.

[6] After a trial in provincial court she was acquitted on May 29, 2002. At her examination for discovery in this action Ms. Todoruk testified that she had been asked to send in all receipts regarding the car accident. She swore that she created those receipts herself because "they don't give receipts out till the end of the year and my lawyer said to send them all in."

[7] She testified at the criminal trial that she understood that she would be required to reimburse the Ministry for the amount that she had received from the Insurance Corporation for child care expenses when she obtained her settlement of this action.

[8] The plaintiff did not provide any evidence on this application. There is no evidence in the material before me that the plaintiff advised the Ministry that she was submitting the receipts to the Insurance Corporation and there is no evidence that she advised the Insurance Corporation that she was not herself paying for the child care.

[9] The orders sought by the defendant are:

> (a) A declaration that all communications between the plaintiff and her initial counsel regarding all receipts and all claims for expenses and alleged expenses incurred as a result of the December 21, 1999 motor vehicle accident during the period December 21, 1999 to June 30, 2000 including all receipts relating to child care provided by Sherry Yarrow or the Bethel Baptist Preschool are not privileged.
>
> (b) An order that the plaintiff re-attend at discovery to answer questions concerning all discussions, dealings, transactions and communications between her and Mr. Hammerberg or other members of his firm regarding the receipts.
>
> (c) An order that the plaintiff produce to counsel for the defendant all documents relating to her communications with Mr. Hammerberg or other members of his firm regarding the receipts and all documents relating to the receipts.

[10] Ms. Boles, counsel for the plaintiff, takes objection to certain of the documents upon which the defendant seeks to rely in this application, namely, letters dated February 26, 2000, March 23, 2000, April 4, 2000, May 23, 2000 and July 24, 2000. Those are all letters from the Insurance Corporation of British Columbia to Hammerberg & Company bearing the heading "without prejudice". Ms. Boles argued that those letters are inadmissible.

[11] Counsel agreed that I would give my ruling on this objection at the same time as my ruling on the application. Ms. Boles also took objection to portions of the affidavit of Tom McKinney sworn September 10, 2003. I have not taken those portions of the material into account.

[12] Counsel for the defendant said that he was taken by surprise by this objection and accordingly counsel were permitted to provide further written submissions after the hearing. Mr. Pettit for the defendant provided submissions promptly and within the deadline. Ms. Boles for the plaintiff, although the deadline was December 15, 2004, did not provide any further submissions until February 2, 2005 and only after several reminders through the Registry. I note her apology for this delay.

[13] A further delay then ensued in connection with the Registry's attempts to bring counsel back before me. I am not aware where the difficulty lay in that regard.

[14] Ms. Boles' objection to the admissibility of these letters is, as I understand it, that they bear the words "without prejudice" and, in fact, were privileged communications that should not be disclosed. She submitted that there is no evidence to support the proposition that the letters were other than an honest attempt to resolve the claim. She points to the absence of an affidavit from the adjuster as to the adjuster's intention with respect to the disclosure of the letters.

[15] Mr. Pettit, for the defence, argues that the letters do not qualify as settlement communications and that although they bear the phrase "without prejudice", that phrase is not decisive. He submitted that they do not have the appearance of communications originating in an expectation that they would not be used in evidence and their content does not suggest any overture of settlement. Instead, he argued, the letters are of a type that would ultimately be revealed to the court.

[16] Mr. Pettit submitted in the alternative that if the letters are privileged as being in furtherance of settlement, fraud is an exception to the rule governing settlement discussions.

[17] Ms. Boles took the position that an allegation of fraud is not enough and fraud has not been proved against her client; further, that fraud is not an action that can be advanced by a tortfeasor as a defence in a negligence action. Instead, it is a defence by an insurer to an application for benefits and the insurer is not a defendant in this action.

[18] Counsel for the defendant, on the other hand, argues that the insurer is the agent of the defendant and that fraud in claiming reimbursement for expenses to that agent is a matter the defendant can raise.

[19] Mr. Pettit submits that the letters provide evidence that the payments were an advance against special damages.

[20] The conditions for the existence of privilege over communications made in furtherance of settlement are set out in Sopinka, Lederman and Bryant, The ***Law of Evidence in Canada***, 2nd ed. (Toronto: Butterworths, 1999) at p. 807:

> (a) a litigious dispute must be in existence or within contemplation;
>
> (b) the communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and
>
> (c) the purpose of the communication must be to attempt to effect a settlement.

[21] The use of the phrase "without prejudice" is not conclusive of the existence of privilege: see ***Farrell v. Tisdale*** (1987), 16 B.C.L.R. (2d) 230 (C.A.) at 239-240; ***Belanger v. Gilbert*** (1984), 58 B.C.L.R. 191 (C.A.) at 192 - 193.

[22] I find that these letters were written with the intention that they would not be disclosed to the Court in the event negotiations failed; in making advances against a claim for special damages, they could be seen to make an implicit concession of liability. They did not contain offers of settlement but arguably did form part of a series of communications with settlement as the long-term goal. The conditions for the existence of privilege are met.

[23] An exception to the general rule that privilege protects documents and communications created for the purpose of achieving settlement exists where there is fraud: ***Middelkamp v. Fraser Valley Real Estate Board*** (1992), 71 B.C.L.R. (2d) 276 (C.A.) at para. 20 (per McEachern C.J.B.C.) and at para. 88 (per Locke J.A.).

[24] When a party argues that a communication that would otherwise be privileged is not privileged due to fraud, that party must provide evidence that gives the assertion of fraud to some substance: ***Bulavant v. A.G. Victoria***, [1901] A.C. 190 (H.L.), ***K-West Estates Ltd. v. Linemayr, McCandless and Zacharias***; ***West Coast Savings Credit Union v. Linemayr et al.*** (1984), 54 B.C.L.R. 60 (S.C.); ***Goldman Sachs & Co. v. Sessions***, [1999] B.C.J. No. 2815 (S.C.).

[25] The phrase used in the cases is that the evidence tendered "gives colour to the charge" or that there is a "*prima facie* case" of fraud: ***Dixon v. Canada (Deputy Attorney General)***, [1991] O.J. No. 1735 (O.H.C.J.).

[26] I find that the defendant has met that burden and that the evidence before me, which was uncontradicted, gives colour to the charge of fraud against the plaintiff. I find that the defendant can raise the issue in that the Insurance Corporation is the defendant's agent for dealing with the plaintiff's claim.

[27] Having reached that conclusion, I then consider the contents of the documents to determine whether the claim of privilege should be upheld. I find that it should not. The adjuster's letters are written in response to correspondence from the plaintiff's lawyer as to which no claim of privilege is made. The adjuster's letters show the adjuster accepting the representation that the plaintiff had incurred child care expenses as a result of the accident and sending cheques in payment of those expenses. An example of such a letter is that of February 26, 2000, from Stacey Rose, ICBC Capilano, to Hammerberg & Company marked "without prejudice". It responded to a letter dated February 22, 2000 from Mr. Hammerberg which stated:

> We write further to our letter dated February 7, 2000 wherein we enclosed various receipts for day care and housekeeping. We understand that these expenses have been approved and we would therefore appreciate receiving a cheque in the sum of $196 payable to our client Jackie Todoruk. As you are aware, Ms. Todoruk is experiencing financial difficulties as a result of these expenses and we would ask that you contact our office...

[28] The letters may provide evidence that the defendant was caused to send funds in payment of claims wrongly put forward by the plaintiff. They are material to a defence raised in the pleadings. The plaintiff has herself put the contents of the letters in issue by arguing that the payments she received were not by way of an advance against special damages. I find that for all of those reasons the claim of privilege should not be allowed and I will receive the letters in evidence on this application

[29] I turn to the defendant's application. The defendant seeks a declaration that communications between the plaintiff and her initial counsel regarding receipts and claims for expenses are not privileged, and seeks orders that she produce documents and answer questions at examination for discovery about those communications.

[30] No claim of privilege can be made with respect to the receipts themselves, which the plaintiff provided in order that they be passed on to the adjuster. They were passed on to the adjuster. There was no intention that they would be confidential. What of the communications between solicitor and client regarding the provision of the receipts? Mr. Pettit relies on the line of cases that state that solicitor-client privilege does not protect communications between solicitor and client made in furtherance of unlawful conduct, which can include making fraudulent misrepresentations: see ***Descôteaux v. Mierzwinski***, [1982] 1 S.C.R. 860 at 881:

> Confidential communications... lose that character if and to the extent that they were made for the purpose of obtaining legal advice to facilitate the commission of a crime.

[31] Mr. Pettit argues that where a client uses her counsel as a conduit for the fraudulent misrepresentations, then the unlawful conduct exception applies and there is no privilege. His submission is that there is a *prima facie* case on the material before me that the exception applies.

[32] Tortious conduct may be considered unlawful conduct for the purpose of this aspect of the law of solicitor/client privilege: ***R. v. Campbell***, [1991] 1 S.C.R. 565 at paras. 58 – 59; ***Goldman Sachs***, *supra*.

[33] I find that the defendant has shown a *prima facie* case that the plaintiff may have been using her solicitor as a conduit for fraudulent representations. The evidence before me "gives colour to the charge", as I have already stated.

[34] Solicitor-client privilege is of central importance to our legal system and it is to be set aside only when it is clearly necessary to do so and to the least extent possible. See ***Descôteaux*** at 875; ***R. v. Solosky***, [1980] 1 S.C.R. 821 at 839.

[35] Accordingly, I will not make the declaration sought by the defendant but I will order that the plaintiff answer questions at the continued examination for discovery regarding communications between herself and her solicitor, his agents or members of his firm with respect only to the claims for child care expenses. I will also order that the plaintiff produce for inspection by the court all documents relating to those communications. Final decisions regarding the plaintiff's claim of privilege over the communications and admissibility of the evidence will be for the trial judge.

[36] It is unnecessary for me to decide whether the plaintiff waived solicitor-client privilege over the relevant communications between herself and her lawyer through raising her solicitor's instructions to her in her responses at the examination for discovery.

[37] The defendant also seeks an order regarding the plaintiff's list of documents. The plaintiff's list of documents does not properly describe the items for which privilege is claimed and it should do so in conformity with Rule 26(2.1), following the principles set out in ***Jones v. Stephens*** (1992), 66 B.C.L.R. (2d) 31 (S.C.). I will make an order accordingly.

(Submissions)

THE COURT: And so my order with respect to the discovery is clear, she will answer questions with respect to child care expenses. Only that.

"Lynn Smith, J."
The Honourable Madam Justice Lynn Smith