

Citation: Figueroa v. Fitzpatrick and Fitzpatrick
2006 BCPC 0489

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File No: 03 14956
Registry: North Vancouver

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

JEAN PIERRE FIGUEROA

CLAIMANT

AND:

MICHAEL ARTHUR FITZPATRICK
WILLIAM FITZPATRICK

DEFENDANTS

RULING ON APPLICATION
OF THE
HONOURABLE JUDGE W. J. RODGERS

Appearing for the Claimant:	R. Figueroa
Counsel for the Defendants:	T. H. Pettit
Place of Hearing:	North Vancouver, B.C.
Date of Hearing:	31 October 2006
Date of Judgment:	7 November 2006

[1] This Application is brought by the Defendants for an Order that the Claimant pay Costs as a result of the Claimant filing a Notice of Withdrawal two days prior to the commencement of trial.

[2] The issue before the Court is to determine whether the Court has jurisdiction to order Costs after the Notice of Withdrawal has been filed.

[3] The facts are not in dispute. The Claimant was involved in a motor vehicle accident in 2001 and in 2003 filed the within Claim. A Certificate of Readiness was filed on January 22, 2004. A Settlement Conference was held on June 30, 2004 and a trial date was scheduled for July 2005.

[4] In June 2005 the Claimant was granted an adjournment of the trial. The Claimant advised the Court that he would be attending university in Chile and required a trial date in September 2006. On February 21, 2006 at a Pre-Trial Conference, trial dates of September 28 and 29, 2006 were fixed.

[5] On September 22, 2006 the father of the Claimant advised counsel for the Defendants that the Claimant intended to file a

Notice of Withdrawal. This was done on September 25, 2006.

[6] At the hearing of this Application, the father of the Claimant appeared. He explained the reasons why his son had filed the Notice of Withdrawal. The first reason was that his son's classes had been rescheduled unexpectedly due to a labour dispute at the university. Secondly, his son did not wish to incur the cost of flying to British Columbia for the trial. The Claimant's father could give no explanation as to why the Claimant had waited until two days prior to the trial date to file the Notice of Withdrawal.

[7] Section 19 of the *Small Claims Act* states:

19 (1) The Provincial Court may determine in accordance with the Rules, the amount of costs that are payable by one party in a proceeding under this Act or the Rules to another party in the proceeding or it may direct a registrar of the Court to determine the amount.

[8] Rule 8 of the Civil Rules states as follows:

8 (4) A party may withdraw a claim, counter claim, reply or third party notice at any time.

[9] Rule 20 of the Civil Rules states:

20. (6) A judge may order a party or witness whose conduct causes another party or witness to incur expenses to pay all or part of those expenses.

[10] The issue of an award of Costs following the withdrawal of a claim was considered in the case of ***Bucan v. Fernandez***, [2002] BCJ 2999. In that case the Claimants filed Notices of Withdrawal after the fourth day of trial. It was held the Court had jurisdiction to determine Costs after the Notice of Withdrawal had been filed.

[11] In the case of ***Preston v. Connelly***, [2003] BCPC 156, the Court came to the opposite conclusion and held that a claim could be withdrawn at any time and after filing the Notice of Withdrawal the claimant was not liable to pay any Costs. A similar conclusion was reached in the case of ***Northwest Waste Systems v. Szeto***, [2003] BCPC 431.

[12] The Decision of the Court in *Bucan* was not drawn to the attention of the presiding Judges in the *Preston* and *Northwest Waste* cases.

[13] In my view, the issue was correctly decided in the *Bucan* case and was wrongly decided in the cases of *Preston* and *Northwest Waste*. Rule 20(6) permits a Judge to order Costs against a party whose conduct causes another party to incur expenses. If the Legislature intended to foreclose any award of Costs following the filing of a Notice of Withdrawal, then the Legislature would have so indicated in the wording of Rule 8 (4).

[14] I therefore hold that the Claimant must pay Costs to the Defendants by reason of filing a Notice of Withdrawal two days prior to the commencement of trial.

[15] I direct that the Defendants prepare a list of those Costs being claimed and, in the event that an agreement cannot be reached with the Claimant, then the matter will be set down before me for further Orders.

[16] Any Notice of Application may be served upon the Claimant by regular mail at the address for service of the Claimant set out in the Claim.

The Honourable W. J. Rodgers
Provincial Court Judge