IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Davie v. Wilson***,
2007 BCSC 1876

Date: 20070905
Docket: B965409
Registry: Vancouver

Between:

Duncan Davie

Plaintiff

And:

John T. Wilson, Elizabeth Wilson
and Thomas William Moser

Defendants

Before: The Honourable Mr. Justice E. R. A. Edwards

Oral Reasons for Judgment

In Chambers
September 5, 2007

Counsel for the Plaintiff	R.V. Burns
Counsel for the Defendants	T.H. Pettit
Place of Trial/Hearing:	Vancouver, B.C.

[1] THE COURT: The plaintiff in this proceeding is plaintiff in a number of actions arising from a series of eight motor vehicle accidents, the first of which occurred in 1994. That action against three defendants, which is presently before the court, arises from the first two motor vehicle accidents. It is with respect to the second of these two accidents that the court is asked to approve, under Rule 31(5), the withdrawal of an admission made by the defendant. That admission is to the effect that the defendant has no claim to past or future income loss or loss of ability to earn income. It was made in October of 2002.

[2] In this action the plaintiff did not plead a claim for income loss. However, during the course of an examination for discovery in March of 2001, he stated that he believed that he had been unable to earn as much income since the accidents in 1994 and 1995. On the basis of that, requests were made by the defendants for information relating to his income for purposes of defending a potential claim for loss of income. When that request for information about the plaintiff's income was pressed, the plaintiff then made the admission, rather than make any disclosure with respect to his income in the relevant period. It is the position of the defendants, which I accept, that the admission was made to avoid any further discovery with respect to the plaintiff's income.

[3] The law with respect to the exercise of the court's discretion under Rule 31(5) respecting the withdrawal of an admission is appropriately summarized -- both counsel appear to have acknowledged that this accurately reflects the law -- in *British Columbia Practice*, third edition, volume 2, at page 31-8:

> If an applicant can establish that the admission was made inadvertently, hastily, without knowledge of the facts or where the facts came to the attention of the court only after the admission was made, an application to withdraw the admission in the pleadings will be decided on a simple balance of prejudice and considerations of the interests of justice. Where, however, none of these conditions are met, the balance of prejudice must be much more substantially in favour of the applicant before the court will conclude that the interests of justice warrant the withdrawal of the admission.

[4] It is acknowledged that the admission was not made inadvertently or hastily, and it is clear that it was made with the advice of counsel and apparently made for the purpose of forestalling discovery with respect to the plaintiff's income. In other words, it was a deliberate step taken after due deliberation.

[5] The position of the plaintiff/applicant is that the admission was made without knowledge of the fact that he would later be involved in subsequent accidents. It seems to me, even acknowledging that he would not be aware of those facts, that those were not the relevant facts which have any bearing on the question of whether or not the admission ought to be permitted to be withdrawn. That is because, first of all, the plaintiff had not pleaded a claim for loss of income, although at the time the action was started he would have been aware of any income loss up to that point. And secondly, that at the time the admission was made, he would have been aware of whether there was a continuing loss of income to that point and also aware of the prospect, if his condition did not improve, he would have a claim for income loss into the future.

[6] In these circumstances it cannot be concluded that any new facts have come to the attention of either the plaintiff or the court which support the application for withdrawal of the admission. Therefore, the second leg of the test which I have just quoted, that is, the circumstance where none of the preconditions are met for a determination on a simple balance of prejudice applies, and it is up to the plaintiff to show a much more substantial balance of prejudice in his favour. In other words, in order to succeed on this application, the plaintiff must show much greater prejudice to himself if the application is not granted than the defendants would suffer if it were granted.

[7] I note that the application is now effectively five years after the admission was made. Such a delay, in my view, results in a presumption of prejudice to the defendants, and in this case that presumption is underlined by the subsequent circumstances. Those are that in respect of the other subsequent actions to which I have referred, there has been what I would describe as intermittent and non-timely disclosure of income-related evidence from the plaintiff in the discovery process. In fact, the first disclosure of such evidence appears to have been in April of 2007.

[8] Another factor is that some relevant records are now no longer available. Banking records prior to 1998 are no longer kept by the Hong Kong Shanghai Bank. The plaintiff has deposed that his house was ransacked in 2004 and certain of his records have disappeared as a result. So those records are no longer recoverable.

[9] It also seems to me that there is and has been prejudice to the defendants in that they have been unable to properly defend this action in a way that would have been appropriate had the admission not been made. That is by considering their position and making an appropriate offer under Rule 37. Certainly the delay has made it impossible for them to give appropriate consideration to any amount which might be offered with respect to an income loss claim. An attempt by the defendants now to pursue an investigation with respect to income loss, some 12 to 13 years after the initial accident took place, so as to establish a pattern of income prior to the accident is unlikely to be fruitful.

[10] Therefore, in the absence of any satisfactory explanation provided by the plaintiff for the delay and in light of both the presumed and evident prejudice to the defendants in permitting the withdrawal of the admission, I dismiss the application.

[11] There was an attendant application to amend the pleadings to include a claim for income loss, but of course it turns on the same considerations, and it was counsels' view that the applications stood and fell together, so it too was dismissed.

[12] Mr. Burns, I am not clear where you stand on this Bossiek [phonetic] application. Your friend made a submission with respect to that but only a brief one, and you did not mention it in your submission, so I am going to ask you what your position is on that now. That is the 2000 accident claim which does not include a pleading with respect to a loss of income claim, as I understand it.

[13] MR. BURNS: Yes, My Lord, that accident was in 2000.

[14] THE COURT: Well, in light of the position taken by the defendants, what I am going to do is simply adjourn this application to amend the statement of claim, in the anticipation there will be further discovery before the trial at which the defendants can establish more clearly the circumstances of the claim. It may be that that will be a basis to determine prejudice or lack of it with respect to a defence of the claim. At that point the application, if there is no agreement, can be renewed and any arguments made resisting a claim for the amendment will be better informed, it seems to me, by the outcome of that discovery.

[15] MR. PETTIT: On the issue of costs, I wonder if we can speak to that. I would argue for costs to the Wilson/Moser defendants with respect to the Wilson/Moser application by my friend in any event of the cause. I think under these circumstances that's warranted insofar as these defendants have done nothing to warrant this application and there's been no wrongdoing by them and the plaintiff has brought an application which failed. So not only do we have the burden of presumption of success in favour of the defendants, but also I think the equity is going in favour as well.

[16] MR. BURNS: My Lord, the admission of liability from Mr. Moser was quite recent, but I don't know that it would be directly relevant on the point. I think that Mr. Davie was certainly entitled to have this brought forward and canvassed. It's a very serious thing for him. He's obviously going to be – the prejudice that I submitted he would suffer is now going to be visited upon him and it's going to be a fairly severe financial penalty. How it got brought on is another matter, but I think that he is going to suffer quite significantly in light of your decision and that costs should be in the cause.

[17] THE COURT: I am satisfied this is an appropriate case for costs in any event of the cause.

"Edwards J."

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The Honourable Mr. Justice E. R. A. Edwards