IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***F.G. v. R.F.***,
2005 BCSC 227

Date: 20050221
Docket: S023002
Registry: Vancouver

Between:

F.G.

Plaintiff

And

R.F.

Defendant

Before: The Honourable Mr. Justice Vickers

Reasons for Judgment

Counsel for Plaintiff	Timothy J. Delaney
Counsel for Defendant	James L. Straith
Date and Place of Trial/Hearing:	June 14-18, 2004 June 21-23, 2004 Vancouver, B.C.

[1] The trial of this matter proceeded in June 2004. The plaintiff's claim for sexual assault and battery was dismissed. The defendant was awarded special costs: ***F.G. v. R.F.***, 2004 B.C.S.C. 889.

[2] An offer to settle these proceedings for $500.00 and costs was made by the defendant to the plaintiff on August 20, 2003. The defendant now seeks an order for double special costs from that date. Counsel for the plaintiff seeks to vary the original order for special costs and argues that the defendant is not entitled to an order for double costs, special or otherwise. He seeks an order that both parties bear their own costs. As the Court's order has not been entered the Court has discretion to vary the original order.

[3] It is fair to say that in my original judgment I considered that unfounded allegations of criminal conduct warranted an order for special costs. However, as the judgment of Quijano J. in ***Austin Industries Ltd. V. General Elevator Maintenance Company Ltd.***, points out, more is needed to warrant the order for special costs.

[4] In my reasons for judgment I concluded the evidence of the plaintiff could not be relied upon. While the case could not succeed, I must acknowledge the plaintiff subjectively believed he had been sexually assaulted. This situation arose because of his condition, occasioned by the ingestion of Paxil and alcohol. In all of the circumstances, this case does not support an order for special costs. It does, however, warrant an order in favour

of the defendant for costs on scale 3.

[5] The application for double costs is made pursuant to Rule 37(24) which reads as follows:

> "(24) If the defendant has made an offer to settle a claim for money [as prescribed by the Rule] and the offer has not expired or been withdrawn or been accepted,
>
> (a) if the plaintiff obtains judgment for the amount of money specified in the offer or a lesser amount, the plaintiff is entitled to costs assessed to the date the offer was delivered and the defendant is entitled to costs assessed from that date, or
>
> (b) if the plaintiff's claim is dismissed, the defendant is entitled to costs assessed to the date the offer was delivered and to double costs assessed from that date.

[6] In ***Cridge v. Harper Grey Easton***, 2005 B.C.C.A. 33, Lowry J.A. for the Court has said clearly there is no discretion in the application of this rule. At paragraph 24 the Court said:

> "Rule 37 is, as stated in ***Brown v. Lowe***, a complete code. It is important that the Rule be uniformly applied to give effect to its purpose. Litigants must be able to make offers of settlement under the Rule with confidence that the Rule will be applied when costs are awarded."

[7] Counsel for the plaintiff submits that the decision in ***Cridge*** should not or does not affect the Court's discretion to deny costs in this case. He argues that this unanimous decision of the Court of Appeal is inconsistent with the majority decision in ***Brown v. Lowe***, 2002 BCCA 7 and submits that because the Court of Appeal did not expressly overrule ***Brown v. Lowe***, that case is still good law. In his submission, the Court of Appeal in ***Cridge*** did not say a judge could not exercise discretion under Rule 37, and anything it did say to suggest a lack of discretion was merely *obiter dicta*. With respect, I do not agree.

[8] In ***Brown v. Lowe***, the trial judge made an award of costs on scale 3 up to the date of an offer to settle and double costs after that date. The offer to settle was made by way of a Calderbank letter and was not an offer made pursuant to Rule 37. The offer was refused. In the Court of Appeal, Southin J.A. for the majority allowed the appeal and overturned the order for costs because of the litigant's conduct. She found the Court could refuse to make an order for costs pursuant to its Rule 57 discretion, noting in paragraphs 149 and150 the seriousness of giving false evidence at any stage of the proceedings. Based on her disposition of the costs issue, the double costs issue did not arise. In addition, Southin J.A. said that Rule 37 "is a complete code and there is no room for judicial discretion save that given by it" (paragraph 154). It is important to note that the discretion the Court exercised was in relation to a Calderbank offer, not a Rule 37 offer.

[9] In ***Cridge*** the Court of Appeal agreed with the remarks of South J.A. in Brown v. Lowe, and has again stated that Rule 37 is a complete code. It said that in a case involving a Rule 37 offer to settle a trial judge has no discretion to refuse to award double costs.

[10] The issue of whether a litigant who has made a Rule 37 offer can be deprived of his or her costs where the Court finds that he or she has lied or in some other way attempted to mislead the Court was not determined in the ***Cridge*** decision. As that is not the case before me, I do not have to decide that issue at this time.

[11] I conclude that upon the facts in this case the Court has no discretion in the application of Rule 37. In these circumstances there will be an order that the defendant recover costs on scale 3 assessed to the date the offer was delivered, August 20, 2003, and double costs assessed from that date.

"D.H. Vickers, J."
The Honourable Mr. Justice D.H. Vickers