

Action No.: 2002-00090
E-File Name: RVQ21GARRETKCANUELK
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF DRUMHELLER

BETWEEN:

KARYN NICOLE GARRET-CANUEL and
PIERRE ANTOINE JOSEPH CANUEL

Plaintiffs

and

ENTERPRISE RENT-A-CAR CANADA LIMITED
and JUBIN SEO

Defendants

PROCEEDINGS

Drumheller, Alberta
February 3, 2021

Transcript Management Services
1901-N, 601 - 5th Street SW
Calgary, Alberta T2P 5P7
Phone: (403) 297-7392
Email: TMS.Calgary@csadm.just.gov.ab.ca

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Court House, Drumheller,
2 Alberta

3
4 February 3, 2021 Afternoon Session

5
6 The Honourable Justice McCarthy Court of Queen's Bench of Alberta
7 (remote appearance)

8
9 A. Wilkins (remote appearance) For K. Garret-Canuel
10 G.A.E. Duckworth (remote appearance) For Enterprise Rent-A-Car Canada Limited
11 M. Martel Court Clerk

12
13
14 THE COURT: Everybody here?

15
16 THE COURT CLERK: Everyone is present.

17
18 MR. WILKINS: Good afternoon.

19
20 MR. DUCKWORTH: We do, My Lord.

21
22 THE COURT: All right, thanks.
23

24 **Reasons for Judgment**

25
26 THE COURT: The plaintiff applies for an advance payment of
27 \$60,000 or, in the alternative, an order directing the payment of the invoices of six experts
28 for their reports or updated reports in the amount of \$36,000. But the defendant has already,
29 on a voluntary basis, paid the plaintiffs \$30,000 in advance of the trial.

30
31 This is a personal injury matter with regard to an accident that occurred October 29th, 2011.
32 The key issue at the outset of this application is whether section 5.6(3) of the *Fair Practices*
33 *Regulation 128/2001* applies.
34

35 It reads as follows: (as read)

36
37 The Court may make an order under section 581 of the Act, on any
38 condition it considers appropriate, requiring the insurer to make a
39 payment to a claimant who applies to the Court under subsection (2)
40 of this section where the Court is satisfied that
41

1 (a) as a result of the injuries of the claimant, the claimant is unable
2 to pay for the necessities of life, or

3
4 (b) the payment is otherwise appropriate.
5

6 The problem with the plaintiff's application is that the *Fair Practices Regulation* came into
7 effect July 1, 2012, about nine months after the accident occurred.
8

9 I agree with the defendant's submissions that prior to section 5.6 of the *Fair Practices*
10 *Regulation*, section 581 of the *Insurance Act* did not compel the defendants to make
11 advance payments. Payments under the *Insurance Act* were permissive and not obligatory.
12

13 Subsection 581(5) of the *Insurance Act* provides that: (as read)
14

15 The Lieutenant Governor in Council may make regulations
16

- 17 (a) authorizing the Court to make an order requiring an insurer to
18 make a payment under section 581 in advance of any judgment;
19 (b) prescribing or otherwise describing the circumstances under
20 which such an order can be made.
21

22 At the time of the collision and at the time the insurance policy was put into effect, the
23 insurance policy in question, the remedy under section 5.6 did not exist.
24

25 I agree with the defendant's submission that the substantive or vested rights cannot be
26 altered retrospectively unless there is a clear intention to apply retrospectivity and such is
27 exposed in the legislation.
28

29 Section 5.6 of the *Fair Practices Regulation* is clear to me that there was no clear intent
30 for a retrospective application of this legislation. And this alone is enough to dismiss the
31 plaintiff's application; however, if I am wrong with regard to the above issue of
32 retrospective application, section 5.6, then I still do not think that the plaintiff has passed
33 the requirements necessary for an advance payment under 5.6 of the *Fair Practice*
34 *Regulations*.
35

36 The Alberta Court of Appeal in the *Shannon* case, at 2014, set out the test for an advance
37 payment which requires two things: (as read)
38

- 39 (1) the defendant is probably liable to the plaintiff for the
40 amount requested; and
41

1 (2) without that payment, the plaintiff is likely to go without
2 necessities or unlikely to be able to prosecute his or her claim
3 for damages.
4

5 With regard to the first part of the test, although the defendant has submitted in this
6 application that the claim is worth 35,000, it has, nevertheless, made an offer in the amount
7 of 130,000 to the plaintiff. And that tells me that the defendant would probably be liable
8 for at least that amount.
9

10 So, on this branch, the first branch of the test, I would find in favour of the plaintiff.
11 However, it is the second part of the test that causes me concern. In other words, the
12 plaintiff has not sufficiently proven inability to pay for necessities or prosecute the claim
13 caused for inability to prosecute the claim caused by the accident.
14

15 And the defendant has set out in its brief at paragraph 1 - 39, certain of the issues which
16 cause me concern as well; i.e., the plaintiff was not able to verify, in questioning, that her
17 household budget is the amount totalled in her affidavit. The dramatic increases in certain
18 expenditures from her household budget in 2017 were unsubstantiated in evidence; no
19 notices of assessment or tax returns from the plaintiff's husband were provided in the
20 affidavit. The plaintiff has not provided sufficient disclosure to prove her own inability to
21 meet her regular expenses, and her husband's disclosure is also insufficient to show he
22 cannot pay them, despite being party to the action.
23

24 In this case, the plaintiff generally managed to meet her regular living expenses for over
25 nine years following the accident. The extent to which her husband contributed over the
26 nine years is unknown, but it was likely that he did contribute. The 30,000 that the plaintiff
27 received from the defendant in 2017 was used largely to pay down personal debt, a
28 significant portion of which was, such as her student loans, pre-existed the accident.
29 Following 2017, no information was provided to the defendants. The plaintiff could not
30 meet her regular living expenses until December, 2020.
31

32 No bank loan has been applied for; no loan was requested from her husband's employer.
33 Even though a previous loan was given by the husband's employer and was repaid by the
34 husband, no litigation loan has ever been applied for.
35

36 I am therefore satisfied that the plaintiff has not met the second part of the test as required
37 by the Court of Appeal. In the result, the plaintiff's application fails on the merits and is
38 dismissed.
39

40 MR. WILKINS:

As the Court pleases, My Lord.

41

1 THE COURT: Any submissions on costs?

2
3 MR. DUCKWORTH: Thank you, My Lord.

4
5 THE COURT: Any submissions on costs?

6
7 **Submissions by Mr. Wilkins**

8
9 MR. WILKINS: I think it's clear that the affidavit showed that she
10 impecunious, they've maxed out their credit cards. They're running through a shortfall of
11 over \$2,000 a month. Ordering her to pay any costs now would just simply eliminate her
12 going to court. I would submit that costs in the cause would be the proper order in the
13 circumstances.

14
15 THE COURT: Mr. Duckworth?

16
17 **Submissions by Mr. Duckworth**

18
19 MR. DUCKWORTH: My Lord, we think there should be an order for
20 costs in this case. Can you hear me, by the way? It says that I am muted but I think you can
21 probably hear me by phone.

22
23 THE COURT: I can hear you.

24
25 MR. DUCKWORTH: Thank you, My Lord. We think there should be
26 an order for costs in this case. This was a very fact intensive application with a lot of
27 medical records that had to be reviewed and considered; cross-examinations that took place
28 December 23rd and work that was required throughout the Christmas holidays based on a
29 schedule chosen unilaterally by the plaintiff's counsel.

30
31 This application was also unusual in the sense that it was fairly boldly about paying for
32 expert reports and that the plaintiff clearly, in our submission, did not qualify on the merits
33 of the tests set out by the Court of Appeal. In other words, being unable to meet daily living
34 expenses and so on.

35
36 So, we do think that costs should be payable at and forthwith; not -- not in any multiple or
37 anything along those lines, but we do think it would be appropriate for a costs order to be
38 payable at this point.

39
40 THE COURT: Okay, anything further, Mr. Wilkins?

41

1 **Submissions by Mr. Wilkins**

2

3 MR. WILKINS: Again, My Lord, we can -- this should probably
4 be dealt with at trial. It would be unfair for the Court to grant an order for costs against the
5 plaintiff right now in these circumstances.

6

7 **Ruling (Costs)**

8

9 THE COURT: Okay, in the circumstances of this case, I am
10 going to direct the following: That the defendant is entitled to an order of costs on the basis
11 of a one-half day special, even though we have gone over a little bit, but the defendant was
12 longer than expected in that afternoon. So, I am going to say a one-half day special costs
13 are awarded to the defendant, in any event of the cause, but they are not payable until the
14 conclusion of the litigation.

15

16 MR. DUCKWORTH: Thank you, My Lord.

17

18 MR. WILKINS: Thank you, My Lord.

19

20 THE COURT: All right. Anything further, gentlemen?

21

22 MR. DUCKWORTH: No, thank you.

23

24 THE COURT: Thank you.

25

26 MR. WILKINS: Not -- not from me, Sir.

27

28 THE COURT: Thank you.

29

30

31

32 PROCEEDINGS CONCLUDED

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1 **Certificate of Record**

2
3 I, Melissa Martel, certify that this recording is the record made of the evidence in the
4 proceedings in Court of Queen’s Bench held in courtroom 201, at Drumheller, Alberta on the
5 3rd day of February, 2021, and that I was the court official in charge of the sound-recording
6 machine during the proceedings.
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1 **Certificate of Transcript**

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3 I, Ruth-Anne Alstad, certify that

4

5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the best
6 of my skill and ability and the foregoing pages are a complete and accurate transcript
7 of the contents of the record, and

8

9 (b) the Certificate of Record for these proceedings was included orally on the record and is
10 transcribed in this transcript.

11

12 Alstad Transcription Services

13 Order Number: AL25626

14 Dated: December 23, 2021

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