IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Murphy v. Snippa,*
2025 BCSC 128

Date: 20250128
Docket: M36982
Registry: Chilliwack

Between:

Kim Elizabeth Murphy

Plaintiff

And

Douglas Snippa, 0854584 B.C. Ltd. dba Sardis Park Wines, and O'Connor Motors Ltd.

Defendants

Before: The Honourable Justice Caldwell

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	J.L. Zacharias L. MacLeod
Counsel for the Defendants, Douglas Snippa and 0854584 B.C. Ltd. dba Sardis Park Wines:	R.C. Brun, K.C.
Place and Date of Hearing:	Abbotsford, B.C. June 28, 2024
Place and Date of Judgment:	Chilliwack, B.C. January 28, 2025

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[1] The plaintiff applies to have the defendants' Notice of Trial by Jury struck.

TIMELINE

[2] The timeline of relevant events and filings is as follows:

1. May 11, 2018 – motor vehicle accident.

2. November 7, 2019 – Notice of Civil Claim filed.

3. June 2, 2020 – Response filed admitting liability.

4. September 18, 2020 – Province of B.C. order-in-council amended Rule 12-6 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 (the "*Rules*"), suspending all jury trials until October 2, 2021 (subsequently extended).

5. May 3, 2021 – Notice of Trial filed, setting trial for May 2, 2022.

6. May 7, 2021 – plaintiff's counsel advised defence counsel of intention to file Notice of Trial by Jury when such filing is once again available.

7. February 15, 2022 – plaintiff filed Trial Brief indicating trial will be by judge alone.

8. March 1, 2022 – defence counsel filed Trial Brief indicating trial will be by judge alone.

9. April 5, 2022 – new defence counsel appointed and Notice of Change of Lawyer filed.

10. May 2, 2022 – trial commenced before judge alone.

11. August 17, 2022 – trial decision released.

12. August 24, 2022 – Supreme Court of British Columbia COVID-19 Notice No. 55 issued, reinstating civil jury trials after October 7, 2022.

13. August 30, 2022 – plaintiff filed Notice of Appeal.

14. September 22, 2022 – current defence counsel filed Response to the Notice of Appeal.

15. December 1, 2022 – appeal heard for full day.

16. January 26, 2024 – appeal allowed and new trial ordered.

17. May 6, 2024 – Notice of Trial filed setting new trial date of May 26, 2025.

18. May 6, 2024 – plaintiff, in error, files and serves Notice of Trial by Jury.

19. May 9, 2024 – defence counsel files and serves Notice of Trial by Jury.

POSITIONS

[3] Interestingly, it was initially the plaintiff who wished to file a jury notice. Plaintiff's counsel say they did all they could, probably beyond what was required by the *Rules*, to put the defendants on notice that they intended to proceed by jury if and when that became possible. It appears that, at some point, the plaintiff lost interest in a jury trial and now applies to quash the defendants' Notice of Trial by Jury.

[4] The plaintiff says the defendants never indicated, in any way, prior to May 9, 2024, that they intended or wished to proceed by way of a jury trial.

[5] The defendants say they never had an opportunity to contemplate a jury trial given that when the original Notice of Trial was filed, jury trials were suspended due to COVID-19. Furthermore, they say that the trial proceeded from start to finish, including decision, during the period when jury trials were suspended and thus unavailable in B.C. Accordingly, the defendants say it was impossible for them to even contemplate the possibility of having the matter heard by a jury.

[6] The defendants say that by the time the appeal was heard, allowed, and a new Notice of Trial filed, the *Rules* had reverted to allow jury trials and accordingly they were entitled to, and did, file a Notice of Trial by Jury in respect of the new trial date.

DISCUSSION

[7] Neither party provided authority which deals with a similar situation – a worldwide pandemic which, at least temporarily, suspended various long-standing rights of Canadians to access the courts and judicial process and procedure.

[8] They did provide authorities dealing with such things as oversights of counsel, adjournments of original trial dates, and failure to pay jury fees.

[9] In *Hoare v. Firestone Canada Inc.* (1989), 42 B.C.L.R. (2d) 237, 1989 CanLII 246 (C.A.), which is perhaps the leading authority on these types of applications, the Court of Appeal made the following comments at pp. 241–243:

> The learned judge very properly emphasized the importance of the right to elect for jury trial. But on a broad consideration of the rules and authorities which has been possible in these appeal proceedings I have concluded that the election is intended to be made once only, at a particular stage, and for good reason. If the trial may be before judge and jury, rather than judge alone, that is generally an important consideration for both parties in preparation of the case and perhaps, indeed, in the selection of counsel. It is, I think, for these reasons that the rules require the election to be made, once for all, soon after the action is set down, instead of leaving the parties free to elect thereafter on the basis of later developments.
>
> While there is not a great deal of authority on the point in this province, the existence of a discretion in some circumstances to extend the time limited for filing a jury notice in order to permit a party to re-elect is supported by two decisions of our Supreme Court: *Guenette v. British Columbia Electric Railway Company Limited* (1944), 60 B.C.R. 261 (S.C.) and *Gombar v. British Columbia Electric Railway Company Limited* (1951), 3 W.W.R. (N.S.) 276 (B.C.S.C.).
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> Those cases suggest, however, that a party seeking to elect for jury trial after expiry of the period limited by the rules must satisfy the court either that the wish, or intention, to do so existed during the period so limited, or that it was prompted in fact by a fundamental change in circumstances.
>
> It would not appear, according to the reasoning in those cases, to be enough that a party allow the period limited by the rules to pass without considering the matter of mode of trial, and sometime thereafter seek to elect for trial by

> jury on the basis of a first-time consideration of the matter. In *Gombar* Wilson J. (as he then was), says that litigants cannot be allowed "to revive lapsed rights on the sole ground that they have, since they allowed the rights to lapse, changed their minds". I think it implicit in that view that a party who had no interest at the appropriate time in having the action tried by jury cannot rely on later change in circumstances as grounds for re-election. But in any event the change in circumstances relied on would, in my view, have to be one which so materially altered the character of the proceedings as to render an action clearly appropriate for trial by jury which, as originally brought, clearly was not.
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> I believe this to be the proper approach to the matter under our present *Rules of Court*.
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> In the context of this action this means the court would have to be satisfied that the plaintiff or his solicitor considered the merits of jury trial before expiry of the time limited following issuance of the first notice of trial, and decided not to elect for jury trial because the action was unsuited for trial by that mode. It would not be enough that the possibility of jury trial was first addressed following the events now said to constitute a change in circumstances.
>
> The learned judge below was, in my view, quite correct in concluding that the opportunity to issue a new notice of trial, when a trial has been adjourned from the original trial date, cannot automatically carry with it a renewed right to issue a jury notice. Adjournments are granted for such reasons, of course, as sickness of witnesses or counsel, or non-availability of a judge, and it would make no sense that whenever an adjournment is granted generally a party should thereafter have the right, by issuing a new notice of trial, to re-elect.
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> …
>
> In the absence of any evidence as to the reason why the plaintiff chose not to elect for jury trial in the first instance, I do not think it proper to infer that it was because his solicitor then regarded it as unlikely that a jury notice would withstand attack. It would not, in my view, be enough that he may, as the learned judge found, have failed to elect jury trial for this reason. But nor can it be said, in my view, that a jury notice would now be *more* likely be upheld than would have been the case had it been given at the proper time.
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> [Emphasis added.]

[10] In *Clark (Guardian ad litem of) v. D. & M. McBicycle Shop Ltd.* (1992), 75 B.C.L.R. (2d) 133, 1992 CanLII 2061 (S.C.), the plaintiff filed a jury notice. The defendants, relying on the plaintiff's jury notice, did not file such a notice. The plaintiff did not pay the jury fees. The defendants claimed that this took them by surprise and they wished to have the matter proceed by way of a judge with a jury. The learned judge found that the defendants in the case could have filed and served

a jury notice but they chose not to do so. Their having changed their minds later did not justify allowing them the later re-election to accomplish that end.

[11] In *Blaikie v. Penafiel*, 2014 BCSC 1470, both parties filed jury notices. When the trial date approached, neither paid the jury fees when they became due. The trial was subsequently adjourned. A new trial date was set and the defendant filed a new jury notice.

[12] Master Muir (now Associate Judge) in *Blaikie* at para. 4, cited the *Clark* decision where the Court concluded:

> … the Plaintiffs voluntarily chose to relinquish their right to a trial with a jury by not paying the jury fees. The provisions of the *Jury Act* clearly provide that a party can maintain their right to a trial with a jury provided that the jury fees are paid.

[13] Master Muir then went on to conclude that in the circumstances of the case before her, the defendant, having failed to pay the jury fees relative to the first trial date, was not entitled to reinstate a jury by filing a new jury notice or paying the jury fees relative to the subsequent trial date.

[14] In both *Clark* and *Blaikie*, there was an ability for each of the parties to consider their options (judge alone or judge with a jury), weigh the benefits and risks of each, and determine which of the options they wished to pursue.

[15] In my view, it is required that the party or parties make their election once and, absent a fundamental change in circumstances, that election cannot be revisited.

[16] However, it is also my view that an election with only one candidate on the ballot is not an election.

[17] A severe and, for over a century, unprecedented worldwide pandemic resulted in a suspension of certain fundamental rights and options available to litigants. In the case of elections for trial, litigants were presented with only one option – to proceed with a judge alone.

[18] Even if the defendants wished to delay the process in hopes of electing a trial by judge and jury, the temporary amendment to R. 12-6 expressly prohibited a party from applying to adjourn a trial in hopes of having the matter heard by a judge and jury at a later time.

[19] The amended Rule did provide that the Court could order otherwise, however, if such a request was made by the defence, it would seem difficult if not impossible to see such application as other than an attempt to deny the plaintiff their day in court indefinitely, if not permanently.

DECISION

[20] In my view, the COVID emergency and resulting temporary amendments to the *Rules*, while essential and proper, denied the defendants an opportunity to consider any form of election as there was only one option open to them. Accordingly, they made no election. That was not an oversight; they were simply precluded from being able to make a choice.

[21] When the matter was set down for the new trial, the temporary measures were no longer in place, the options of jury or no jury were once again in play, and the parties had their first opportunity to actually elect between those options. The circumstances of a new trial afford the parties a chance to reconsider their approach to trial and strategy, including whether they will proceed with a jury.

[22] I see no valid reason to interfere with the election.

[23] The plaintiff's application is dismissed. The defendants will have their costs in the cause.

"Caldwell J."