IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Funk v. Harder,*
2015 BCSC 2152

Date: 20151124
Docket: S29066
Registry: Chilliwack

Between:

Andrew Jonathan Funk and Karen Leanne Funk

Plaintiffs

And

Janet Lorraine Harder

Defendant

- and -

Docket: S29067
Registry: Chilliwack

Between:

Andrew Jonathan Funk and Karen Leanne Funk

Plaintiffs

And

Caroline Irene Harvey-Boersma also known as Caroline Irene Boersma

Defendant

- and -

Docket: S29070
Registry: Chilliwack

Between:

Andrew Jonathan Funk and Karen Leanne Funk

Plaintiffs

And

Jesse Michael Harvey-Boersma also know as Jesse Michael Boersma

Defendant

- and -

Docket: S28990
Registry: Chilliwack

Between:

Andrew Jonathan Funk and Karen Leanne Funk

Plaintiffs

And

Natasha Lynn Schwab also known as Natasha Lynn Funk

Defendant

- and -

Docket: S28991
Registry: Chilliwack

Between:

Andrew Jonathan Funk and Karen Leanne Funk

Plaintiffs

And

Jennifer Allard also known as Jennifer Schwab Allard

Defendant

- and -

Docket: S28994
Registry: Chilliwack

Between:

Andrew Jonathan Funk and Karen Leanne Funk

Plaintiffs

And

Vanessa Coutts

Defendant

- and -

Docket: S29068
Registry: Chilliwack

Between:

Andrew Jonathan Funk and Karen Leanne Funk

Plaintiffs

And

Eric Allard

Defendant

- and -

Docket: S29073
Registry: Chilliwack

Between:

Andrew Jonathan Funk and Karen Leanne Funk

Plaintiffs

And

Amy Dunkley Tinson

Defendant

- and -

Docket: S29076
Registry: Chilliwack

Between:

Andrew Jonathan Funk and Karen Leanne Funk

Plaintiffs

And

Jennifer Foster

Defendant

Before: Master Keighley

Reasons for Judgment

Counsel for the Plaintiffs:	P.G. Kent-Snowsell
Counsel for the Defendants, Janet Harder, Caroline Harvey-Boersma and Jesse Harvey-Boersma:	G.T. Reeves
Counsel for the Defendants, Natasha Schwab, Jennifer Allard, Vanessa Coutts, Eric Allard, Amy Tinson, Jennifer Foster:	B.J. Cabott

Place and Date of Hearing:	Chilliwack, B.C. November 2, 2015
Place and Date of Judgment:	Chilliwack, B.C. November 24, 2015

[1] Recently, Roy Greenslade of *The Guardian* reported that British courts had experienced a 23% increase in the number of reported defamation cases, according to research conducted by Thomson Reuters, attributable, in large part, to the publication of defamatory words on social media websites, blogs, and Twitter. Keith Mathieson, a contributor to Thomson Reuters, a practical law service, was quoted in the article as saying "The increase in actions over internet-based communications is a reflection of people's concern about their online reputations and the ease with which damaging information about individuals and businesses can be shared and spread".

[2] And whereas, in the past, those disseminating libelous material, might, in the case of media, at least, balance potential profits against the risk of being sued, private individuals blithely passing on potentially inflammatory words or information by Facebook or other social media give not a thought or care to the possibility that doing so might leave them open to suit.

[3] Which brings me to the application brought before me on November 2, 2015.

The Application

[4] The application is brought pursuant to Rule 22-5(8) of the *Supreme Court Civil Rules* and pursuant to s. 15 of the *Libel and Slander Act*, R.S.B.C. 1996, c. 263 for the consolidation of nine defamation actions, commenced against nine different defendants as a result of the publication of alleged defamatory words through social media.

Background

[5] The plaintiff, Andrew Funk, and the defendant, Natasha Schwab ("Natasha"), were former partners and were parties to a high-conflict family case, which I gather has now been resolved. The plaintiff, Karen Leanne Funk is the mother of the plaintiff, Andrew Funk.

[6] In order to obtain financial assistance in paying her legal bills, Natasha posted allegedly defamatory words on the website "Fundrazer.com" using the alias "Mama S". The alleged defamatory words were:

> (a) … they have taken my two babies (aged 5 and 2) from me.
>
> (b) They have proven to be aggressive, harassing, controlling and very dangerous.
>
> (c) He has physically assaulted me and was charged with choking me, but threatened to take my babies away from me if I testified.
>
> (d) … he and his parents have ganged up on me and taken them anyways.
>
> (e) They are narcissiistic [sic] without a conscience and very well known to the police.
>
> (f) I believe they are abusing my babies, and I have seen countless unexplainable bruises on wrists, ankles, back along with bleeding finger nails and stories from my babies of being hit, slapped, and dragged throught [sic] the house by their arms. Not to mention locked in their room for crying over missing me.
>
> (g) He lies intentionally and calculatedly to manipulate the family court system with outrageous and empty accusations and allegations.
>
> (h) I have been trying to fight their abusive and harassing actions along with their extremely over-priced lawyer on my own since legal aid funding was cut off, but I can no longer muster through their out right lies, malicious fabrications and manipulations of the family court system, on my own.
>
> (i) … dealing with the effects of being psychologically, emotionally and physically abused.
>
> (j) They are not safe where they are. Please help me save them!

[7] Natasha did not say who "he", "we", "they", or "them" were. With respect to that publication (the defamatory words) the plaintiffs say at para. 7 of the Notice of Civil Claim concerning Natasha:

> The Plaintiffs state that the words referred to in paragraph 6 above, in their natural and ordinary meaning, and by innuendo, meant and were understood to mean, inter alia, the following:
>
> > (a) That the Plaintiff Andrew Jonathan Funk did abuse and presently abuses his spouse, Natasha Lynn Schwab and his Children;
> >
> > (b) That the Plaintiffs Karen Leanne Funk and Andrew Jonathan Funk illegally took away the Children and avoided due process in doing so and did so without colour of right;

(c) That the Plaintiffs did abuse and presently abuse the Plaintiff Andrew Jonathan Funks' Children;

(d) That the Plaintiffs did and continue to interfere with the administration of justice;

(e) That the Plaintiffs are dishonest and that the Plaintiff Andrew Jonathan Funk has committed perjury;

(f) That the Plaintiffs have engaged in the intentional psychological, emotional and physical abuse of the Defendant and the Children; and

(g) That the Plaintiffs are criminals or have a criminal background.

[8] Following Natasha's posting, several other individuals, the other named defendants, reposted the link to the Fundrazer item on their personal Facebook pages. The defendants now all seek to have these various actions consolidated.

[9] In passing, I should mention that there are in fact two additional lawsuits commenced against Sarah McCormack and Graham Funk. Judgment by default has been taken against Ms. McCormack who has apparently made an assignment in bankruptcy. Mr. Funk cannot, at this point, be served.

[10] The plaintiffs' pleadings in all of the nine actions before me are essentially identical. The only major difference is that some defendants made certain additional comments which accompanied their Facebook postings.

[11] Mr. Kent-Snowsell represents the plaintiffs in all of the actions. In terms of pre-trial proceedings, Lists of Documents have been exchanged, but Discoveries have not been conducted or even scheduled. No Notice of Trial has been issued in any of the actions at this time.

Position of the Defendants

[12] The defendants say that the pleadings in all of the actions raise essentially identical issues, amongst other concerns: (a) whether the postings referred to the plaintiffs; (b) whether the postings were true; (c) whether the postings were published as fair comment; (d) the alleged general bad reputation of the plaintiff, Andrew Funk; and (e) damages, if any, arising from the alleged publication. The defendants submit, in general terms, that it would be an enormous waste of judicial

time and resources to allow the actions to proceed separately. Further, say the defendants, there is a significant risk that the Court may be embarrassed by inconsistent decisions on liability and/or damages in the several cases.

[13] Rule 22-5(8) reads:

> **Consolidation**
>
> Proceedings may be consolidated at any time by order of the court or may be ordered to be tried at the same time or on the same day.

[14] Section 15 and 16 of the *Libel and Slander Act* read:

> **Consolidation of actions**
>
> 15(1) The Supreme Court, on an application by or on behalf of 2 or more defendants in actions in respect of the same, or substantially the same, libel or defamation brought by the same person, may make an order for the consolidation of the actions, so that they are tried together.
>
> (2) After the order has been made, and before the trial of the actions, the defendants in any new actions instituted in respect of the same, or substantially the same, libel or defamation are also entitled to be joined in a common action, on a joint application being made by the new defendants and the defendants in the actions already consolidated.
>
> **Verdict, damages and costs in consolidated actions**
>
> 16(1) In a consolidated action under section 15, the court or jury must assess the whole amount of the damages, if any, in one sum, but a separate verdict must be taken for or against each defendant, in the same way as if the actions consolidated had been tried separately.
>
> (2) If the court or jury finds a verdict against the defendant or defendants in more than one of the actions consolidated, they must proceed to apportion the amount of damages that they have found between and against the defendants.
>
> (3) If the court awards costs to the plaintiff, the court must make an order it thinks just for the apportionment of costs between and against the defendants

[15] The defendants say that in enacting the *Libel and Slander Act*, the legislature envisaged the consolidation of defamation actions based on the same or substantially the same allegations. The rationale of the enactment, say the defendants, is clear: to prevent inconsistent findings between actions concerned with the same or substantially the same words. The defendants also say that defamation actions, unlike other actions, allow for repetition of the tort by re-publication by subsequent individuals. Section 15(2) allows the joinder of those individuals to an

action consolidated under s. 15(1). Section 16, say the defendants, also clarifies the legislative intention by setting out a procedure for assessing damages in a consolidated case.

The Law

[16] The law to be applied on applications of this nature is well known and familiar. In the case of *Merritt v. Imasco Enterprises Inc.* [1992] B.C.J. No. 160, an oft quoted passage from the decision of Master Kirkpatrick, as she then was, reads as follows:

> I accept that the foundation of an application under R. 5(8) is indeed disclosed by the pleadings. The examination of the pleadings will answer the first question to be addressed: do common claims, disputes and relationships exist between the parties? But the next question which one must ask is: are they "so interwoven as to make separate trials at different times before different judges undesirable and fraught with problems and economic expense"? Webster v. Webster (1979) 12 B.C.L.R. 172 (C.A.). That second question cannot, in my respectful view, be determined solely by reference to the pleadings. Reference must also be made to matters disclosed outside the pleadings:
>
> (1) will the order sought create a saving in pre-trial procedures (in particular, pre-trial conferences)?
>
> (2) will there be a real reduction in the number of trial days taken up by the trials being heard at the same time?
>
> (3) what is the potential for a party to be seriously inconvenienced by being required to attend a trial in which that party may have only a marginal interest? and
>
> (4) will there be a real saving in experts' time and witness fees?
>
> This is in no way intended to be an exhaustive list. It merely sets out some fo the factors which, it seems to me, ought to be weighed before making an order under R. 5(8).

[17] In the case of *Shah v. Bakken,* [1996] B.C.J. No. 2836 (BCSC), Master Joyce, as he then was, added two further factors for consideration:

> 15. Other factors which in my view can be added to the foregoing list are:
>
> (5) Is one of the actions at a more advanced stage than the other? see: *Forestral Automation Ltd. v. RMS Industrial Controls Inc. et al*. (No. 2), unreported, March 6, 1978, No. C765633/76, Vancouver (B.C.S.C.).
>
> (6) Will the order result a delay of the trial of one of the actions, and, if so, does any prejudice which a party may suffer as a

> result of that delay outweigh the potential benefits which a combined trial might otherwise have?

[18] And finally, in the case of *Murray v. Morgan*, [1999] B.C.J. No. 2871, Master McCallum paraphrased Master Kirkpatrick's analysis in *Merritt* as: "Will the order make sense in the circumstances".

[19] The defendants say that analysis of the "two-part test" weighs strongly in favour of consolidation. Firstly, they say, the pleadings are effectively identical and raise the same issues summarized in para. 12 above. As a result, say the defendants, the pleadings clearly disclose common claims, disputes, and relationships between the parties.

[20] With respect to the second part of the test, the defendants frame the following analysis:

(1) Whether there will be savings in pre-trial procedures

[21] The defendants say that consolidation will streamline discoveries allowing for counsel for the each defendant to examine the plaintiffs once each (instead of nine times) and say that should evidentiary or procedural disputes arise, those might be dealt with once, instead of by multiple applications. And finally, say the defendants, consolidation will also result in only one trial management conference and one trial record being required.

(2) Whether there will be a reduction in trial days

[22] The defendants say there will be a significant reduction in the total number of days for resolution of these nine proceedings because duplicative witnesses would not need to be called in each proceeding. For example, the plaintiffs and Natasha would only need to be examined once. It is very unlikely, say the defendants, that the number of days required for the trial of all nine matters together would exceed the total numbers of days required for separate trials.

(3) Whether there will be inconvenience to parities

[23] The defendants say that any inconvenience to a party being obliged to attend portions of a trial which have a direct relevance to their case is minimal. The defendants, in any event, waive any complaint with respect to such.

(4) Whether there will be a saving in witness time and fees

[24] The defendants say that there are obvious and significant overlapping evidentiary issues such as those concerning the plaintiffs and Natasha which would not need to be covered nine times should the matters be consolidated. Assuming that the plaintiffs call character witnesses with respect to the issue of their reputations, those witnesses would not be obliged to testify on more than one occasion.

(5) Whether an action is at a more advanced stage than the others

[25] All actions are presently at the same stage.

(6) Whether the order will result in a delay of the trial

[26] The defendants say that consolidation will not delay the trial. No trial date is presently set and the plaintiffs are represented by the same counsel. If there is any delay in scheduling the matters for trial as a consolidated proceeding, the defendants say that streamlined pre-trial procedures, global general damage assessment and consistent findings strongly outweigh any prejudice resulting.

(7) Whether there is a substantial risk that separate trials will result in inconsistent findings on identical issues

[27] The defendants say that there is a real risk of inconsistent findings on identical issues such as the truth of the postings, whether the postings referred to or could reasonably be inferred to having referred to the plaintiffs, whether some of the statements amounted to fair comment, evidence with respect to Mr. Funk's reputation and issues as to damages. With respect to the latter points, say the

defendants, it is particularly appropriate that the trier of fact come to one assessment of general damages for any injury provided to the plaintiffs' reputation and divide that assessment amongst the defendants as intended by s. 16 of the *Libel and Slander Act*. The defendants say that there is a very real likelihood of inflated or unrepresentative generally damages being awarded should these proceedings proceed separately.

(8) Whether consolidation will deprive a party of their right to a jury trial

[28] No jury notice has been issued by any party in this proceeding.

[29] As a result, say the defendants, the action should be consolidated and the costs of this application should be payable to the defendants in any event of the cause.

Position of the Plaintiffs

[30] The plaintiffs say that consolidation of the actions will extend the trial time and will not result in a savings in pre-trial procedures, will inconvenience the plaintiffs, and will not result in a savings in witness time and fees.

[31] The plaintiffs say that the only common issue results from the nature of the claims, namely that they are all defamation actions, but that the facts in each case are different in that each defendant may or may not have personal knowledge which would give rise to a defence based on such personal knowledge.

[32] Some of the defendants, say the plaintiffs, have no personal knowledge of the plaintiff, and are simply parroting the comments made by Natasha on the Fundrazer site. Others added their own personal "editorial" comments as to the truth or veracity of Natasha making, say the plaintiffs, their actions different in kind from mere republication.

[33] An example of such, say the plaintiffs, is found in the Caroline Boersma lawsuit, in which the plaintiffs allege that Ms. Boersma posted the words "This is real

and Natasha really needs your help" (Boersma denies having published those words in her response).

[34] Another example of such editorializing is contained in Jesse Boersma's claim, wherein the plaintiffs allege that he posted the words "They were taken by their mother-in-law, Don, who happens to be my aunty [sic], and it was she that took the kids from Natasha…, and there's no real reason. We think she's had some kind of mental breakdown, our whole family has been trying to help her get them back."

[35] Again, Jesse Boersma has denied publishing these words.

[36] In the Janet Harder lawsuit, the plaintiffs say that she added the words "it's a true story people" (Harder has denied publishing these words in her response).

[37] The plaintiffs say that the Natasha lawsuit is significantly different from the others. The plaintiffs have alleged that Natasha posted numerous false allegations concerning the plaintiffs, including allegations with respect to criminal activities, child abuse, psychological, emotional, and physical abuse, and abuse and manipulation of the court system in the postings she created. The plaintiffs say that Natasha then reposted the publication to her Facebook page and encouraged others to recirculate the posting and send money to her Fundrazer page. Natasha, say the plaintiffs, has pleaded in her response at para. 8 that, *inter alia* "the statements of the defendant alleged to be defamatory in this action were made in response to the slanderous statements of the plaintiff, Karen Leanne Funk averred to in her Affidavit and to the Defamatory Facebook Post, and to attacks by the plaintiffs on the defendant's character and conduct".

[38] As a result, say the plaintiffs, the Natasha action is fundamentally different from the other actions sought to be consolidated and has no common issues with the other cases, other than being the origin of the original defamatory words.

[39] The plaintiffs also say that issues in the Natasha action are intermixed with issues in the family law litigation between Andrew Funk and Natasha and will require additional time and expense to deal with issues of breach of confidentiality by

Natasha of the implied undertaking of confidentiality regarding publishing affidavit evidence from the family law case and unrelated court documents, in her response to the defamation claim.

[40] With respect to pre-trial proceedings, the plaintiffs say that discovery of the defendants other than Natasha, will be brief and that the trial of each matter would likely take no more than three days. Document discovery in the cases other than Natasha's is minimal. As an alternative to consolidation, say the plaintiffs, the Natasha action ought to proceed first and the other actions abeyed pending the outcome of the Natasha claim.

Discussion

[41] A decision in this case requires the judicial exercise of discretion. Rarely would two or more actions which are sought to be consolidated or tried together be based on precisely the same evidence or precisely the same legal considerations. Accordingly, a sustainable decision should balance the interests of the parties and the interests of justice as nearly as possible.

Result

[42] I am satisfied that in this case, it is appropriate to grant the order sought for the following reasons:

(1) I am satisfied that there will be a real savings in pre-trial procedures, particularly with respect to the conduct of Examinations for Discovery and the fact that only one trial management conference will be required. There may also be some saving in interlocutory applications which may arise in the course of the litigation;

(2) I am satisfied that there will likely be a reduction in the total number of days required for trial, although I am unable to assess the parties needs objectively. It simply seems that in many cases, the Court may only need to hear evidence once rather than nine times and savings in time are bound to result;

(3) There will be minimal inconvenience to the parties. There may be some inconvenience to the plaintiffs in having to conduct a lengthy trial involving multiple parties, but surely this can be no more inconvenient than having to prosecute separate claims which may take perhaps three days each (by Mr. Kent-Snowell's estimate). There may be some inconvenience to the defendants in having to sit through portions of the trial which do not directly concern them but they are obviously prepared to waive that concern having brought this application.

(4) Perhaps most significantly, there is a real risk of inconsistent findings on issues raised in the several proceedings and particularly with respect to the issues raised in para. 12 of these reasons;

(5) Finally, granting the order sought simply makes sense in the circumstances.

Costs

[43] The defendants will each have the costs of this application in cause.

Master Keighley