

Professional negligence claim against litigation lawyer dismissed in a case of “settler’s remorse” (Kiselbach v. DeFilippi)

Litigation | Litigation & Dispute Resolution | Professional Negligence

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In *Kiselbach v DeFilippi*, 2024 YKSC 7 (CanLII), the Supreme Court of Yukon dismissed a professional negligence claim against a litigation lawyer who acted for the plaintiff in a business dispute. Although the lawyer was found to have breached the standard of care in failing to advise the plaintiffs about a potential settlement option, the plaintiff failed to establish that he would have accepted the settlement at the time.

The individual plaintiff was a businessman who provided services to a company known as “Yukon Stone,” owned by an American citizen (Florian). Yukon Stone operated an outfitting business on a concession in Yukon. Under Yukon law, a concession could only be operated by a Canadian citizen or permanent resident.

In 2012, Yukon Stone offered the position of outfitter to the plaintiff, who qualified as an outfitter whereas Florian did not. The plaintiff accepted the offer and held the concession in his name, purportedly subject to a trust declaration by which he agreed to hold the concession in trust for Yukon Stone and to surrender the concession upon Yukon Stone’s request. He also became a director of Yukon Stone.

The plaintiff’s responsibilities thereafter involved the management of guided hunting trips as well as the overall planning and management of marketing and booking and other activities for the business.

In 2016, the plaintiff sought to either become a majority partner in Yukon Stone or move on. His decision was based upon his success in operating the business and his concerns that, in his view, Florian was not maintaining the company’s records in good order and was not holding up his part of their agreement.

At or around that time, the plaintiff also started to look for acquiring rights to another outfitting concession. Florian took the position that in doing so the plaintiff was in breach of his fiduciary duties to Yukon Stone.

Florian then purported to terminate the plaintiff’s position with Yukon Stone and asked him to surrender the concession.

Litigation ensued, with Yukon Stone seeking an order enjoining the plaintiff to comply with the terms of their trust declaration and to surrender the concession. In response, the plaintiff challenged the validity of the trust declaration. The plaintiff retained the defendant lawyer and his firm for his dispute and a hearing was scheduled in August 2016.

At the initial hearing, the parties agreed that the main dispute would be converted to an action after the plaintiff’s application for interim injunction was heard, which sought to restrain Florian and Yukon Stone from interfering with his operation of the concession until the end of the 2016 hunting season. The injunction was reserved for a decision to be given orally on 2 September 2016.

On 1 September 2016, the plaintiff’s lawyer made a proposal for settlement of the claims for payment to the plaintiff of \$550,000. The offer was stated to be open for acceptance by return email up to one minute before the injunction judgment was rendered. The offer was not accepted before the injunction decision was

released.

On 2 September 2016, the court released its decision in writing by email to the parties’ counsel by email. The plaintiff’s lawyer sent him an email advising “We won. Report to follow”. Five minutes later, Florian’s lawyer sent an email to the plaintiff’s lawyer purporting to accept the settlement offer. The plaintiff’s lawyer rejected the acceptance of the settlement offer by email on the basis that such acceptance was too late.

A dispute then arose as to whether or not the plaintiff’s offer had been accepted before it expired. Florian and the plaintiff exchanged a number of texts that were not copied to the plaintiff’s lawyer, wherein Florian conveyed that he was still prepared to accept the offer. Florian’s lawyer said that he would bring an application to enforce the purported settlement but did not do so. The plaintiff approved a further settlement offer at \$650,000, which was sent to Florian’s counsel. Florian did not respond to that offer.

In December 2016, the plaintiff’s lawyer informed him that he could no longer represent him and withdrew as his counsel. The plaintiff eventually settled his claim in 2017 against Yukon Stone for \$250,000, payable over five years.

The plaintiff sued his former lawyer for negligence, arguing that he ought to have achieved a better result. Specifically, he alleged that the lawyer failed to advise him, in a timely manner, of Florian’s late acceptance of the \$550,000 offer and that he could have agreed to the belated acceptance.

The lawyer counterclaimed for unpaid legal fees of more than \$70,000, arguing that the plaintiff’s claim was a case of “settler’s remorse.”

At trial, the lawyer did not dispute that he owed a duty of care to the plaintiff. The court had to determine whether the standard of care was breached; whether the plaintiffs suffered a loss or damages; and whether that loss or those damages were caused in fact and in law by the lawyer’s alleged breach.

While the plaintiff did not obtain an expert opinion on the applicable standard of care, the court reasoned that expert evidence was not required to establish the proposition that lawyers have a duty to inform and advise their clients of all relevant matters, including all settlement offers (citing *Pelky et al. v. Hudson Bay Insurance Co.*; *McKittrick, Erickson, Jones (Third Party)*, 1981 CanLII 1958 (ON SC)). In the trial judge’s view, the lawyer breached his duty because he did not inform the plaintiff of Florian’s late acceptance in a timely manner, and he never informed the plaintiff that Florian’s late acceptance could be considered a new offer that he could accept, or not, without involving the courts.

The trial judge noted, however, that in a professional negligence action, “[i]t is not enough for a plaintiff to demonstrate that their lawyer breached the duty of care they owed to them to find liability. The plaintiff must also establish that the breach is the cause of the plaintiff’s loss or damages.”

In that regard, the court did not find the plaintiff’s evidence to be credible concerning his allegations that he did not know he could accept Florian’s belated acceptance or that he would have agreed to settle for \$550,000 even after the injunction had been decided in his favour.

The trial judge referred to the principle that in cases of professional negligence, “a bare assertion that a client would have behaved differently if he or she had received proper advice should be viewed with some skepticism”: *Fong v. Lew*, 2015 BCSC 436, at paragraph 35, affirmed 2016 BCCA 67.

The court reviewed the plaintiff’s contemporaneous correspondence and concluded that it was not consistent with someone who wanted to settle but believed he could not do so. Rather, the correspondence was consistent with someone who was not interested in a settlement at \$550,000 after winning an injunction that allowed him to open Yukon Stone’s books and to manage the concession for the 2016 hunting season without any interference from Florian; and who thought he was in a good position to obtain a higher amount.

The court therefore concluded that plaintiff had not established, on a balance of probabilities, the element of causation. The claim in professional negligence was dismissed and the lawyer’s counterclaim for unpaid legal fees was granted.

The decision demonstrates the importance of establishing causation in a professional negligence claim. Ultimately, while the legal services provided by the defendant lawyer were not without fault, they did not result in loss or damages to the plaintiff. The emails and text messages exchanged during the relevant times demonstrated that the plaintiff was aware of the belated acceptance of his offer to settle and that he knew he could accept it but chose not to. At the time, the plaintiff believed he was in a good position to obtain a higher amount. The fact that this did not turn out to be the cause was not due to negligent advice from his lawyer. A PDF version is available for download [here](#).

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