

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gibson v. Insurance Corporation of  
British Columbia*,  
2016 BCSC 814

Date: 20160506  
Docket: S032715  
Registry: Vancouver

Between:

**Peter Robert Gibson**

Plaintiff

And

**Insurance Corporation of British Columbia,  
Heather Bradshaw also known as  
Heather Sawicki and Darryl Sawicki**

Defendants

And

**Insurance Corporation of British Columbia**

Plaintiff by Counterclaim

And

**Zoltan Sandli**

Defendant by Counterclaim

Corrected Judgment: The text of the judgment was corrected on the front page  
where changes were made on May 9, 2016

Before: The Honourable Mr. Justice Pearlman

## **Reasons for Judgment**

Counsel for the Plaintiff:

E. James McNeney, Q.C.  
& Robert B. McNeney

Counsel for the Defendant, Insurance  
Corporation of British Columbia:

Timothy Goepel

Counsel for the Defendants,  
Bradshaw and Sawicki:

Clive Boulton

Counsel for the Defendant by Counterclaim,  
Sandli:

Howard Rubin, Q.C.

Place and Date of Hearing:

Vancouver, B.C.  
October 13, 2015

Place and Date of Judgment:

Vancouver, B.C.  
May 06, 2016

## **INTRODUCTION**

[1] Mr. Zoltan Sandli, as defendant by counterclaim, applies pursuant to Rule 9-7(2) of the *Supreme Court Civil Rules* for an order dismissing all claims against him.

[2] In this action, the plaintiff claim damages for personal injuries sustained on May 24, 2002 at 104<sup>th</sup> Avenue and 168<sup>th</sup> Street in Surrey, British Columbia. He claims that while riding his motorcycle he was the victim of a hit and run by an unidentified driver. After the defendant, the Insurance Corporation of British Columbia (“ICBC”) admitted liability for the accident, Heather Bradshaw, also known as Heather Sawicki, admitted that she drove the vehicle that struck the plaintiff. Ms. Bradshaw also asserted that the plaintiff told her and her passenger and friend, Denise Izatt, to leave the scene of the accident.

[3] By its counterclaim, ICBC claims that the plaintiff and Mr. Sandli conspired to defraud ICBC in order to obtain benefits that were not owed by ICBC to Mr. Gibson. ICBC alleges that Mr. Sandli made misrepresentations or withheld material information in order to induce it to pay insurance monies and benefits to Mr. Gibson.

## **ISSUES**

[4] The issues arising on this application are:

- (a) whether ICBC’s counterclaim against Mr. Sandli is suitable for determination by summary trial; and
- (b) whether Mr. Sandli knew Ms. Bradshaw was the driver, failed to disclose that information to ICBC and fraudulently conspired with Mr. Gibson to misrepresent the collision as a hit and run.

## **BACKGROUND**

### **Litigation History**

[5] Tracing the history of this litigation takes one down a long and convoluted path.

[6] Mr. Gibson commenced his action against ICBC as a nominal defendant pursuant to the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 on May 21, 2003.

[7] On December 13, 2003, ICBC filed a statement of defence denying liability.

[8] On January 18, 2007, shortly before the commencement of trial, ICBC admitted liability under s. 24 of the *Insurance (Vehicle) Act*, leaving only damages to be assessed.

[9] On March 8, 2007, the trial judge gave oral reasons awarding the plaintiff damages for non-pecuniary loss, past wage loss and special damages totaling \$105,259.49. Mr. Gibson appealed the damages award.

[10] On May 10, 2007, before entry of the trial judgment, ICBC received an anonymous tip concerning the identity of the driver and owner of the vehicle that struck the plaintiff's motorcycle. In an interview on May 29, 2007, Heather Bradshaw informed an agent of ICBC that she was the driver and was operating a vehicle owned by her husband, Darryl Sawicki.

[11] On November 27, 2007, Mr. Gibson and Mr. Sandli were charged under s. 42.1 of the *Insurance Motor Vehicle Act*.

[12] On December 13, 2007, ICBC applied to the trial judge to withdraw its admission of liability. By Reasons for Judgment issued on December 20, 2007 and indexed as *Gibson v. ICBC*, 2007 BCSC 1843, the trial judge dismissed that application.

[13] On April 24, 2008, when Mr. Gibson's appeal came on for hearing, ICBC applied for leave to appeal the trial judge's dismissal of its application to withdraw its admission of liability. By Reasons for Judgment indexed as *Gibson v. ICBC*, 2008 BCCA 217, the Court of Appeal allowed Mr. Gibson's appeal and ordered a new trial on the ground that the damages award was not supported by reasons sufficient for appellate review. The Court stated that the intended appeal by ICBC of the order refusing withdrawal of the admission of liability was moot.

[14] On December 8, 2008, Crown Counsel stayed the charges against Mr. Gibson and Mr. Sandli.

[15] On August 4, 2010, Master Donaldson determined that it was no longer necessary for ICBC to withdraw its admission of liability. The Corporation had made that admission only for the purpose of trial. The Court of Appeal's order for a new trial reinstated the pleading denying liability. Master Donaldson also granted ICBC leave to amend its statement of defence, to bring a counterclaim against the plaintiff, and to add Zoltan Sandli as a defendant to the counterclaim.

[16] At a Case Management Conference held on August 10, 2010, Madam Justice Adair ordered the severance of the issues of liability and damages.

[17] On November 18, 2010, the plaintiff filed a malicious prosecution action against ICBC, Mr. Douglas Smith, an employee of ICBC's special investigation unit, and the Attorney General of British Columbia. Later, by consent, Her Majesty the Queen in Right of the Province of British Columbia as represented by the Minister of Public Safety and the Solicitor General were added as defendants in the malicious prosecution action. There is an outstanding notice of application to join the malicious prosecution action with this proceeding. The malicious prosecution action has not yet been set for trial, although examinations for discovery have been conducted in that action.

[18] In this action, Mr. Gibson applied to add Heather Bradshaw and Darryl Sawicki as defendants "in view of the position taken by [ICBC] in this litigation that Heather [Bradshaw] was the driver of the vehicle that struck the plaintiff" and that "Darryl Sawicki was the owner of the alleged vehicle". Mr. Gibson continued to claim against ICBC, in the event that his claims against the defendants Bradshaw and Sawicki were dismissed.

[19] The plaintiff has consistently maintained that Ms. Bradshaw was not the driver of the vehicle that struck him and says that he has been unable to determine the identity of the driver or owner of that vehicle.

[20] ICBC also applied under Rule 9-7 for an order removing it as a defendant and dismissing the plaintiff's action as against ICBC by summary trial of the issue of the identity of the driver and owner of the vehicle that had injured the plaintiff.

[21] On November 21, 2011, a judge of this court granted ICBC's summary trial application and dismissed the action as against ICBC.

[22] Mr. Gibson appealed the dismissal of his action against ICBC to the Court of Appeal. On December 23, 2013, the Court allowed Mr. Gibson's appeal. By Reasons for judgment indexed as *Gibson v. ICBC* 2013 BCCA 557, the Court held, at paras. 40 - 42

[40] My analysis of the evidence set out above makes it clear that the testimonial conflict as to the identity of Ms. Bradshaw as the responsible driver should be resolved by a trier of fact receiving the evidence *viva voce*. There was a material conflict in the evidence that cannot be justly resolved by affidavit evidence.

[41] In addition, there is a valid concern that the finding by the summary trial judge on the identity issue might compromise resolution of the other issues in the case. I am unable to see how the appellant is to present his case against Bradshaw/Sawicki when he does not accept that Heather Bradshaw was the driver of the vehicle that struck his motorcycle. It seems to me that the logical way to proceed is for the appellant to present his case as involving a hit-and-run collision and leave it to ICBC to attempt to establish that the driver has been ascertained as Ms. Bradshaw.

[42] Perhaps of greater importance is the effect the identity finding would have on the counterclaim. To establish the conspiracy it alleges, ICBC must prove that Ms. Bradshaw was the driver, that both the appellant and Mr. Sandli knew that to be so and that they conspired to defraud ICBC by alleging that the collision was a hit-and-run when it was not. There has to be a serious question as to whether Mr. Sandli would be bound on the counterclaim by the identity finding made in the action by the order under appeal. Mr. Sandli is a party only in the counterclaim. This means the potential for inconsistent findings with respect to a material fact looms large. Determination of the identity issue at a summary trial does not assist in the resolution of all issues in the proceeding.

[23] In the course of setting aside the dismissal of the action as against ICBC, the Court noted at para. 27 that the evidence of Ms. Bradshaw in many respects was inconsistent with a statement given by Mr. Gibson to ICBC shortly after the collision. Ms. Bradshaw said the motorcyclist did not fall off his motorcycle and that there was no damage to her car. She testified that if the motorcycle was a write-off because of

damage to its frame, that damage could not have been caused by her. She denied the motorcyclist was thrown to the ground.

[24] For his part, Mr. Gibson told ICBC that the impact threw him into the air and that he landed on the pavement. After Mr. Sandli returned and called for help, a fire truck, ambulance and police attended. The plaintiff was taken by ambulance to Surrey Hospital. The Court commented at paragraph 29 that the minimal impact with no damage described by Ms. Bradshaw appeared to be inconsistent with the evidence concerning the damage to the motorcycle, the injuries to Mr. Gibson and the damages assessed at the first trial.

[25] In 2015, the parties hoped to resolve these proceedings by a judicial settlement conference. However, that conference was delayed when defence counsel sought additional independent medical examinations of the plaintiff.

[26] Mr. Sandli then brought his application for dismissal of ICBC's counterclaim against him. The plaintiff consents to the relief sought by Mr. Sandli. ICBC opposes Mr. Sandli's application on the ground the matter is not suitable for disposition by summary trial.

[27] The conventional trial of this action and the counterclaim is set for 20 days, commencing on January 16, 2017. However, counsel for ICBC estimates the liability trial will take no more than 5 to 7 days. I understood from Mr. Rubin's submissions on behalf of Mr. Sandli that he did not disagree with that estimate.

## **APPLICABLE LEGAL PRINCIPLES**

[28] Rule 9-7(2)(d) provides:

(2) A party may apply to the court for judgment under this rule, either on an issue more generally, in any of the following:

...

(d) an action by way of counterclaim in which a response to counterclaim has been filed.

[29] Under Rule 9-7(15) on the hearing of a summary trial application, the court may:

(a) grant judgment in favour of any party, either on an issue or generally, unless

(i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or

(ii) the court is of the opinion that it would be unjust to decide the issues on the application,

...

[30] The Court of Appeal summarized the law concerning the suitability of a case for determination by summary trial in *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30-31:

[30] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), the court confirmed that the court under this rule “tries the issues raised by the pleadings on affidavits”, that “a triable issue or arguable defence will not always defeat a summary trial application”, and that “cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law” provided that the judge does not find “it is unjust to do so” (p. 211). In determining the latter issue (whether it would be unjust to proceed summarily), the Chief Justice identified a number of relevant factors to consider (at p. 215):

In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

[31] To this list has been added other factors including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices: *Dahl v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, upheld on appeal at 2006 BCCA 369.

[31] In *Kemp v. Vancouver Coastal Health Authority*, 2015 BCSC 1319 at para. 77, Madam Justice Arnold-Bailey discussed the obligation of an opposing party responding to a summary trial application:

If adequate notice is given to an opposing party that a summary trial application is going to be brought, an obligation then falls on that party to take every reasonable step to complete as much of the pre-trial procedure as necessary to achieve the best mastery of the facts as is reasonably possible before the summary trial proceeding: *Anglo Canadian Shipping Co. v. Pulp, Paper and Woodworkers of Canada, Local 8* (1988), 27 B.C.L.R. (2d) 378 (C.A.). Failure to take such steps cannot serve to frustrate the summary trial process. The respondent to such an application cannot insist on a full trial in the hope that with *viva voce* evidence, something additional and favourable might turn up: *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275 at para. 34.

[32] Even on a summary trial application brought by a defendant, the plaintiff retains the onus of establishing his or her claim; the defendant retains the burden of establishing any defence to the claim: *Gichuru* at para. 35.

[33] The object of the *Supreme Court Civil Rules*, as stated in Rule 1-3(1) is “to secure the just, speedy and inexpensive determination of every proceeding on its merits” in order to secure that object, Rule 1-3(2) provides that proceedings must be conducted in ways “so far as is practicable ... that are proportionate to (a) the amount involved in the proceeding, (b) the importance of the issues in dispute, and (c) the complexity of the proceeding.”

[34] In appropriate cases, summary trial will serve the object of the *Rules* by providing a just and efficient process by which the court may grant judgment in favour of a party “on an issue or generally”. However, particularly where the issues in an action are interrelated or overlapping, the court will avoid “litigating in slices”: *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd.*, 2002 BCCA 138; *Coast Foundation v. Currie*, 2003 BCSC 1781 at paras. 12, 13 and 15-18.

[35] As Masuhara J. explained in *R.C. Hotel Ventures Ltd. v. Meristar Sub 2C, LLC*, 2008 BCSC 918 at para. 13, a court should be reluctant to “slice off” and decide isolated issues where resolution of those issues will not resolve the litigation or will only resolve the litigation if answered in a particular way. The Rule 9-7 applicant will be required to demonstrate and the court will be expected to decide that the administration of justice, including the orderly and effective use of court time would be enhanced by dealing with the separate issue advanced by the applicant.

[36] In *Prevost v. Vetter*, 2002 BCCA 202, the plaintiff claimed damages for injuries he suffered when he was thrown from an automobile driven by the defendant Desiree Vetter. The trial judge found she had consumed alcoholic beverages on the property of the appellants, her uncle and aunt, and that she was intoxicated when she and the plaintiff entered her automobile. On the summary trial application, the trial judge found the appellants were social hosts and owed the plaintiff a duty of care, which they had breached. The defendant driver, who denied she was impaired, took no part in the summary trial application. Causation, assessment of damages and contributory negligence were all to be decided in a subsequent trial.

[37] In *Prevost* at para. 8, the Court of Appeal set aside the order of the summary trial judge and directed a new trial. The Court held that it was not possible for the summary trial judge to determine the existence or breach of the standard of care without also determining facts the plaintiff had to establish in order to succeed on the issue of causation. The trial judge's findings would be embarrassing to the subsequent trial judge, who would be asked by the appellants to make contrary findings on the basis of full evidence. The potential for prejudice to the appellants and to defendant driver was obvious. The trial judge might make different findings of fact concerning whether Desiree Vetter was intoxicated when she left the appellants' property and might have to reconsider the summary trial judge's findings of duty, standard of care and breach. Again, in *Prevost* slicing off and deciding isolated issues would not resolve the litigation and raised the potential for inconsistent findings by the trial judge.

[38] Not every conflict in the evidence will render a matter unsuitable for summary judgment. As D. Smith J.A. stated in *Bell v. Levy*, 2011 BCCA 417 at para. 64:

“Head on” conflicts in the evidence that go to the core issue in the action will generally provide an impediment to disposition of an action by way of summary trial, especially where findings of credibility are a central issue in the dispute. [Case references omitted].

[39] However, as the court stated in *Kemp* at para. 86: “... where one party asserts an absence of evidence on a key ingredient of the claim and the judge on

summary trial agrees, the issue may well be amenable to adjudication in this manner, despite the opposing party voicing its disagreement as to the meaning or significance of the presence or absence of such evidence. In such instances, it may not properly be said that there is a clear conflict in the evidence going to a core issue”.

[40] Hearsay evidence is admissible on a Rule 9-7 application for the limited purpose of determining whether the matter is suitable for disposition by summary trial: *Calder v. King*, 1994 CarswellBC 214.

## **POSITIONS OF THE PARTIES**

### **Position of Mr. Sandli**

[41] Mr. Sandli says the issues in the action and the counterclaim are discrete, and do not overlap. The issue in the main action, which requires a conventional trial is whether Ms. Bradshaw was the driver of the vehicle that struck Mr. Gibson, as alleged by ICBC. The issue in ICBC's counterclaim against Mr. Sandli is whether he knew that Ms. Bradshaw was the driver and failed to disclose that information to ICBC.

[42] Mr. Sandli says that before the collision he had turned right from 104 Avenue into a lane that provides access to his house. He says he did not witness the accident and has never said that it was a hit-and-run.

[43] In his affidavit sworn June 25, 2015 in support of this application, Mr. Sandli deposed he did not see nor was involved in the accident; that he had been riding ahead of Mr. Gibson, got about a block ahead, by which time when he looked back, he could no longer see the plaintiff. When he went back to the scene of the accident, he observed the plaintiff off his motorcycle lying at the side of the road. Mr. Sandli denied any knowledge of the identity of the driver or owner of the motor vehicle that collided with Mr. Gibson and swore that he has not met with Mr. Gibson to discuss the case since the plaintiff issued his statement of claim.

[44] Ms. Bradshaw does not say in her affidavit Mr. Sandli was present when the accident happened. On her examination for discovery, Ms. Bradshaw did not remember the name of the motorcyclist she says she rear-ended until the name was provided to her by a representative of ICBC. She initially named Ms. Coleman as her passenger but later accepted that Ms. Izatt was her passenger. As the Court of Appeal observed in *Gibson v. ICBC*, 2013 BCCA 557 at para. 27:

... Contrary to what she swore in her affidavit, Ms. Bradshaw agreed in cross-examination that the motorcyclist could have been somebody other than the person identified to her as Pete (of which name she apparently has no independent recollection). She even agreed that the incident she described could have been completely separate from the one that, as the questioner put it 'brings us to court today'.

[45] ICBC has not obtained an affidavit from Ms. Izatt and was unable to locate her before the hearing of the summary trial application.

[46] Mr. Sandli submits that while there is a head-on conflict between the affidavits of Ms. Bradshaw and Mr. Gibson concerning the identity of the driver who struck the plaintiff, there are no conflicts in the affidavit evidence relating to Mr. Sandli's knowledge, or lack of knowledge, of the accident or his alleged misrepresentation. Mr. Sandli says his evidence that he knew nothing of the hit-and-run is not contradicted by any affidavit. He says that in the absence of any admissible contrary evidence, his undisputed evidence is sufficient to enable the Court to find the facts necessary to decide the issues of fact and law raised in ICBC's counterclaim against him.

[47] Mr. Sandli says that he is impecunious, that he will not have counsel if this case proceeds to a conventional trial, and that most of the time required for the conventional trial will be devoted to the trial of Mr. Gibson's claim and the identity of the driver. He submits that in these circumstances, summary trial provides a just and fair means of adjudicating ICBC's counterclaim against him.

[48] On the merits, Mr. Sandli submits that in order for ICBC to establish fraudulent misrepresentation by omission or half-truth, ICBC must adduce evidence that he, with the intention to deceive the Corporation, suppressed material facts and

restricted his statements to the Corporation to information calculated to assist Mr. Gibson in obtaining insurance benefits to which he was not entitled: see *Freeman v. Perlman*, 1999 BCCA 40 at paras. 10-13 where the Court applied the *dictum* of Chambre J. in *Tapp v. Lee* (1803), 3 Bos. & P. 367, 127 E.R. 200 at 203:

Fraud may consist as well in the suppression of what is true, as in the representation of what is false. If a man, professing to answer a question, select those facts only which are likely to give a credit to the person of whom he speaks, and keep back the rest, he is a more artful naive than he tells a direct falsehood.

[49] Mr. Sandli says that because he did not witness the accident, he has no knowledge of the identity of the driver who struck Mr. Gibson, and has not withheld any material information within his knowledge in his statements to ICBC.

[50] Mr. Sandli submits that ICBC has failed to adduce any affidavit evidence establishing that he did any act in furtherance of the alleged conspiracy to defraud the Corporation. The defendant by counterclaim says that ICBC was obliged to marshal its evidence in response to Mr. Sandli's summary trial application and that ICBC is "not entitled to sit back and rely on the possibility that more favourable facts may develop at trial": *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 at para. 56.

[51] In her statement, Ms. Izatt confirms that Mr. Sandli had turned off 104 Street before Ms. Bradshaw's vehicle struck the rear of Mr. Gibson's motorcycle. While Ms. Izatt states that after the collision she and Ms. Bradshaw went to Mr. Sandli's home, she does not say that she told Mr. Sandli about Ms. Bradshaw rear-ending the plaintiff. Mr. Sandli submits that although Ms. Izatt spent the night at his residence and he drove her to work the following morning, there is no evidence Ms. Izatt told him how the accident occurred.

[52] Mr. Sandli says eight years have now passed since Ms. Izatt gave her statement to ICBC and that there is no reasonable expectation that she will be available to testify at the conventional trial of this action.

**Position of ICBC**

[53] ICBC says Ms. Izatt's statement renders this matter unsuitable for determination by summary trial and contends Mr. Sandli's knowledge and involvement will be a live issue to be tested in cross-examination at trial.

[54] By its counterclaim, ICBC pleads:

10. ICBC says that as from the time of the Accident up to and including the present, Mr. Gibson and Mr. Sandli, and each of them, wrongfully and maliciously conspired together to defraud and injure ICBC by combining at different times for the purpose of assisting and encouraging Mr. Gibson in making fraudulent insurance claims as against ICBC in respect of claims for damage to or loss of property and in respect of claims for benefits pursuant to a contract of insurance with ICBC and/or pursuant to the *IMVA* and the Regulations thereto.
11. Further, ICBC says that Mr. Gibson and Mr. Sandli, and each of them, fraudulently and deceitfully conspired and agreed together to cheat and defraud ICBC and to hoodwink and deceive ICBC, and ICBC's employees and agents, to obtain payments and benefits from ICBC, which were not properly owing by ICBC to Mr. Gibson.
15. ICBC says that following the Accident, Mr. Gibson and Mr. Sandli made various representations to ICBC, which were made either expressly and/or by way of material omissions, as follows:
  - a. On or about May 24, 2002, Mr. Gibson represented orally to ICBC that:
    - i. the Accident was a hit and run accident;
    - ii. he was unable to obtain the licence plate number of the other vehicle;
    - iii. the other motorist in the accident fled the scene.
  - ...
  - c. On June 13, 2002, Mr. Sandli represented orally to ICBC that:
    - i. he was out with Mr. Gibson on the night in question and did not have any information about the vehicle that hit Mr. Gibson.
  - d. On March 3, 2003, Mr. Sandli represented orally to ICBC that:

- i. on May 23, 2004, he had been out riding motorcycles with Mr. Gibson and Kerry Singh, and there was no mention made of any other parties.
- e. On June 21, 2007, Mr. Sandli represented to ICBC that:
  - i. he was out with Mr. Gibson on the night in question and did not have any information about the vehicle that hit Mr. Gibson.

[55] At paragraph 19 of the counterclaim, ICBC pleads that Mr. Gibson and Mr. Sandli knew the other driver involved was Ms. Bradshaw and that after the accident, Mr. Gibson told Ms. Bradshaw to leave the scene of the accident.

[56] ICBC maintains that Mr. Sandli gave false statements when he denied there were any witnesses to the accident. The Corporation says Mr. Bradshaw and Ms. Izatt were following him to his house. At trial, ICBC will invite the court to draw an inference that Mr. Sandli knew how the accident occurred. If Ms. Bradshaw and Ms. Izatt followed Mr. Sandli to his home, they must have seen the accident. ICBC says the Court ought not to make any findings on the summary trial on issues that will be contested at trial. Counsel for ICBC says he hopes to have Ms. Izatt under subpoena to testify at trial.

[57] Ms. Izatt's statement to Constable Smith in July 2007 is admissible on the issue of suitability. She described spending time in the bar with "Zoltan", "Pete" and others, and says that she was a passenger in Ms. Bradshaw's vehicle following Pete and Zoltan to Zoltan's house. She spent the night there and Zoltan drove her to work the next morning. ICBC will ask the Court to draw an inference that Mr. Sandli must have known how the accident occurred, but says that is a matter to be determined by the trial judge.

[58] In his statement to Constable Smith at tab 17, Mr. Sandli was asked if there were any witnesses and answered in the negative. At page 9, he was asked again and responded "No, there was nobody there." ICBC says that Ms. Bradshaw and Ms. Izatt who were following the motorcyclists, must have witnessed the accident, and went to Mr. Sandli's home.

[59] Mr. Sandli professed to have no knowledge about anyone following him on his way to his home, other than Mr. Gibson. He denied picking up any girls at the Sandpiper Pub and denied that he was hiding anything or protecting anybody.

[60] In *0895625 B.C. Ltd. v. Ascent Developments Corp.*, 2014 BCSC 1722, the court defined the elements of civil conspiracy at para. 22:

The elements of civil conspiracy are:

1. An agreement between two or more persons;
2. Concerted action taken pursuant to the agreement;
3. The conspirators:
  - (a) intended to cause damage to the plaintiff, if the action is lawful, or
  - (b) knew or ought to have known that their action would injure the plaintiff, if the action is unlawful; and
4. Actual damage suffered by the plaintiff.

[61] The term “agreement” is not used in the sense of a binding contract but rather in the sense of a joint plan or common design: *Ascent Developments Corp.* at para. 24; *Nicholls v. Richmond (Municipal Corporation)*, [1984] 3 W.W.R. 719, 52 B.C.L.R. 302 (S.C.), at 312.

[62] ICBC says Mr. Gibson and Mr. Sandli agreed and acted in concert to provide a false story, or agreed to withhold material facts in order to obtain insurance coverage for the plaintiff. The Corporation maintains that by providing false statements Mr. Gibson and Mr. Sandli acted unlawfully, and knew or ought to have known they would cause damage to ICBC including, but not limited to the payment of Part 7 benefits, legal fees and an inability to attempt to recover any recoverable costs from the party actually responsible for the accident. The Corporation claims that it suffered damages as a result of the conspiracy in the amount of \$194,326.80 for legal fees and disbursements it has incurred, and for benefits paid to Mr. Gibson.

[63] ICBC submits that a conspiracy to defraud is usually to be inferred from behaviour: see *Encorp Pacific (Canada) v. Rocky Mountain Return Centre Ltd.*, 2005 BCSC 1700 at para. 36. The Corporation says that cross-examination and a conventional trial are necessary to fully canvass and test the evidence from which

the court will be invited to draw inferences concerning Mr. Sandli's participation in the alleged conspiracy to defraud ICBC.

## **DISCUSSION**

### **Suitability**

[64] There are significant inconsistencies between the evidence of Mr. Sandli and Mr. Gibson concerning their activities at the Sandpiper Pub and whether Mr. Sandli invited girls back to his house. Those contradictions go to the core of the issue of whether Mr. Sandli knew Ms. Bradshaw and Ms. Izatt were following him and Mr. Gibson; that Ms. Bradshaw was the driver of the vehicle that struck Mr. Gibson; and that Ms. Izatt was a witness to the accident.

[65] On his examination for discovery, Mr. Gibson gave evidence that he, Mr. Sandli and another friend, Mr. Kerry Singh were out riding motorcycles on May 24, 2012. Mr. Gibson testified that they stopped at the Sandpiper Pub in White Rock, where Mr. Singh's girlfriend, Leanne Coleman was the karaoke singer. Mr. Gibson also testified that Denise Izatt, who he knew to be a friend of Ms. Coleman's, was also present. He recalled there was "a whole bunch" of people at the table and remembered that some people were going to go back to Mr. Sandli's house to play pool.

[66] At questions 205 to 209 of his examination for discovery, Mr. Gibson gave the following evidence:

205 Q How did you get the drift that they were going to Zoltan's place to play pool? What do you remember? What brought that to your attention?

A Well, some people, I think Zolly said let's go to my place and play pool or something. And I just said, I think I'm going to go home. Kerry said I'm going home too.

206 Q Some of the girls said yes?

A I would imagine. I mean I don't know. Never said yes to me. It was not my place. I never invited anybody.

207 Q But you got the drift that people --

A I had the drift there was going to be some people. There was like guys, girls at the table. I don't know if he invited all of them or some of them or any of them, like, you know, he must have invited somebody.

208 Q And Zoltan, he is a single guy at this time?

A I believe so.

209 Q So he is a guy that was interested in meeting females as far as you know?

A You would hope so.

[67] On his examination for discovery, Mr. Sandli gave evidence that although he had known Kerry Singh for 20 years, he was unaware Leanne Coleman was his girlfriend and had not heard her name before the day of the accident.

[68] Mr. Sandli testified that he had no recollection of hanging out with a group of girls at the Sandpiper Pub. At questions 60 to 64, he gave the following evidence:

60 Q You don't recall a group of girls being there?

A No. Actually, no. I don't.

61 Q So you have no recollection of hanging out with a group of girls at the Sandpiper?

A There was quite a few people there so I don't recall who I hung -- personally hung out with, no.

62 Q Do you recall a Denise being there?

A No, I don't.

63 Q Do you recall a Heather being there?

A No.

64 Q And do you recall Leanne being there?

A No, I don't. I don't know these people.

[69] Mr. Sandli also denied inviting any girls back to his house, did not recall any girls following him, and did not remember either Mr. Gibson or Mr. Singh inviting any girls to his house.

[70] When asked about Ms. Izatt's statement that she went to his house and spent the night and that he drove her work in the morning, Mr. Sandli testified that some

people he did not know showed up at his house but he did not know them. He acknowledged that Denise Izatt might have been there and that he gave a girl a ride to work in the morning.

[71] Ms. Bradshaw was examined for discovery by counsel for the plaintiff. Ms. Bradshaw gave evidence that she, Leanne Coleman, Denise Izatt, Mr. Sandli, Mr. Singh, all shared a table at the Sandpiper Pub and that afterward, accompanied by Denise Izatt, she followed two motorcycles from White Rock to Surrey. She recalled bumping a motorcycle and the motorcyclist waving her on and telling her to “go, go, go”. Ms. Bradshaw recalled going to a house with Ms. Izatt but claimed she did not know who owned the house. When asked if there was a party at the house, she responded “Not for very long. I don’t remember how long we were there. We weren’t there for very long.”

[72] In each of his three voluntary statements to ICBC, Mr. Sandli said that he had turned off 104 Street before the collision, and that when Mr. Gibson did not follow him to his home, he went back to the intersection at 104 Street where he found Mr. Gibson lying on the road, injured, at some distance from his motorcycle.

[73] In the statement Mr. Sandli gave to Mr. Doug Smith, a special constable with ICBC’s special investigations unit, on March 3, 2003, Mr. Sandli was asked twice whether there were any witnesses to the collision. Both times he answered in the negative. Mr. Sandli was also asked if he remembered Mr. Gibson describing the type of vehicle that struck his motorcycle. At page 15 of his March 3, 2003 statement, he answered, “I just remember him saying that they hit him with the car was a flash as they bolted through, a Mustang or something like that, I think that’s what he said I am not even sure.”

[74] Mr. Sandli was also asked and answered the following questions at line 20, page 24 to line 5, page 25:

DS: And the glass on the road you have no doubt that this is a hit  
and run where a vehicle had hit him ...

ZS: Yes.

DS: Knocked him to the ground and left the scene of the accident?

ZS: Without a doubt at all, without a doubt because I know that when a bike goes down in any which form or matter like it does not do that kind of a damage can't occur, it had to be a vehicle.

DS: Everything you are telling me here today is the truth.

ZS: Yes it is.

[75] Mr. Sandli gave a second statement to Cst. Smith on June 21, 2007. When Cst. Smith told Mr. Sandli that ICBC had information he and Mr. Gibson had spent time at the Sandpiper Pub on the evening of the accident and met some people there, Mr. Sandli acknowledged that he might have been there. Later in his statement, he said he did not remember being at the Sandpiper Pub, explaining that after so many years it was hard to remember exactly where he was. He denied picking up any girls at the Sandpiper to bring black to his place and denied that he was hiding or protecting anybody.

[76] Cst. Smith interviewed Denise Izatt on July 11, 2007. She said that she, her girlfriend Leanne, Heather, Pete, Zoltan and Kerry had been at the Sandpiper Pub earlier in the evening of the accident. She said that she, Heather, Zoltan and Pete and a few other people decided they all wanted to hang out together after the bar and so she and Heather followed Zoltan and Pete out to Zoltan's house.

[77] At page 3 of her statement, Denise Izatt said this:

DI: ... and um, Zoltan was in the lead and then Pete and then us behind Pete, and um as we were driving down the road an alley came up on the right hand side and Zoltan had turned and as Pete was turning Heather didn't see ... she was playing with her radio and she cl ... clipped the back of his vehicle or his motorcycle and he flew (laugh) and ah yeah and um he told us then just to leave cause he just wanted to save our asses, so we left and went to Zoltan's, which is only a few doors down, and parked the car on the side of the road um and ...

DS: In front of the house.

DI: ... in front of the house, yeah. An um we stayed there most of the night, and I guess Pete had taken off to the hospital or her ... someone had called for him to go to the hospital, so and that that was pretty much it.

DS: So you guys went to Zoltan's after to party for the rest of the evening.

DI: Yeah, yeah.

[78] Ms. Izatt did not have an entirely clear recollection of the accident. She said she and Ms. Bradshaw did not know Mr. Gibson was turning off 104 Street and that they just kept going straight, without slowing down. She estimated the speed of Ms. Bradshaw's vehicle about 60 to 65 kilometers per hour. She recalled the front end of the car striking the back of the bike. Ms. Izatt did not remember how the car ended up in front of Mr. Sandli's house. She recalled that after the accident Mr. Gibson told them to "get out of here."

[79] Ms. Izatt said Mr. Gibson told them to "get out of here" and that he was "saving our asses" because Heather had been drinking. She said she had been drinking too but thought she could still remember pretty clearly what had happened five years before. She thought Zoltan had come back to the scene of the accident, and that he was the one who had called the ambulance. Ms. Izatt also said she and Ms. Bradshaw went to Zoltan's house after the accident and that Ms. Bradshaw was "freaked out" and did not want to drive anywhere because she had just had an accident. At page 15 of her statement, Ms. Izatt said that "... either Heather took off or whatever or I don't know, and um yeah, and I called Leanne to come get me, she wouldn't cause she was I guess drinking or whatever, so I stayed at Zoltan's and he drove me to work in the morning."

[80] On September 21, 2010, Mr. Doug Thomson, an adjuster for ICBC attempted to take another statement from Ms. Izatt. She refused to provide a written statement, said she had consumed a lot of alcohol the night of the accident, had no idea what happened and could not recall what she had told the ICBC investigator earlier. Ms. Izatt also stated that she had a crystal meth addiction and could not distinguish reality from truth. When Mr. Thomson attempted to follow up with her a few days later, she indicated, in no uncertain terms, that she was not prepared to cooperate at that time.

[81] After Mr. Sandli filed his summary trial application in June 2015, counsel for ICBC attempted to locate Ms. Izatt and obtain her sworn evidence. ICBC was unable to do so before the hearing of this application. Counsel has advised that ICBC is attempting to locate Ms. Izatt and to secure her attendance at the conventional trial by subpoena. In my view, this is not a case where a party opposing a Rule 9-7 application has failed to take reasonable steps to marshal its evidence as best it can in answer to summary trial location.

[82] Credibility will be a critical factor on the trial of both the main action and ICBC's counterclaim. With respect to ICBC's counterclaim against Mr. Sandli, resolution of inconsistencies between the evidence of Mr. Sandli, Ms. Bradshaw and Mr. Gibson, and between the evidence of Mr. Sandli and Ms. Izatt, if she is located, will require cross-examination and a *viva voce* trial. Without cross-examination, I am not in a position to satisfactorily resolve all of the conflicts in the evidence or to find the facts necessary to decide all of the issues of fact and law raised in ICBC's counterclaim against Mr. Sandli.

[83] ICBC's claim against Mr. Sandli, insofar it is based upon the commission of fraud by "incomplete disclosure" (see: *ICBC v. Phung*, 2003 BCSC 1281), involves some complexity.

[84] Curving out and deciding the fraud and conspiracy claim against Mr. Sandli would involve litigating in slices, and raises the spectre of inconsistent findings of fact by the summary trial judge and the judge hearing the conventional trial.

[85] If Mr. Sandli succeeded on a summary trial, he would be spared the cost and time of attending the liability trial as a party. However, a summary trial is unlikely to significantly reduce the length of the conventional trial and will not result in a final resolution of this litigation.

[86] I recognize there may be some prejudice to Mr. Sandli by further delay until the conventional trial of this proceeding in January, 2017. Memories may continue to fade with the passage of time. However, that is a factor affecting all parties.

[87] The amount involved in the counterclaim – approximately \$194,000 – is significant for all parties.

[88] Taking all of these factors into account, I do not consider this matter to be suitable for determination under Rule 9-7. Proceeding by summary trial is unlikely to assist the efficient resolution of this proceeding.

**CONCLUSION**

[89] Accordingly, Mr. Sandli’s summary trial application is dismissed.

“PEARLMAN J.”