

# SUPREME COURT OF YUKON

Citation: *PS Sidhu Trucking Ltd v Kazemi*,  
2024 YKSC 14

Date: 20240404  
S.C. No. 22-A0039  
Registry: Whitehorse

BETWEEN:

P.S. SIDHU TRUCKING LTD.

PLAINTIFF

AND

BERAHMAND KAZEMI

DEFENDANT

Before Justice K. Wenckebach

Counsel for the Plaintiff

James R. Tucker

Counsel for the Defendant

Daniel S. Shier;  
Natasha Weninger; and  
Ruth O’Gorman

## REASONS FOR DECISION

### Overview

[1] The plaintiff, P.S. Sidhu Trucking Ltd., is engaged in the sale of gasoline and diesel fuel, including by operating gas stations, amongst other things. The defendant and cross claimant, Berahmand Kazemi, was employed by Sidhu Trucking. Although the parties do not agree about Mr. Kazemi’s exact role at Sidhu Trucking, there is agreement that he sometimes delivered fuel to Sidhu Trucking’s gas stations.

[2] On October 11, 2021, Mr. Kazemi delivered both gasoline and diesel to a few different sites, including to one of Sidhu Trucking’s gas stations, located in Mayo, Yukon. At the Mayo gas station, Mr. Kazemi put diesel fuel in the gasoline fuel tank.

Sidhu Trucking claims that this caused damage to its equipment and to customers who filled their cars with diesel rather than gasoline.

[3] Sidhu Trucking began a statement of claim against Mr. Kazemi, alleging that he was negligent, and seeking damages for harm caused to its equipment and to its customers whose cars were damaged after they used the diesel fuel instead of gasoline.

[4] Mr. Kazemi responded with a counterclaim. Mr. Kazemi alleges that he gave his notice of resignation to Sidhu Trucking but that Sidhu Trucking stopped giving him work before his last day on the job. He therefore claims constructive dismissal. Mr. Kazemi also claims that Sidhu Trucking withheld his last pay and began its proceedings against him with an improper motive. He alleges that Sidhu Trucking's actions caused him mental distress and is suing for intentional infliction of mental distress.

[5] Both parties have brought applications to strike each other's claim or part of their claim on the basis that they disclose no reasonable claim (Rule 20(26)(a) of the *Rules of Court* of the Supreme Court of Yukon). Sidhu Trucking seeks that parts of Mr. Kazemi's statement of defence be struck, as well as the claim of intentional infliction of mental distress in his counterclaim. Mr. Kazemi is seeking that Sidhu Trucking's amended statement of claim be struck in its entirety. I heard both applications at the same time.

[6] For the reasons below, I strike Sidhu Trucking's statement of claim, with leave to amend. I also strike Mr. Kazemi's claim of intentional infliction of mental distress, with leave to amend.

## **Issues**

### Defendant's Application

- A. Should the statement of claim be struck because the claim is pleaded in negligence rather than gross negligence?
- B. Is the statement of claim an abuse of process?
- C. If the claim is struck, should it be struck with leave to amend?

### Plaintiff's Application

- D. Should parts of the statement of defence be struck?
- E. Should the claim of intentional infliction of mental distress be struck?
- F. If the claim of intentional infliction of mental distress is struck, should it be struck with leave to amend?

## **Analysis**

### Defendant's Application

[7] Mr. Kazemi's counsel submits that the statement of claim discloses no reasonable claim, is unnecessary and vexatious, and is an abuse of process.

[8] As a part of his written argument that the statement of claim does not disclose a reasonable claim, Mr. Kazemi submitted that Sidhu Trucking's pleadings do not properly plead damages. After Mr. Kazemi filed his written argument, Sidhu Trucking amended its pleadings. It now claims about \$80,000 in damages to remove, dispose, and replace the contaminated diesel fuel for the Mayo gas station. This is sufficient to meet the requirement for damages. I will therefore not address Mr. Kazemi's submissions on this issue.

[9] Mr. Kazemi's argument that the statement of claim is unnecessary and vexatious, and much of his argument that the statement of claim is an abuse of process, is really about whether the statement of claim discloses a reasonable claim. I will therefore address all the arguments related to whether the statement of claim discloses a reasonable claim together. Because Mr. Kazemi has also made submissions that are about abuse of process, I will address those arguments as well. At the end, if I determine that the pleadings should be struck, I will decide whether Sidhu Trucking should have leave to amend the statement of claim.

A. Should the statement of claim be struck because the claim is pleaded in negligence rather than gross negligence?

[10] Counsel to Mr. Kazemi submits that there is no cause of action in law whereby an employer can sue an employee for simple negligence. He further submits that the statement of claim alleges that Mr. Kazemi was negligent; and Sidhu Trucking suffered damages because of his negligence. Counsel's position is, therefore, that because the statement of claim involves an employer suing an employee in negligence, it should be struck.

[11] I agree that the statement of claim should be struck.

[12] The circumstances in which an employee will be liable for an employer in tort are narrow. In *Douglas v Kingler (Litigation Guardian of)*, 2008 ONCA 452 ("*Douglas*") at para. 65, the Court of Appeal for Ontario determined that, in general, an employee will be liable for tortious actions against an employer only when "... the loss is occasioned by negligence outside the parties' reasonable expectations ...". The employee's level of wrongdoing must, therefore, be high. Thus, employees would be liable for intentional

torts or wilful misconduct. In addition, an employee may be liable to their employer in negligence in unique situations, for instance, if the employee has insurance coverage. The court declined to determine whether gross negligence would be sufficient to render an employee liable to their employer. Courts in British Columbia have adopted the principles enunciated in *Douglas* (see *Kirby v Amalgamated Income Limited Partnership*, 2009 BCSC 1044).

[13] In accordance with *Douglas*, therefore, an employee's liability to an employer arises in intentional torts and wrongdoing such as wilful misconduct. It is also possible, though not certain, that an employee will be liable for gross negligence, or in negligence in unique situations.

[14] Here, the facts contained in the statement of claim allege that Mr. Kazemi was given the task of filling gasoline and diesel fuel tanks, but that he filled the gasoline fuel tank with diesel. No additional facts are pleaded that would support anything other than negligence; and the statement of claim pleads that Mr. Kazemi was negligent. As currently pleaded, no cause of action arises from the statement of claim. It should, therefore, be struck.

B. Is the statement of claim an abuse of process?

[15] In his pleadings, Mr. Kazemi states that some months after he put diesel fuel in the gasoline tank, and after he stopped working for Sidhu Trucking, Paramjit Sidhu, who is the president of Sidhu Trucking, phoned him and left him a voicemail. Mr. Sidhu is alleged to have stated that Sidhu Trucking would start a legal action against Mr. Kazemi, that Mr. Sidhu knew Sidhu Trucking's claim would fail, but that he would bring the action to cause Mr. Kazemi a "headache". Mr. Kazemi argues that Sidhu Trucking

brings this action for an improper motive. The claim should therefore be struck as an abuse of process.

[16] I conclude that the claim should not be struck for abuse of process.

[17] The court has the ability to strike pleadings as an abuse of process to prevent the misuse of its procedure in a way that would bring the administration of justice into disrepute (*Toronto (City) v Canadian Union of Public Employees, Local 79*, 2003 SCC 63 at para. 37). The focus of the abuse of process doctrine is on maintaining the integrity of the courts and its adjudicative functions (para. 43). Thus, abuse of process principles are most often applied where the nature of the proceedings is at issue. For example, abuse of process arises when a party re-litigates proceedings before different adjudicative bodies; conducts a collateral attack on decisions or orders; or commences multiple proceedings in different jurisdictions on the same issues and between the same parties (*National Bank Financial Ltd v Potter (appeal by Barthe Estate)*, 2015 NSCA 47 (“*National Bank*”) at para. 214).

[18] On the other hand, citing the conduct of the parties during litigation as an abuse of process is not common. In *National Bank*, the Nova Scotia Court of Appeal addressed when a party’s conduct warrants striking a pleading on the basis of abuse of process. It concluded that, in the case before it, an abuse of process would be found if the impugned party’s conduct “tainted the case to such a degree as to be manifestly unfair to another party to the litigation, or has brought the administration of justice into disrepute by impairing the adjudicative function of the courts and undermining public confidence in the legal process” (*National Bank* at para. 240). I conclude that a similar test would be appropriate in the case at bar.

[19] Here, both Mr. Kazemi and Paramjit Sidhu have filed affidavits about Mr. Sidhu's message to Mr. Kazemi. Mr. Kazemi's affidavit reiterates what is pleaded in his statement of defence. Mr. Sidhu, on the other hand, attests that after Mr. Kazemi poured diesel into the wrong tank, Mr. Sidhu attempted to speak with Mr. Kazemi a number of times to discuss the damage Mr. Kazemi caused. Mr. Kazemi did not respond, so Mr. Sidhu did leave a voicemail for Mr. Kazemi in which he said that he would commence legal action. He denies stating that he was doing so to cause Mr. Kazemi a "headache" or that he knew proceedings against Mr. Kazemi would not be successful. He attests that he believes that a claim would be successful.

[20] Thus, the evidence about whether Sidhu Trucking has brought the action with an improper motive is contested. Moreover, even if the evidence were accepted, the conduct does not taint the case to such a degree that it would be manifestly unfair to Mr. Kazemi to continue. It has also not brought the administration of justice into disrepute by impairing the adjudicative function of the courts and undermining public confidence in the legal process. I will therefore not strike the pleadings on this ground.

C. If the claim is struck, should it be struck with leave to amend?

[21] Claims should be struck with leave to amend if, properly pleaded, they would disclose a cause of action (*Olumide v British Columbia (Human Rights Tribunal)*, 2019 BCCA 386 at para. 10). In Sidhu Trucking's statement of claim all the elements are properly pleaded except that they plead the action in negligence. If there are facts that support a higher degree of wrongdoing, then Sidhu Trucking should have the opportunity to pursue an action. I will therefore strike the claim, with leave to amend.

Plaintiff's Application

[22] Sidhu Trucking seeks that parts of the statement of defence be struck, as well as the paragraphs in the counterclaim alleging intentional infliction of mental distress.

D. Should parts of the statement of defence be struck?

[23] Because I have struck out Sidhu Trucking's statement of claim, the arguments about the statement of defence are moot. I will therefore not address whether parts of the statement of defence should be struck.

E. Should the claim of intentional infliction of mental distress be struck?

[24] I conclude that the claim for intentional infliction of mental distress should be struck.

[25] In his counterclaim, Mr. Kazemi alleges that Sidhu Trucking intended to cause Mr. Kazemi mental distress by refusing to pay him and by starting proceedings against him that it knew would be fruitless. The counterclaim also pleads that because of Sidhu Trucking's conduct, Mr. Kazemi has suffered from mental distress and emotional injury. Thus, Mr. Kazemi brings a claim of intentional infliction of mental distress against Sidhu Trucking.

[26] As I understand it, counsel for Sidhu Trucking submits that Mr. Kazemi's claim for intentional infliction of mental distress should be struck for policy reasons. He argues that permitting the claim to proceed would allow other defendants to launch claims of intentional infliction of mental distress against plaintiffs in retaliation for pursuing a legal action.

[27] However, far more detailed submissions would need to be made to entertain the argument that, for policy reasons, the ability to bring an action for intentional infliction of



mental distress should be limited or prohibited where the allegation includes that the party misused court processes or proceedings.

[28] The reason I conclude that the claim of intentional infliction of mental distress should be struck is because Mr. Kazemi has failed to provide sufficient facts to sustain the cause of action.

[29] The test for establishing the tort of intentional infliction of mental distress is:

- the defendant engaged in flagrant and outrageous conduct;
- the conduct was calculated to produce harm; and
- the conduct resulted in a visible and provable injury to the plaintiff (*Fouad v Longman*, 2014 BCSC 785 at para. 112, citing Lewis N. Klar, *Remedies in Tort*, vol 1 (Toronto: Thomson Reuters Canada Limited, 2013) ch 10 at para. 10).

[30] Here, in my opinion, the counterclaim contains the facts necessary to establish that Mr. Kazemi suffered an injury but fails to provide the facts necessary to sustain the claims that Sidhu Trucking engaged in flagrant and outrageous conduct or that the conduct was calculated to produce harm. I will address these issues in turn.

#### *Flagrant and Outrageous Conduct*

[31] Flagrant and outrageous conduct has been described as conduct which is “conspicuously offensive”, “so obviously inconsistent with what is right or proper to appear to be a flouting of law or morality”, and “glaring, scandalous, or conspicuously wrongful” (*Eks v Tadeu*, 2019 ONSC 3745 at para. 117).

[32] Circumstances in which courts have concluded that a party engaged in flagrant and outrageous conduct include:

- a finance company bombarding one of its debtors, whom the company knew was ill, with offensive and threatening letters (*Rahemtulla v Vanfed Credit Union*, [1984] BCJ No 2790 at para. 54, citing *Clark v Associated Retail Credit Men of Washington D.C.* (1939), 105 F.2<sup>nd</sup> 62);
- a supervisor severely harassing an employee whom the supervisor knew was in a fragile mental state (*Prinzo v Baycrest Centre for Geriatric Care*, [2002] OJ No. 2712 (“*Prinzo*”) at para. 47, citing *Boothman v Canada (TD)*, [1993] 3 FC 381);
- colleagues and supervisors sexually harassing an employee (*Prinzo* at para. 47, citing *Clark v Canada*, [1993] 3 FC 323);
- management style that was confrontational, contradictory and brash (*Prinzo* at para. 47, citing *Bogden v Purolator Courier Ltd*, [1996] AJ No. 289 (Alta QB).

[31] The conduct Mr. Kazemi complains of is not equivalent to these cases. Sidhu Trucking’s alleged conduct is objectionable but is not so serious as to be flagrant and outrageous. The facts in the counterclaim do not, therefore, sustain the first element of intentional infliction of mental distress.

*Calculated to Produce Harm*

[32] Not only must the defendant’s conduct be flagrant and outrageous but it must also be calculated to produce harm. The level of intent is high. It is insufficient to prove that the defendant ought to have known that harm would occur; rather, “[t]he defendant must have intended” to cause the harm (*Boucher v Wal-Mart Canada Corp*, 2014 ONCA 419 (“*Boucher*”) at para. 44).

[33] Additionally, the defendant must know that serious psychological injury will follow. Knowledge here means knowledge that the harm is almost certain to occur (*Boucher* at para. 44; *Colistro v Tbaytel*, 2019 ONCA 197 at para. 23).

[33] In the case at bar, the facts pleaded in relation to intent are that Mr. Sidhu stated that he knew legal proceedings would not succeed but would pursue a legal action to give Mr. Kazemi a headache. The pleadings also state that Sidhu Trucking “knew, or reasonably ought to have known” that: Mr. Kazemi was entitled to payment for the work he performed; Sidhu Trucking was in a position of authority as Mr. Kazemi’s corporate employer, with better financial resources than Mr. Kazemi to pursue legal action; the statement of claim was bound to fail; and pursuing legal action would cause Mr. Kazemi mental distress.

[34] The pleadings fail to provide a sufficient basis for intention to inflict the harm for two reasons. First, because the counterclaim alleges that Sidhu Trucking “ought to have known” certain facts, the pleadings place the level of intent too low.

[35] Second, and more fundamentally, the pleadings do not set out an adequate basis for concluding that Sidhu Trucking intended to cause Mr. Kazemi mental distress. The pleadings do contain some facts that go to intent. These facts are that Mr. Sidhu stated in his voicemail that he knew legal proceedings would fail but that he would pursue them to cause Mr. Kazemi a “headache”. However, the pleadings are deficient in setting out facts to support the contention that Sidhu Trucking also kept Mr. Kazemi’s pay with the intention of producing serious psychological harm to Mr. Kazemi.

[36] The mere fact that Sidhu Trucking withheld Mr. Kazemi’s pay does not lead to the inference that it did so as part of its decision to commence unmeritorious litigation

against Mr. Kazemi: there are many reasons why Sidhu Trucking would withhold Mr. Kazemi's pay. There are also no facts pleaded to support the conclusion that Sidhu Trucking's decision to hold back Mr. Kazemi's wages was part of a larger scheme to cause Mr. Kazemi financial difficulties and serious psychological damage.

[37] On an application to strike, the pleadings must be read generously. Additionally, pleadings will be struck only if it is plain and obvious that the claim discloses no reasonable cause of action (*McDiarmid v Yukon*, 2014 YKSC 31 at para. 14). Here, I am satisfied that, even with a generous reading of the pleadings, it is plain and obvious that Mr. Kazemi's claim of intentional infliction of mental harm is insufficiently pleaded. It should, therefore, be struck.

[38] Mr. Kazemi also seeks aggravated and punitive damages. This claim is based on his claims of constructive dismissal and intentional infliction of mental harm. Because the claim for aggravated and punitive damages depends, in part, on the claim of intention infliction of mental damages, pleadings about aggravated and punitive damages will also be struck.

F. If the claim of intentional infliction of mental distress is struck, should it be struck with leave to amend?

[38] While Mr. Kazemi has not pleaded the facts necessary to support a claim of intentional infliction of mental distress, there may be a basis for him to properly make such a claim. Moreover, there may still be a basis for pleading aggravated and punitive damages. I therefore will strike the claims, with leave to amend.

**Conclusion**

[39] I order that the plaintiff's statement of claim be struck, with leave to amend within 30 days of the date of this decision.

[40] I order that paragraphs 9 to 17 and claims 7 and 8 of the defendant's counterclaim be struck, with leave to amend within 60 days of the date of this decision.

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WENCKEBACH J.