

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Zhang v. Chen*,
2024 BCSC 285

Date: 20240220
Docket: E202085
Registry: Vancouver

Between:

Nina Zhang

Claimant

And:

Wei Chen

Respondent

Corrected Judgment: The cover page was
corrected on February 23, 2024.

Before: The Honourable Justice D.M. Masuhara

Ruling on Costs

Counsel for the Claimant:

F. MacLean
L. MacLean, K.C.
S. Hothi
L. Ledesma (Articled Student)

Counsel for the Respondent:

C. Ke
M. Lokshin (Agent)

Counsel for Ms. Ke:

J. Forstrom
J. Gray

Place and Date of Hearing:

Vancouver, B.C.
January 12, 15, 23, 31, 2024
February 2, 2024

Place and Date of Judgment:

Vancouver, B.C.
February 20, 2024

Introduction

[1] This ruling deals with an application for costs arising from an application brought on by Mr. Chen for parenting time in China with his three children who reside with their mother, Ms. Zhang, in North Vancouver, BC and attend school in West Vancouver. The children, though born in the United States, were raised in Shanghai until their move to Canada and are Chinese nationals.

[2] Ms. Zhang seeks party and party costs arguing she was substantially successful in opposing the motion. She also seeks special costs against Mr. Chen's counsel, Ms. Ke, on the basis that Ms. Ke inserted into the notice of application two non-existent cases, which were discovered subsequently to have been invented by ChatGPT. It is submitted that her conduct was reprehensible and deserving of rebuke as it led to opposing counsel expending considerable time and expense to determine whether the cases existed or not. The position relies upon R. 16-1(30)(b) and (c) of the *Supreme Court Family Rules* [Rules], or alternatively on the inherent jurisdiction of the court.

[3] Mr. Chen argues that in terms of party and party costs, success was divided and as result each party should bear their own costs. In respect to special costs being ordered personally against Ms. Ke, Mr. Forstrom her counsel, submits that the basis for the special costs sought is a matter for the Law Society of British Columbia (the "Law Society"), which deals with lawyer conduct and the broader public interest. He submits that while the impugned conduct arose in the context of the litigation, the non-existent cases were withdrawn before the hearing of the application and not relied upon when the matter was heard, and therefore did not impact the consideration of the merits.

[4] Mr. Forstrom was critical of the public "whistle blower" campaign of Mr. MacLean, K.C. to "expose and vilify" Ms. Ke's mistake and argued that the steps taken to investigate the existence of the cases were not necessary to dispose of the key issue; namely, a father's application to have parenting time with his children in China. It is argued that it was known by opposing counsel well in advance that the

fake cases would not be relied upon. He argued that an award of special costs against a lawyer is reserved for the most serious forms of misconduct which are not present here. He acknowledges that though the impugned conduct was presumptively negligent, the authorities clearly indicate that more is needed, such as an intentional act to mislead.

Background

[5] On January 29, 2024, I provided my ruling with respect to Mr. Chen's application. I denied the motion for parenting time but indicated that the matter could be revisited once the s. 211 Report was obtained or if circumstances changed. I also provided directions for parenting time in Canada or the United States as offered by Ms. Zhang. I also provided structure for video calls for the children with their father.

[6] I noted that the litigation between Mr. Chen and Ms. Zhang has been described as high conflict. The parties have had difficulties in their marriage for many years. Ms. Zhang started a divorce action in Shanghai in 2015 and left with the children to another city. The parties apparently settled their differences through a settlement agreement, which largely concerned financial matters, and the court action in China was withdrawn. In 2018, the parties chose West Vancouver as a location for the children to reside and attend school. They purchased a large home there. The parties obtained permanent residence status; however, Mr. Chen maintained his work and employment in China and would visit the family in West Vancouver. Ms. Zhang remained in West Vancouver and was the children's primary caregiver. It seems that things did not go well between the two and separation occurred around 2020. The materials indicate that Mr. Chen did not live up to a financial commitment set out in the settlement agreement, and this was the final straw for Ms. Zhang.

[7] The subject application was brought on by Mr. Chen after his requests to have parenting time went nowhere. Ms. Ke prepared a notice of application and sought short leave without notice on December 5, 2023. While at the courthouse,

she sent an email to Mr. MacLean stating that she was there to speak to the short leave application for an order permitting the children's travel to China and requested Mr. MacLean's availability on December 8 or December 11, 2023. Mr. MacLean asked the matter to be stood down until the afternoon and the request was granted. That afternoon, the draft notice of application was handed up to Associate Judge Robertson as part of the short leave materials. Short leave was denied; and a date for a hearing of the application was set to December 19, 2023.

[8] The notice of application was formally filed on December 6, 2023. The Legal Basis section of the notice contained only two cases. These cases are at the center of the controversy before me, as they were discovered to be non-existent. The cases are summarized in the Legal Basis section as follows:

16. In *M.M. v. A.M.*, 2019 BCSC 2060, the court granted the mother's application to travel with the child, aged 7, to India for six weeks to visit her parents and extended family. The court found that the trip was in the best interests of the child, as it would allow him to maintain his cultural and familial ties, and that the mother had taken reasonable steps to address the father's concerns about the child's safety and health. The court also noted that the mother had provided a detailed travel itinerary, a consent letter from the father, and a return ticket for the child.

17. In *B.S. v. S.S.*, 2017 BCSC 2162, the court granted the mother's application to travel with the child, aged 9, to China for four weeks to visit her parents and friends. The court found that the trip was in the best interests of the child, as it would enhance her cultural and social development, and that the mother had complied with the terms of the existing parenting order and agreement. The court also noted that the father had consented to the trip in writing, and that the mother had provided a travel consent letter, a copy of the child's passport, and contact information for the trip.

[9] On December 13, 2023, opposing counsel advised Ms. Ke's office that the cases could not be located by their citations and requested copies of the cases, as they were in the process of preparing their response due December 14, 2023. After several further inquiries, the following response was sent to Mr. MacLean's office from Ms. Ke's office:

Dear counsel,

We apologize for the incorrectness of the case laws referenced in Paragraphs 16 and 17 and will continue looking into it.

We intend to rely on these cases below:

1. *DW. v. Y.Y.*, 2018 BCPC 37 (CanLII), travel to China and the sharing of important Chinese holidays granted.
2. *MW. v N.L.M.W.*, 2021 BCSC 1273, particularly at paragraphs 107—109, the court cautions against labeling conduct as “family violence” where there is no evidence the child has suffered any physical or emotional harm as a result of the parents’ conduct. The provisions of the FLA relating to family violence are intended to address a serious social issue and to protect children and spouses from actual harm or danger.
3. *D.M.F. v T.J.D.*, 2021 BCSC 1249, the court looked at the principle of maximum contact where is the lack of findings of family violence directed at the children.
4. *In B.J. v R.S.B.*, 2022 BCSC 2135, the court urges that allegations of family violence have to be analyzed under s. 38 of the FLA. In this case, the court allowed shared parenting. The judge said that although there was evidence of sonic family violence, it did not appear to be frequent and the family violence that the claimant submits was perpetrated against her is not particularly recent. At paragraph 44, the court states, “There is no evidence to assist me in assessing the effect of the alleged family violence on the children. Both parties describe their children as well-adjusted and happy.”

[10] Mr. MacLean’s office objected to the inclusion of the new cases and continued to demand copies of the two cases in the notice of application.

[11] It appears that Mr. MacLean’s office retained a legal researcher to look for the two cases. The researcher could not locate the cases. The researcher came to the view that they did not exist.

[12] At the scheduled December 19, 2023 hearing date, the parties attended chambers. Ms. Lokshin attended for the applicant, as Ms. Ke was unavailable. Ms. Ke had sent an email to Ms. Lokshin which contained an apology and admission that the subject cases were fake and asked that copies of the email be provided to opposing counsel and the court. Ms. Ke’s email reads as follows:

Hi Ms. Lokshin,

Please bring a copy of this email with you when you are appearing in front of the court as an agent for me.

I made a serious mistake when preparing a recent Notice of Application for my client, Mr. Wei Chen, by referring to two cases suggested by Chat GTP

(an artificial intelligent tool) without verifying the source of information. I had no idea that these two cases could be erroneous. After my colleague pointed out the fact that these could not be located, I did research of my own and could not detect the issues either. Regardless of the level of reliability of AI aids, I should have used more reliable platforms for doing legal research and should have verified the source of information that was going to be presented in court and/or exchanged with the opposing counsel. I have taken this opportunity to review the relevant professional codes of conduct and reflected on my action. I will not repeat the same mistake again. I had no intention to mislead the opposing counsel or the court and sincerely apologize for the mistake that I made.

I was still trying to detect the problem and was not aware that the references are fake when I instructed my assistant to respond to my friend at 1:43 p.m., and 2:23 p.m., respectively.

[...]

I alone made the mistake with respect to the erroneous citations and nobody else in my office was any part of it.

Kind Regards,

Chong Ke (she/her)
Lawyer

[13] Unfortunately, the matter was not heard due to the unavailability of a judge that day. For some reason Ms. Lokshin did not provide opposing counsel a copy of the email.

[14] The application came before me on January 15, 2024, at which time Ms. Ke's email was handed up. Opposing counsel had received the email the day before.

[15] On January 29, 2024, I provided the parties my ruling on parenting. I left the question of costs, including whether Ms. Ke should be personally responsible to pay the costs, to be addressed on January 31, 2024.

[16] At the start of the hearing on January 31, Ms. Ke's affidavit sworn January 26, 2024 was handed up. It indicates that she was called in May 2019 and outlines how she came to find the cases on ChatGPT (an online tool that uses artificial intelligence ("AI")), her lack of knowledge of the risks of its use, the efforts she took to respond to the emails from opposing counsel's office, the difficulties she had being on a flight to Asia when the inquiries started to come in, and her discovery that

the cases were fictitious, which she describes as being “mortifying”. Ms. Ke states that she contacted the Law Society on December 15, 2023 to speak with a practice advisor, and that she was able to speak with one on December 18, 2023. She says that by December 18, 2023, she had concluded that the appropriate course was to disclose and explain her error, reiterate apologies, and confirm that she had no intention of relying on the fictitious cases suggested by ChatGPT. As mentioned, Ms. Ke sent the aforementioned email to her colleague Ms. Lokshin. She deposes that:

20. On December 19, 2023, Ms. Lokshin left me a brief message, advising me that the court was unable to hear the respondent's application that day and the matter had been adjourned to some time in January. I expected that Ms. Lokshin would have provided a copy of Exhibit "A" to opposing counsel at that time, but later learned that she had not.

[17] She further deposes that:

23. I did not intend to generate or refer to fictitious cases in this matter. That is clearly wrong and not something I would knowingly do. I only became aware of the risk that AI technology could generate fictitious authorities on and after December 13, 2023, as explained above. When I became aware of this, I understood that I could not rely on such material and advised claimant's counsel that we would not be doing so. I never had any intention to rely upon any fictitious authorities or to mislead the court.

24. I am remorseful about my conduct. I am now aware of the dangers of relying on AI generated materials. I understand that this issue has arisen in other jurisdictions and that the Law Society has published materials in recent months intended to alert lawyers in BC to these dangers. I acknowledge that I should have been aware of the dangers of relying on AI-generated resources, and been more diligent and careful in preparing the materials for this application. I wish to apologize again to the court and to opposing counsel for my error.

25. I am also deeply embarrassed about this matter. The hearings on January 12, 15 & 23 have generated significant publicity. Attached as Exhibit "C" to this affidavit is a copy of a January 23 report by Global News regarding the matter. Attached as Exhibit "D" to this affidavit is a copy of a screen shot taken from of claimant's counsel's LinkedIn page. I am advised by my counsel and believe that this image was obtained at approximately 9:30 PM on January 19, 2024. An unusually large crowd attended the hearing on January 12, 2023. I have been asked for comment by reporters. I apprehend that the Law Society is now likely to investigate my conduct, pursuant to Rule 3-4(2) of the *Law Society Rules 2015*. This publicity and the potential consequences of my error have made it hard for me to focus and left me feeling anxious and overwhelmed.

Discussion

[18] I will address first whether there has been substantial success and then whether cost should be awarded. I will then address whether Ms. Ke should be personally liable for any costs awarded.

A. Costs of the Application

[19] The awarding of costs is discretionary. Under the *Rules*, a party who successfully opposes an application is not entitled to costs unless that party is awarded costs at trial, subject to the court ordering otherwise, per R. 16-1(9). The degree of success necessary to be awarded costs is substantial success. A rough-and-ready guide is about 75% or better looking at all of the disputed matters globally and recognizing that not all issues heard are of equal significance. It is a qualitative exercise.

[20] Mr. Chen argues that success in this case was divided, thus costs ought not be awarded. It is submitted that while parenting time in China was not permitted, the court permitted parenting time in the Lower Mainland or the United States. The court also granted orders sought in relation to video conferencing calls with the children.

[21] In my view, Ms. Zhang has been substantially successful. The major focus of the application was whether Mr. Chen should have parenting time with the children in China. This was the main priority of the application, and it was denied. My decision regarding parenting in Canada or the United States or revisiting parenting in China was secondary, as was my ruling regarding video conferencing time for Mr. Chen and the children. I provided structure on how such communication was to be conducted, as there was a pattern of calls being missed or coming in late by Mr. Chen given the informal schedule that was in place and a lack of coordination between the parents. However, this was a minor aspect of my ruling.

[22] I am therefore of the view that an award of costs in favour of Ms. Zhang is justified in this case. Though the application was in relation to the children of the

marriage, the authorities are clear that there is no rule stipulating that a dispute involving parenting is immune from a cost award. Here, the materials indicate a substantial investment of time and effort on the part of Ms. Zhang in responding to the application, one which started with a without-notice short leave application, and an assertion by Mr. Chen he could not come to Canada because of the expiry of his permanent residence card that was shown not to be a barrier to his ability to enter Canada. Evidence was also tendered by Ms. Zhang indicating difficulties that may be encountered as a result of the legal system in China, if a dispute arose regarding the return of the children from China, given that China is a non-signatory to the *Hague Convention on Civil Aspects of International Child Abduction*. She also provided some evidence that this could be a problem in the specific circumstances of the parties. The non-payment by Mr. Chen of support under a court order until some prompting on my part at the start of the hearing is also a factor. I am also of the view that a cost award against Mr. Chen would not upset the balance between the parties.

[23] In these circumstances, Ms. Zhang is awarded costs of the application as per R. 16-1.

B. Costs Payable by Ms. Ke

[24] I now turn to whether Ms. Ke should be personally responsible for costs or special costs.

[25] Ms. Zhang seeks an order of special costs personally against Ms. Ke. This is premised on the submission of “the extraordinary situation for the costs incurred by MacLean Law to try to find and then expose the AI ‘hallucination’ and Ms. Ke’s delay in addressing the true nature of the cases” in the notice of application. This involved extra time, cost, and preparation to file the application response.

[26] It is an extraordinary step to award special costs against a lawyer. It requires a finding of reprehensible conduct or an abuse of process by the lawyer. The authorities make it clear that special costs against a lawyer are appropriate only where there has been “a serious abuse of the judicial system... or dishonest or

malicious misconduct... that is deliberate”: *Nuttall v. Krekovic*, 2018 BCCA 341 at para. 28, citing *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26 at para. 29. A mere “mistake, error in judgment or even negligence” does not warrant such an order: *Nuttall* at para. 29.

[27] Mr. MacLean, K.C. questioned the *bona fides* of Ms. Ke in her assertion that the insertions of the fake cases were due to an honest mistake based on a lack of knowledge of the risks of ChatGPT. He asked, rhetorically, how it could be that a lawyer would not look up the cases which are foundational to an application or know of the risks of ChatGPT, given the guidance from the Law Society and the widely publicized case of a lawyer in New York who relied on fake cases from ChatGPT (see *Mata v. Avianca, Inc.*, No. 22-cv-1461, 2023 WL 4114965, (S.D.N.Y. June 22, 2023)). He also handed up a page from a website that set out the several law degrees Ms. Ke holds, which include a Ph.D. in law from the University of Victoria.

[28] When Mr. MacLean was questioned if he was asserting dishonesty on the part of Ms. Ke, as his submissions seemed to be pointed that way, he conceded he was not. When asked what it was he was asserting then, he stated that it was something between dishonesty and honest mistake. He could not provide more clarity than that.

[29] Citing fake cases in court filings and other materials handed up to the court is an abuse of process and is tantamount to making a false statement to the court. Unchecked, it can lead to a miscarriage of justice.

[30] I note, however, the following observations. Though I recognize the notice of application containing the fake cases was filed and was before the court in the hearing, they had been withdrawn. I am of the view that the cases would not have been argued in support of the application, in any event. The dispute has involved from the start well-resourced opposing counsel; the parties had prepared volumes of materials for the hearing before me. My sense is that Ms. Zhang had an active legal team on her case. I note that Ms. Zhang throughout the hearing before me had three counsel and an articulated student sitting at the counsel table. There was no

chance here that the two fake cases would have slipped through. A book of authorities would have had to be produced and handed up, which would have exposed the non-existence of the cases. These circumstances would have been known to Ms. Ke when she was preparing the notice of application.

[31] These observations are not intended to minimize what has occurred, which—to be clear—I find to be alarming. Rather, they are relevant to the question of whether Ms. Ke had an intent to deceive. In light of the circumstances, I find that she did not.

[32] In my view, the circumstances do not justify the imposition of a special costs award against Ms. Ke which include the significant negative publicity to which she has been subjected. I accept her evidence that she was naïve about the risks of using ChatGPT and that she took steps to have the error corrected. Though her legal education is extensive, there is a significant difference between academics and lawyering. I do not find that she had the intention to deceive or misdirect. I accept the sincerity of Ms. Ke’s apology to counsel and the court. Her regret was clearly evident during her appearance and oral submissions in court.

[33] It is unfortunate that Ms. Ke was not aware of the various notices from the Law Society regarding the risks of generative AI.

[34] In this regard, I note that the Law Society sent out guidance to the profession in July 2023 stating:

With the rapid deployment and use of technologies like ChatGPT, there has been a growing level of AI-generated materials being used in court proceedings. Counsel are reminded that the ethical obligation to ensure the accuracy of materials submitted to court remains with you. Where materials are generated using technologies such as ChatGPT, it would be prudent to advise the court accordingly. The Law Society is currently examining this issue in more detail and we expect that further guidance to the profession will be offered in the coming weeks.

[35] The Law Society issued further guidance to the profession in November 2023 on the use of generative AI tools, which affirmed that lawyers are responsible for

work products generated using “technology-based solutions” and urged lawyers to “review the content carefully and ensure its accuracy.”

[36] Also, the fact that Ms. Ke did not read or heed the express warning on the ChatGPT website that the output could be inaccurate and that using ChatGPT is not a substitute for professional advice is troubling. Ms. Ke was using a generative AI tool not fit for her purposes.

[37] It is also unfortunate the fact the cases were fake was not conveyed to opposing counsel when Ms. Ke first discovered the true nature of the cases.

[38] The risks of using ChatGPT and other similar tools for legal purposes was recently quantified in a January 2024 study: Matthew Dahl et. al., “Large Legal Fictions: Profiling Legal Hallucinations in Large Language Models” (2024) arXiv:2401.01301. The study found that legal hallucinations are alarmingly prevalent, occurring between 69% of the time with ChatGPT 3.5 and 88% with Llama 2. It further found that large language models (“LLMs”) often fail to correct a user’s incorrect legal assumptions in a contrafactual question setup, and that LLMs cannot always predict, or do not always know, when they are producing legal hallucinations. The study states that “[t]aken together, these findings caution against the rapid and unsupervised integration of popular LLMs into legal tasks.”

[39] While I have dismissed the request for special costs, I recognize that as a result of Ms. Ke’s insertion of the fake cases and the delay in remedying the confusion they created, opposing counsel has had to take various steps they would not otherwise have had to take.

[40] In this regard, the application of R. 16-1(30)(c) and (d) is appropriate.

[41] Under R. 16-1(30), the court may order that a lawyer be personally liable for all or part of any costs ordered to be paid to another party:

- (30) If the court considers that a party's lawyer has caused costs to be incurred without reasonable cause, or has caused costs to be wasted

through delay, neglect or some other fault, the court may do any one or more of the following:

- (a) disallow any fees and disbursements between the lawyer and the lawyer's client or, if those fees or disbursements have been paid, order that the lawyer repay some or all of them to the client;
- (b) order that the lawyer indemnify his or her client for all or part of any costs that the client has been ordered to pay to another party;
- (c) order that the lawyer be personally liable for all or part of any costs that his or her client has been ordered to pay to another party;
- (d) make any other order that the court considers will further the object of these Supreme Court Family Rules.

[42] There is no requirement under this rule for reprehensible conduct or abuse of process, as would be required for special costs under the *Rules* or the inherent jurisdiction of the court. The authority under R. 16-1(30) is discretionary; however, it is to be exercised with restraint and sparingly: *Nazmdeh v. Spraggs*, 2010 BCCA 131 at para. 103; and *J.P. v. British Columbia (Children and Family Development)*, 2018 BCCA 325 at para. 39.

[43] Additional effort and expense were incurred because of Ms. Ke's insertion of the fake cases. This additional effort and expense is to be borne personally by Ms. Ke. As she herself notes, this was a "serious mistake" attributable solely to her own conduct. The costs are to be reviewed by the Registrar in accordance with the Schedule in Appendix B of the *Rules* (including disbursements reasonably incurred). In terms of hearing day increments, the minimum is a one-half day under the rules. Costs are allowed for January 15 (1/2 day), 23 (1/2 day), and 31 (1/2 day), 2024, and February 2, 2024 (1/2 day).

Other

[44] Ms. Ke is also to review all of her files that are before this court. If any materials filed or handed up to the court contain case citations or summaries which were obtained from ChatGPT or other generative AI tools, she is to advise the opposing parties and the court immediately. Otherwise, a report confirming her

review of her files is to be provided within 30 days of the date of these reasons for judgment.

[45] Prospectively, consistent with the guidance of the Law Society referenced above, it would be prudent for Ms. Ke to advise the court and the opposing parties when any materials she submits to the court include content generated by AI tools such as ChatGPT.

Final Comment

[46] As this case has unfortunately made clear, generative AI is still no substitute for the professional expertise that the justice system requires of lawyers. Competence in the selection and use of any technology tools, including those powered by AI, is critical. The integrity of the justice system requires no less.

“The Honourable Mr. Justice Masuhara”