**NOVA SCOTIA COURT OF APPEAL**
**Citation:** *Delano v. Gendron*, 2019 NSCA 32

**Date:** 20190426
**Docket:** CA 482392
**Registry:** Halifax

**Between:**

Gillian Delano

Appellant

v.

Gena Leger Gendron and
Shawn Hurlburt

Respondents

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**Judge:** The Honourable Justice Anne S. Derrick

**Appeal Heard:** March 21, 2019, in Halifax, Nova Scotia

**Subject:** Objection to a question at a discovery examination. *Civil Procedure Rule* 18.13(1)

**Summary:** The respondent, Hurlburt, was involved in a three-vehicle accident. During a discovery examination, Mr. Hurlburt was asked to sketch an intersection. His lawyer objected. The appellant brought a motion before Justice Robin Gogan for a determination of the objection pursuant to *Civil Procedure Rule* 18.17(7). The motions judge found there was no authority under *Civil Procedure Rule* 18 that required a witness to produce a sketch. She concluded the *Civil Procedure Rules* only require witnesses "to give but not make evidence."

**Issue:** Was the motions judge correct in her interpretation of *Civil Procedure Rule* 18.13(1)?

**Result:** Leave to appeal granted and appeal allowed with costs to the appellant, and the respondent, Ms. Gendron.

The motions judge's interpretation of the *Rule* was not correct. Asking a witness at a discovery examination to supplement an answer with a sketch or a marking on a map is well within what Rule 18.13(1) requires. It is wholly consistent with what the *Rules* are intended to achieve: answers that provide relevant evidence and the just, speedy and inexpensive resolution of the proceeding.

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| | |
|---|---|
| **Judges:** | Beveridge, Farrar and Derrick, JJ.A. |
| **Appeal Heard:** | March 21, 2019, in Halifax, Nova Scotia |
| **Held:** | Leave to appeal granted and appeal allowed, with costs per reasons for judgment of Derrick, J.A.; Beveridge and Farrar, JJ.A. concurring. |
| **Counsel:** | Karen N. Bennett-Clayton and Sara D. Nicholson, for the appellant, Gillian Delano<br>Colin D. Bryson, Q.C., for the respondent, Gena Leger Gendron<br>Clarence A. Beckett, Q.C. and Daniel Boyle, for the respondent, Shawn Hurlburt |

**Reasons for judgment:**

*Introduction*

[1] This appeal concerns an objection raised in the course of a discovery examination. Mr. Hurlburt, the respondent, was asked to provide a sketch of an intersection. His lawyer, Mr. Beckett, objected. Efforts to resolve the dispute failed. A motion was brought by Ms. Delano, the appellant, before Justice Robin Gogan for a determination of the objection pursuant to *Civil Procedure Rule* 18.17(7).

[2] The motions judge upheld the objection. Ms. Delano seeks leave to appeal. She submits the motions judge erred in principle by taking an overly restrictive and technical approach in her interpretation of the Rule – Rule 18.13(1) – governing the request made of Mr. Hurlburt. She also argues that upholding Mr. Beckett's objection produced a patent injustice.

[3] Neither respondent contested the application for leave. We are satisfied that an "arguable issue" had been raised (*Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38, at para. 18). After hearing from Mr. Beckett we granted leave to appeal and unanimously allowed the appeal with reasons to follow. These are those reasons.

*Overview of the Facts*

[4] On February 5, 2014, Mr. Hurlburt was involved in a three-vehicle accident. Ms. Delano and Ms. Gendron were the other drivers. Mr. Hurlburt's discovery examination by Ms. Bennett-Clayton, the lawyer for Ms. Delano, commenced on October 25, 2017. He testified from Edmonton by video-link. Ms. Bennett-Clayton, Mr. Beckett, and Mr. Bryson, the lawyer for Ms. Gendron, were all together in Halifax.

[5] At discovery, Mr. Hurlburt described the collision which occurred at a large intersection. He was then asked to sketch the intersection, a request which raised the objection of his counsel. The exchange went as follows:

> **Q.** I am going to ask you to sketch out, or draw out, that intersection in front of the Hubley Centre. You have paper and pen, I think you indicated in your backpack that I can see there.
>
> **A.** I do, yes.

> **Mr. Beckett:** No, I'm not going to let him do that. If you have a plan, that's to scale, then he can mark on it.
>
> **Ms. Bennett-Clayton:** Well, the challenge we have is getting it to him.
>
> **Mr. Beckett:** I know.
>
> **Ms. Bennett-Clayton:** So, how are we going to do this? Do we have to adjourn the discovery until we can do that? Because I can't figure out any other way to do it.
>
> **Mr. Beckett:** Well ----
>
> **Mr. Bryson:** What's the objection for him sketching something? It's a pretty common way to go about things.
>
> **Ms. Bennett-Clayton:** If he's not – if you're not prepared to let him sketch something then we're going to have to adjourn the discovery.
>
> **Mr. Beckett:** Then you're going to have to get a plan of the intersection.

[6] Mr. Beckett went on to say that he had "no idea of his [Mr. Hurlburt's] ability to recreate a drawing here and I just don't want him to do it". There was then some discussion about faxing Mr. Hurlburt the sketch that Ms. Delano had produced that same morning in the course of her discovery examination and a Google map of the roadway where the collision occurred. Both had been marked as discovery exhibits. Ultimately, however, efforts to find a mutually acceptable route around Mr. Beckett's objection foundered.

*The Motions Judge's Decision*

[7] The motions judge acknowledged in her reasons (reported as 2018 NSSC 226) that asking witnesses on discovery examination to produce a sketch or mark a map is "a widespread practice". But despite recognizing that the *Rules* "must be interpreted broadly and liberally", she fell into error by adopting a narrow and restrictive approach to what Mr. Hurlburt was asked to do. Mr. Hurlburt was simply asked to explain, verbally and with a visual representation, a sketch or a marking on a map, the intersection where the accident had occurred.

[8] The motions judge described the issue before her as a question of whether a witness "can be compelled to sketch or draw or mark on a map during discovery examination". She found there was no authority under the applicable *Rule*, Rule 18, that obliged a witness "to do anything more" than answer questions that sought relevant and not privileged responses. She concluded the *Civil Procedure Rules* only require witnesses to "give evidence but not make evidence." She viewed

asking Mr. Hurlburt to make a sketch of the intersection as an illegitimate request to have him create evidence.

[9] Asking Mr. Hurlburt to mark on a Google map as an alternative to the sketch was also seen by the motions judge as falling outside the imperatives created by the *Rules*. She found that "… there is no obligation to make any marks on such maps".

*Analysis*

[10] Mr. Hurlburt was being asked to provide a sketch or mark on a map in accordance with Rule 18.13(1) which states:

> A witness at a discovery must answer every question that asks for relevant evidence or information that is likely to lead to relevant evidence.

[11] Ruling on Mr. Beckett's objection required the motions judge to interpret Rule 18.13(1). Her interpretation had to be correct (*Laushway v. Messervey*, 2014 NSCA 7, at para. 29).

[12] *Civil Procedure Rule* 94.01(1) provides that the *Rules* "must be interpreted in accordance with the principles for interpretation of legislation." It was recently held by this Court that an interpretative approach to statutory interpretation favouring a narrow textual analysis to the detriment of a broader and purposive contextual analysis constitutes an error (*Sparks v. Holland*, 2019 NSCA 3, at para. 69).

[13] The motions judge appreciated that the interpretative approach to the *Rules* governing disclosure and discovery must not be narrow and restrictive:

> [20] The basic Rules for disclosure and discovery must be interpreted broadly and liberally and in a manner consistent with the purpose of the Rules generally and the goals of the discovery process.

[14] This statement is correct (*Sparks v. Holland*, at para. 27). The modern principle of statutory interpretation applied to the interpretation of the *Civil Procedure Rules* requires the words of the *Rules* governing discovery to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Rules* overall, their objects, and the intention of their drafters.

[15] The motions judge also correctly recognized the *Rules* "mandate conduct that is consistent with the just, speedy and inexpensive resolution of the proceeding", which has been identified by this Court as the "preeminent goal" of the *Rules*, informing their interpretation and application (*Homburg v. Stichting Autoriteit Financiële Markten*, at para. 41).

[16] However, the motions judge's interpretation of Rule 18.13(1) and her restriction of the meaning of "answer" to a verbal answer only frustrated that preeminent goal. Asking a witness at a discovery examination to supplement an answer with a sketch or a marking is wholly consistent with what the *Rules* are intended to achieve: answers that provide relevant evidence and the just, speedy and inexpensive resolution of the proceeding.

[17] I am not persuaded by Mr. Beckett's argument that it is redundant to oblige a witness on discovery to make a sketch or mark on a map after giving a verbal answer. I am satisfied that supplementing a verbal answer with a sketch or marking is well within the scope of what Rule 18.13(1) requires. It may clarify the verbal description, and if it does, it will benefit the parties' understanding, prior to trial, of the case being litigated, accomplishing the critical objective of discovery examination.

[18] I also find no merit in the suggestion that requiring Mr. Hurlburt to provide a sketch or mark on a map would constitute discovery by ambush leading to a patent injustice. Subject to my comments below, Mr. Hurlburt was not being asked to do anything that can be characterized as unfair or unreasonable.

[19] It is to be noted that Mr. Beckett's objection, arising as soon as Mr. Hurlburt was asked to make a sketch, leaves me in the dark as to whether Mr. Hurlburt felt he was able to provide what was being asked of him. In my view, that is a threshold question – can the witness provide a sketch or make a mark? If the witness says they cannot, then they have answered the question. If they say they can, I find that, applying the proper interpretation of Rule 18.13(1), they are obliged to do so if asked.

[20] I also note that this case illustrates the challenges associated with discovery examinations of witnesses by video-link. Even if the parties had been able to agree that Mr. Hurlburt could mark on a map, the record of the discovery examination indicates no arrangements were in place to achieve the transfer of a reliable and accurate document to him. On the day of the discovery, scanning a map and sending it electronically would have been a reliable method of ensuring that what

Mr. Hurlburt received was accurate. Use of video-link for discoveries, with its efficiency and cost benefits, is to be encouraged, as is the utilization of appropriate technologies where witnesses and exhibits are not in the same location.

*Disposition*

[21] Leave to appeal is granted. The appeal is allowed with costs to the appellant, and the respondent, Ms. Gendron, in the amount of $1000 each, inclusive of disbursements.

Derrick, J.A.

Concurred in:

Beveridge, J.A.

Farrar, J.A.