

NOVA SCOTIA COURT OF APPEAL

Citation: *Grover v. MacQuarrie's Drugs Limited (MacKinnon Pharmacy)*,
2024 NSCA 45

Date: 20240411

Docket: CA 527283

Registry: Halifax

Between:

Teresa Grover

Appellant

v.

MacQuarrie's Drugs Limited operating under the business name
MacKinnon Pharmacy

Respondent

-and-

Atlantic Provinces Trial Lawyers Association

Intervenor

Judge: The Honourable Justice David P. S. Farrar

Appeal Heard: March 27, 2024, in Halifax, Nova Scotia

Subject: *Civil Procedure Rule* 49.09 – Interpretation – Withholding documents for the sole purpose of impeachment

Summary: The respondent, MacQuarrie's Drugs Limited, operates a pharmacy in Antigonish, Nova Scotia. On October 15, 2022, Ms. Grover was a customer at the pharmacy and alleged she suffered injuries as a result of a walker falling off a cooler and hitting her in the head. She was told a CCTV camera had captured the incident. She subsequently commenced action against MacQuarrie's.

When MacQuarrie's filed its Affidavit Disclosing Documents, the CCTV coverage was not listed. Ms. Glover requested it be produced. MacQuarrie's refused. Relying on *Rule* 49.09, it said it was withholding production of the CCTV footage to use for the sole purpose of impeachment.

Ms. Glover moved for production of the CCTV footage.

Justice Scott C. Norton dismissed the motion finding MacQuarrie's could withhold production pursuant to *Rule 49.09* if its use was for the sole purpose of impeaching a witness. Ms. Glover appealed. The Atlantic Trial Lawyers Association sought and was granted intervenor status.

Issues: Leave to appeal was granted at the hearing of the appeal. The only issue to be determined was whether the motion judge erred in determining the CCTV footage could be withheld under *Rule 49.09*.

Result: Appeal dismissed. The motion judge committed no error in his interpretation of *Rule 49.09*. The *Rule* specifically carves out an exception to full disclosure requirements in the *Rules* if a document is being used for the sole purpose of impeachment.

Costs awarded to MacQuarrie's in the amount of \$2,500.00, inclusive of disbursements, payable by Ms. Glover. No costs were payable by or to the intervenor.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 31 paragraphs.

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Atlantic Provinces Trial Lawyers Association

Intervenor

Judges: Farrar, Bryson and Derrick JJ.A.

Appeal Heard: March 27, 2024, in Halifax, Nova Scotia

Held: Appeal dismissed with costs, per reasons for judgment of
Farrar J.A.; Bryson and Derrick JJ.A. concurring

Counsel: Madison Veinotte, for the appellant
Adam McQuarrie, for the respondent
Peter McVey, KC and Lyndsay Jardine, for the intervenor

Reasons for judgment:

Overview

[1] The appellant, Teresa Grover, appeals the September 21, 2023 decision of Justice Scott C. Norton.¹ In his decision, the motion judge held that closed circuit television (CCTV) footage in the possession of the respondent, MacQuarrie's Drugs Limited, may be withheld from production if it was being used solely for the purposes of impeaching a witness pursuant to *Rule* 94.09.

[2] The Atlantic Provinces Trial Lawyers Association was granted leave to intervene in Ms. Grover's appeal.

[3] For the reasons that follow, I would dismiss the appeal with costs to the respondent in the amount of \$2,500.00, inclusive of disbursements, payable by Ms. Grover.

[4] No costs shall be awarded to or from the intervenor.

Background

[5] MacQuarrie's Drugs operates a pharmacy at 243 Main Street, Antigonish, Nova Scotia. The pharmacy carries on business under the name MacKinnon Pharmacy.

[6] On November 18, 2022, Ms. Grover filed a Notice of Action and Statement of Claim seeking damages for the injuries she alleged she sustained while attending the pharmacy on October 15, 2022. The Statement of Claim describes the incident:

3. On October 15, 2022, the Plaintiff was attending the Defendant's Property as a patron. The Plaintiff states she was retrieving milk from a cooler (the "cooler") when suddenly, a walker (the "walker") that was positioned on top of the cooler, fell and struck the Plaintiff in her head. This caused the Plaintiff to fall into a display rack before landing on the ground.
4. Due to the dangerous condition of the Defendant's Property, the Plaintiff sustained personal injuries and suffered injury, loss and damage.

[...]

¹ *Grover v. MacQuarrie's Drugs Limited*, 2023 NSSC 289 [Grover].

6. The Plaintiff suffered personal injuries including, but not limited to, her neck, as well as a concussion and a fractured wrist. All of the Plaintiff's injuries were caused or materially contributed to by the Defendant's aforementioned negligence.

[7] Ms. Grover was told by pharmacy staff there was a CCTV recording the events in the store at the time.

[8] On July 4, 2023, MacQuarrie's produced their Affidavit Disclosing Documents. The CCTV footage was not listed in any of the schedules to the document.

[9] On July 19, 2023, Ms. Grover sent a Demand for Production of Undisclosed Copy to MacQuarrie's seeking:

- October 15, 2022, CCTV footage from MacKinnon's Pharmasave.

[10] MacQuarrie's responded to the Demand as follows:

1. Following the Defendant's disclosure of documents, the Plaintiff demanded production of closed-circuit television (CCTV) footage from MacKinnon's Pharmasave from the date of loss, October 15, 2022.
2. The Defendant refuses the demand in accordance with *Civil Procedure Rule* 14.09(2)(b).
3. The Defendant refuses the demand on the ground that the Defendant is withholding the CCTV footage solely for the purpose of impeachment under *Rule* 94.09(1)

[11] On July 27, 2023, Ms. Grover moved for an Order of Production of the CCTV footage.

[12] The motion was heard on September 5, 2023. At the motion hearing, MacQuarrie's conceded the CCTV footage was a document as defined by *Rule* 14.02; it was relevant evidence; and it was not subject to a claim for litigation privilege.² The only issue to be determined was whether *Rule* 94.09 allowed it to refuse to produce the CCTV footage.

[13] Following argument, Justice Norton gave an oral decision dismissing the motion. As noted earlier, his written reasons followed on September 21, 2023.

² *Grover* at ¶5.

Issues

1. Should leave be granted?

[14] At the hearing of the appeal, leave to appeal was granted. It is not necessary to address it further.

2. Did the motion judge err in determining the CCTV footage could be withheld under *Rule 94.09(1)*?

Standard of Review

[15] The motion judge's decision involved the interpretation of the *Rules*. It is a question of law. The standard of review is correctness.³

Analysis

[16] *Rule 94.09* provides:

94.09 Withholding information solely to impeach

- (1) *Despite a Rule that requires a party to disclose a document, to answer a question on discovery or by interrogatory, or to otherwise provide information to another party or the court, the party may, for the sole purpose of impeaching a witness, opt to withhold making the disclosure, answering the question, or otherwise providing the information.*
- (2) All of the following apply to a party who chooses to withhold a document, not answer a question, or withhold other information for the sole purpose of impeaching a witness:
 - (a) the party cannot use the witness who is subject to impeachment as an affiant on a motion, or seek to call the witness to give direct evidence on a motion;
 - (b) the party cannot call the witness who is subject to impeachment as a witness for the party at a trial or hearing, unless the presiding judge permits otherwise;
 - (c) *the party may only offer the withheld document or make use of the withheld information to impeach credibility, and it cannot be used by the withholding party to prove any fact in issue other than credibility;*

³ *Housen v. Nikolaisen*, 2002 SCC 33 at ¶8.

- (d) the party must immediately disclose the document or immediately provide the answer or the information, when the party decides not to use it or becomes aware the witness is not to be called.

[Emphasis added.]

[17] Ms. Grover and the intervenor argue strenuously that to allow MacQuarrie's to withhold the CCTV footage fails to carry out the intent of the *Rules* as set out in *Rule 1.01*:

These Rules are for the just, speedy, and inexpensive determination of every proceeding.

[18] They identify a host of issues resulting from the motion judge's decision including:

- Forced preparation without key evidence;
- Lack of pertinent evidence in expert reports;
- Limiting settlement chances;
- Higher litigation costs;
- Delay and additional costs from late disclosure;
- Witness list complications;
- Impediment to the fact finding process;
- No clear limitation on criteria for withholding;
- Limitations on the use of withheld evidence;
- Prejudice to opposing party from withholding evidence; and
- Lack of requirement to disclose existence of withheld evidence.

[19] To avoid these consequences, Ms. Grover encourages us to read into the *Rule* that it would only apply to privileged documents. Alternatively, she argues the word "purpose" in *Rule 94.09(1)* is ambiguous and can be understood broadly as including uses such as evaluating the merits of the claims in a dispute. Therefore, because the video can be used by MacQuarrie's for multiple such purposes in the course of the litigation, its sole purpose cannot be simply to impeach credibility.

[20] In support of her argument the *Rule* only applies to privileged documents, Ms. Grover refers to what she says is the Ontario equivalent to our *Rule* 94.09(1). It only allows the withholding of documents that are subject to privilege:

Privileged Document not to be Used without Leave

30.09 Where a party has claimed privilege in respect of a document and does not abandon the claim by giving notice in writing and providing a copy of the document or producing it for inspection at least 90 days before the commencement of the trial, the party may not use the document at the trial, except to impeach the testimony of a witness or with leave of the trial judge.⁴

[21] The Ontario *Rule* does not assist Ms. Grover. It is not the equivalent of our *Rule*. There is nothing in *Rule* 94.09(1) which limits its application to privileged documents. Another significant difference is the mandatory nature of the Ontario *Rule* – if you claim a privilege and do not abandon it, you are necessarily limited in how you may use that document unless the trial judge provides leave. The Nova Scotia *Rule* is permissive – rather than restricting what uses can be made of privileged documents, it provides an optional (“...the party may...”) mechanism by which parties can withhold documents to impeach. As such, even if the Nova Scotia *Rule* only applied to privileged documents as Ms. Grover claims, it would still be fundamentally different from the Ontario *Rule* in that not all privileged documents would be mandatorily limited to impeachment uses.

[22] The intervenor supports the position of Ms. Grover and goes further, asking this Court to differentiate between CCTV coverage which it describes as “real evidence”, being videos or similar evidence that does not require relying on testimony, and other evidence. It explains the distinction in its factum:

18. While “real evidence” is often a vague and ambiguous term, *The Law of Evidence in Canada*, 4th Ed., describes it thusly:

...When things are produced before the court, the court applies its own senses and draws conclusions. The classification commonly used is “real evidence”. The classification has been criticized as being both indefinite and ambiguous. The term is used in a number of different ways, ***but in its widest meaning includes any evidence where the court acts as a witness, using its own senses to make observations and draw conclusions rather than relying on the testimony of a witness.*** In this sense, it includes not only the production of articles before the court, but the observation by the

⁴ *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, s. 30.09.

court of the demeanour of a witness in the witness-box, the viewing of a motion picture of videotape and taking a view.

...

For obvious reasons, real evidence will often be more effective than *viva voce* evidence. Although testimony is needed to connect it to the issues at trial, real evidence appeals directly to the trier of fact without passing through the intermediary of a witness. This is noticed in *McCormick on Evidence*:

Since “seeing is believing”, it is today universally felt that this kind of evidence possesses an immediacy and apparent reality which endow it with particularly persuasive effect.⁵

[Emphasis added.]

[23] The difficulty with Ms. Grover’s and the intervenor’s arguments is that they are not seeking to have the *Rule* interpreted, rather, they are asking us to amend it.

[24] The motion judge did a thorough analysis of the *Rule* and its predecessor in determining it permitted MacQuarrie’s to withhold the CCTV footage. He first looked at the historical development and application of the present *Rule* 94.09:

[12] It is helpful to review the historical development of the present *Rule* 94.09. The previous *Nova Scotia Civil Procedure Rules* (1972) contained rule 31.15 that stated:

31.15 (1) Unless the court orders, no document shall be admissible in evidence on behalf of a party unless,

- (a) reference to it appears in the pleadings, or in a list of documents filed and served under rule 20.01 by any party;
- (b) it has been produced by any party or an officer, director or managing agent of a party that is a body corporate, partnership or association, on an examination for discovery;
- (c) it has been produced by a witness who is not, in the opinion of the court, under control of the party;
- (d) it is a plan, photograph, or model in respect of which the requirement of rule 31.07 has been satisfied.

(2) Paragraph (1) does not apply to a document that is used solely as a foundation for, or as part of a question in, cross-examination or re-examination. [...]

⁵ Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 4th ed (Markham: LexisNexis Canada Inc. 2014) at §2.14 to §2.16.

[13] In *O'Brien v. Clark*, 1995 NSCA 171, the Nova Scotia Court of Appeal considered a personal injury case wherein counsel for the defendant attempted to introduce surveillance video of the plaintiff into evidence. The video had not been disclosed pursuant to the previous rule 20. No mention of the tapes had been made during cross-examination of the plaintiff. The trial judge refused to admit the tapes. ***Allowing the appeal, the Court of Appeal held that the previous rule 31.15(2) provided a limited exception to the principle of full disclosure before trial, but any document so exempted could only be used for the limited purpose of impeachment.***

[Bold italicized emphasis added; underlined emphasis in original.]

[25] Before the judge, Ms. Grover argued it could not have been the intention of the drafters of the *Rules* that a relevant document to which no litigation privilege attaches should not be listed in the Affidavit of Documents. The judge addressed this argument head on:

[15] This apparent contradiction was answered by the court's decision in *Hawboldt v. Cahill*, (1995) 142 NSR (2d) 120. ***There, the defendant's list of documents did not reflect the existence, if any, of videotapes and surveillance reports that plaintiff counsel believed to exist. The plaintiff applied pursuant to the previous Rule 20 for a complete list of documents and production for inspection of any and all surveillance videotapes and/or reports.*** Regarding whether the defendant was required to deliver a list of documents inclusive of any surveillance videotapes and reports pursuant to Rule 20.02, Justice Stewart found there was an appearance of conflict between Rule 20 and Rule 31.15. Rule 20 appeared to require that all documents, including those for which privilege was claimed, be listed. ***Rule 31.15(2) allowed the admissibility of documents used solely as a foundation for, or as part of a question in, cross-examination or re-examination even though the particular documents had not been listed pursuant to Rule 20.***

[16] Justice Stewart concluded, at para. 27:

...the apparent contradiction between the requirement to list all relevant documents, excluding only the solicitor's brief, and the right under C.P. Rule 31.15(2) to use documents not listed under C.P. Rule 20 is only reconcilable by limiting the admissibility to use on cross-examination for the purpose of [contradicting] and impeaching the witness and not as a mechanism whereby one party may introduce it as part of its evidence, albeit through a witness called by another party, without having made the required disclosure under C.P. Rule 20. It will be for the trial judge to decide whether the particular report or document meets the exception of C.P. Rule 31.15(2). If it does not, then under C.P. Rule 31.15(1) and subject to the court's discretion recited therein, the document or report, if not listed under C.P. Rule 20 would not be admitted. Failure by counsel to

list the tapes and reports may, therefore, run the risk they will not be admitted in evidence during trial.

28 The decision whether to list the tapes and reports, if any, and whether to claim privilege or not, is for the person filing the List of Documents and, in this case, the defendant. In making those decisions, the defendant will have to consider the potential risks of not listing the tapes and reports and, of claiming privilege. [...]

[Bold italicized emphasis added; underlined emphasis in original.]

[26] The motion judge also recognized the overarching intent of the *Rules* is to promote full disclosure and that *Rule* 94.09 should be narrowly interpreted.⁶ He emphasized the narrow scope of *Rule* 94.09 and the consequences of withholding information such as CCTV footage:

[25] If a withheld document (not subject to litigation privilege) is not otherwise disclosed before the trial pursuant to *Rule* 15.02(2)(d) and not used for impeachment, the instant that the withholding party has completed their cross-examination of the witness, the withholding party must immediately disclose the withheld document.

[26] The trial judge may permit the witness to be questioned about the document through a re-opening of the direct evidence or re-examination. The trial judge has the responsibility to ensure a fair trial and may consider an adjournment to allow counsel to meet with the witness to discuss the content of the document before their testimony continues. The trial judge may permit other witnesses to be called or recalled to speak to the contents of the previously withheld document.

[27] The withholding of a document, such as video of the actual occurrence that is the basis for the cause of action, could have serious consequences for a trial. For example, the decision not to disclose dash camera footage of a motor vehicle collision would mean that it could not be considered by accident reconstruction experts for the parties. The later disclosure of this evidence, just before or during the trial, could lead to an adjournment to allow for revision of the expert reports and result in delay and a potential mistrial in a jury trial.

[28] If it is determined by the trial judge that the document was withheld improperly, there could be significant costs or other consequences to the withholding party. A trial judge that finds, in the context of all the evidence, that the document was withheld for a purpose other than impeachment, could find that the withholding is an abuse of the court's process leading to the imposition of the extreme remedies discussed in *Rule* 88.02, including dismissal of the claim or judgment and an order for solicitor and client costs.

⁶ *Grover* at ¶19.

[29] Thus, the decision to withhold a relevant document (not subject to litigation privilege) must be made carefully and with full consideration of the potential consequences.

[27] I agree with the analysis of the motion judge. *Rule 94.09* specifically carves out an exception to the full disclosure requirements in the *Rules*. The introductory words in *Rule 94.09* could not be clearer in evidencing an intention to create this exception. It provides “[d]espite a Rule that requires a party to disclose a document [...]”. Ms. Grover and the intervenor would have us simply ignore these words. The interpretation suggested by Ms. Grover and the intervenor would require a wholesale rewriting of *Rule 94.09*.

[28] Although the arguments regarding fairness and full disclosure being made by the appellant and the intervenor have resonance, the *Rule* simply cannot be interpreted in the way they suggest. It may be that technology has overtaken this particular *Rule* and the *Rules* Committee may wish to look at it to see if it needs to be modified. There is little doubt CCTV footage can be a very effective tool if it records the actual occurrence of an accident. By withholding the document for the sole purpose of impeachment, MacQuarrie’s is taking a significant risk.

[29] *Rule 94.09* precludes the use of the withheld CCTV footage for any purpose other than to impeach credibility:

(2) All of the following apply to a party who chooses to withhold a document, not answer a question, or withhold other information for the sole purpose of impeaching a witness:

[...]

(c) the party may only offer the withheld document or make use of the withheld information to impeach credibility, and it cannot be used by the withholding party to prove any fact in issue other than credibility;

[30] Given the potential consequences of withholding a document, as identified by Justice Norton, it is reasonable to expect there would be a very limited number of cases where the *Rule* would be invoked:

[21] In most cases, evidence from CCTV on-premises, or dash-mounted cameras in vehicles, will provide the parties with real and substantive evidence of the conditions and circumstances existing at the time the cause of action arose which is highly relevant to their claim or defence. It may be significantly detrimental to their case to withhold such a relevant document. Thus, it is

reasonable to expect that it will be in a very limited number of cases that a party will choose to invoke *Rule* 94.09.

[31] In conclusion, the motion judge committed no error in his thorough analysis of the background and purpose of *Rule* 94.09. I would dismiss the appeal with costs to the respondent, payable by Ms. Grover, in the amount of \$2,500.00, inclusive of disbursements. No costs will be payable by or to the intervenor.

Farrar J.A.

Concurred in:

Bryson J.A.

Derrick J.A.