**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *Gushue v. Nova Scotia Health Authority*, 2022 NSSC 380

**Date:** 20221229
**Docket:** Hfx No. 458127
**Registry:** Halifax

**Between:**

Olivia Grace Gushue, by her litigation guardian Robin Nicole Gushue, Robin Nicole Gushue and Craig Donald James Gushue

Plaintiffs

and

Nova Scotia Health Authority, a body corporate, carrying on business as the Cape Breton Regional Hospital, Angus Gardner, Saima Haleem, Victor Espinal, Ayman A. Habiba, John Doe

Defendants

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**DECISION ON MOTION**

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| **Judge:** | The Honourable Justice Glen G. McDougall |
| **Heard:** | October 19, 2022, in Halifax, Nova Scotia |
| **Decision:** | December 29, 2022 |
| **Counsel:** | Raymond Wagner, K.C., and Lauren Harper, for the Plaintiffs<br>Karen Bennett-Clayton, Erin McSorley, and Christa Korens, for the Defendant, Nova Scotia Health Authority, carrying on business as the Cape Breton Regional Hospital<br>Brian Downie, K.C., and Jillian Strugnell, for the Defendants – Angus Gardner, Saima Haleem, Victor Espinal, and Ayman A. Habiba |

**By the Court:**

## Introduction

[1] Plaintiffs' counsel moves for an Order declaring the experts reports of Drs. Lawrence Oppenheimer, Ian Wilson, and Ernest Phillipos inadmissible by operation of Civil Procedure Rule 55.11(8).

[2] Rule 55.11(8) provides the following:

> 55.11 Questioning expert in writing
>
> …
>
> (8) The opinion of an expert who fails to answer questions in compliance with this Rule 55.11 is inadmissible, and the party who asks the questions may make a motion for an order that the opinion is inadmissible on that ground.

[3] It is important to consider the request of Plaintiffs' counsel in the context of the entire rule. The remaining portions of Rule 55.11 are as follows:

> 55.11 Questioning expert in writing
>
> (1) A party may not obtain a discovery subpoena for or deliver interrogatories to an expert witness, but a party may interview or discover an expert if the expert and the party who delivers the expert's report agree.
>
> (2) A party who receives an expert's report, or a rebuttal expert's report, may, no more than thirty days after the day the report is delivered, deliver to the other party written questions to be answered by the expert.
>
> (3) The questions may only call for information that is not privileged and is relevant to one of the following:
>
> (a) the expert's qualifications;
>
> (b) a factual assumption made by the expert;
>
> (c) the basis for an opinion expressed in the expert's report.
>
> (4) The party who receives written questions must deliver them to the expert immediately.
>
> (5) The expert must fully answer the questions in writing, sign the answer, and deliver it to each party no more than thirty days after the day the questions are delivered to the expert.

> (6) A party may not submit supplementary questions, unless the parties agree or a judge allows otherwise.
>
> (7) A party who receives written questions may make a motion to set aside or limit the questions.

[4] In order to be compliant, a question put to an opposing party's expert "… may only call for information that is not privileged and is relevant to one of the following:

> (a) The expert's qualifications;
>
> (b) A factual assumption made by the expert;
>
> (c) The basis for an opinion expressed in the expert's report.
>
> (See Rule 15.11(3))

**Background**

[5] Expert reports in chief were exchanged by May 31, 2022. Counsel for the parties agreed, amongst themselves, to relax the deadline for filing such reports which, based on Civil Procedure Rule 55.03(1), would have required them to be filed "… no less than six months before the finish date, ..." A party who receives an expert's report may, "no more than thirty days after the day the report is delivered, deliver to the other party written questions to be answered by the expert." (See Rule 55.11(2)). Plaintiffs' counsel presented their questions for Dr. Lawrence Oppenheimer, Dr. Ernest Phillipos, and Dr. Ian Wilson to counsel for the Defendant Doctors within the 30-day deadline.

[6] Counsel for the Defendant Doctors promptly forwarded the questions to each of their experts. They also wrote to counsel for the Plaintiffs expressing concerns with some of the questions as being outside the ambit of Rule 55.11(3). In his July 13, 2022 correspondence to Plaintiffs' counsel, Mr. Brian Downie, K.C., specifically identified the questions asked of each of the three physicians that, in his opinion, failed to comply with the requirements of the rule.

[7] Counsel for Nova Scotia Health Authority ("NSHA") also had similar concerns regarding questions sent to her by Plaintiffs' counsel to be presented to one of their proposed experts – Dr. John van Aerde. By correspondence dated July 19, 2022 NSHA's counsel identified four questions – number 3, 5(c), 6, and 8 "as outside the scope of the requirements of Rule 55.11(3)." The Court has not been called upon to rule on the appropriateness of these questions in the context of Rule 55.11. The focus is on the refusal of Drs. Oppenheimer, Phillipos, and Wilson to answer some

of the questions presented to them by counsel for the Defendant Doctors at the request of counsel for the Plaintiffs.

[8] On July 21, 2022 counsel for the Plaintiffs forwarded correspondence to counsel for both NSHA and the Defendant Doctors addressing the concerns raised in their earlier correspondence. In their correspondence, counsel for the Plaintiffs stated, at para. 2. That:

> We agree that Rule 55.11(3) provides three **exhaustive areas** on which an expert can be questioned…
>
> (Emphasis added)

Based on my review of the letters sent by defence counsel there is no mention of "exhaustive areas" on which an expert can be questioned. Both counsel pointed out the three general areas for which questions could be asked as set out in Rule 55.11(3)(a), (b), and (c) but neither counsel characterized the permissible questioning as "exhaustive areas on which an expert can be questioned."

[9] Counsel for the Plaintiffs cited the case of *Baird v. Barkhouse*, 2012 NSSC 289, as support for their position. In that decision, the Honourable Justice Cindy A. Bourgeois (while she was a judge of this Court prior to being appointed to the Nova Scotia Court of Appeal) stated the following at para. 42:

> 42 I do not accept the Plaintiff's restrictive interpretation of Rule 55.11(3). It would be contrary to the Court's goal of admitting and utilizing **reliable** expert evidence, to arbitrarily limit the written questions that can be asked in the manner being suggested by the Plaintiff. Provided a question relates to one of the categories listed in Rule 55.11(3), the question can be put forward. It is nonsensical to read the rule as requiring a party to choose one of the three categories, and limiting the questions posed therein.

[10] The last complete sentence of this paragraph was not included in the quotation. Clearly Justice Bourgeois was referring to the position advanced by counsel for the Plaintiff in that particular case that questions pertaining to only one of the general categories could be asked. She made it abundantly clear, in para. 45, of her decision that the rule allows for questions in any of the three permitted areas. She put it this way:

> 45 The important analysis is whether the questions fall within any of the three permissible subjects contained in Rule 55.11(3). I am satisfied that Question 10 relates to Mr. Cunningham's experience and knowledge base on an important

> subject which impacted on his opinion. As such, it relates to his qualifications. The remaining questions all seek information from Mr. Cunningham as to how he ultimately reached the opinions contained in his report, either in terms of his factual assumptions or how he reached his conclusions, which go to the basis of the opinion. As such, I find all of the disputed questions to be appropriate.

[11] Counsel for the Plaintiffs also disagreed with defence counsel that a more recent discussion of the Honourable Justice Jamie S. Campbell (of this Court), in *Fiola v. MacDonald*, 2021 NSSC 262, should not be read "… as a constraining decision on questions about the basis for an expert opinion."

[12] Without delving into all the particular nuances and subtleties of the *Fiola* decision, Justice Campbell, at para. 25 of his decision, very succinctly laid out the interpretation of Rule 55.11 and in particular, Rule 55.11(3):

> 25 Experts can no longer be required to submit to discovery examination. Interrogatories cannot be delivered to an expert. Both of those would allow for a broad scope of questioning on matters that are potentially relevant. Rule 55.11(3) limits the written questions that can be asked of an expert. The questions can only call for information that is not privileged and relevant to one of three things. Those are the expert's qualifications, a factual assumption made by the expert, or the basis for an opinion expressed in the expert's report. If a question falls outside the scope of those permitted areas of inquiry, it is not a question that can be asked, and it is not a question that requires an answer.

[13] Plaintiffs' counsel in their July 21, 2022 correspondence provided their rationale for the various questions put to each of the three experts offered up by counsel for the Defendant Doctors and one by counsel for NSHA, as follows:

> In the questions we have posed to various experts, we are seeking to understand the basis or bases for opinions expressed in reports, some of which appear to be directly in conflict with reputable sources. It is our obligation to our clients to ensure we understand, …

The letter goes on to set out in detail counsels' position in regard to each of the impugned questions which counsel for the Defendants felt were outside the parameters of the three areas provided for in Rule 55.11(3). After providing this, counsel for the Plaintiffs summed up their position, as follows:

> **Our Position on the Contemplated Motion**
>
> In short, I do not agree with your very narrow reading of Rule 55.11(3)(c), which permits us to ask questions about the basis of an expert opinion. In a technical case such as this, many questions need to be asked to ensure that we understand the

> content of expert opinions and to avoid trial by ambush. It is unclear to me why the requested information would not be beneficial to all parties in understanding the case.
>
> Rule 55.11 replaces the old regime of expert discoveries. While it is not a procedural mechanism by which to obtain discovery, it was designed as a replacement for that process, and, so, we believe it should be afforded a liberal reading. All of our questions seek to clarify the basis for complex opinions expressed by your experts. If a motion is required, we anticipate making many of the same arguments set-out above; otherwise, we look forward to receiving your experts' answers in an effort to more fully understand the bases for their opinions.

[14] Counsel for the Defendant Doctors was not persuaded by opposing counsels' efforts to have all the questions presented to Drs. Oppenheimer, Phillipos, and Wilson answered. Only those felt to be within the ambit of Rule 55.11(3) were answered. Those of Dr. Oppenheimer and Dr. Phillipos were sent to Plaintiffs' counsel on August 11, 2022. Those of Dr. Wilson were delayed due to other professional obligations and summer vacation. They were provided on August 31, 2022. Since this motion only deals with the three experts being relied on by the Defendant Doctors, I will not concern myself with the questions that NSHA's expert, Dr. John van Aerde, was counselled not to answer.

[15] It should be noted that there was no absolute refusal to answer all of the questions put to the Defendants' experts. Dr. Earnest Phillipos, for instance, answered 16 of the 31 full and multiple-part questions put to him; Dr. Lawrence Oppenheimer answered 9 of the 21 full and multiple-part questions he was presented with; Dr. Ian Wilson provided answers to 3 of the 6 full and multiple-part questions he was asked to consider. It was counsels' submission that answers were not provided for questions that were non-compliant with Rule 55.11. They argue that a response to an offending question is not required.

**Discussion/Analysis**

[16] I have previously cited a passage from Justice Campbell's decision in *Fiola v. MacDonald*, supra. In addition, to that quotation, at para. 29 of the decision, Justice Campbell added this:

> 29 Written questions replace discovery but they are not a form of written discovery. The questions that can be asked are limited to three general areas. They must be relevant to the expert's qualifications, to a factual assumption made by the expert, or to the basis for an opinion expressed in the report.

[17] The rules of procedure adopted by this Court in 2010 brought about some very significant changes to the procedure pertaining to expert opinion sought to be introduced at trial. In particular, Rule 55.11(1) did away with the right to discover experts or deliver interrogatories as had been the case under the previous rules of court. It did, however, allow for an interview or discovery "… if the expert and the party who delivers the expert's report agree."

[18] Rule 55.04 requires the proposed expert to sign the report and to make a number of representations relating to objectivity; independence; everything the expert regards as relevant to the expressed opinion while drawing attention to anything that could reasonably lead to a different conclusion; a willingness to answer written questions put by parties as soon as possible after the questions are delivered to the expert; and, a representation that the expert will notify each party in writing of a change in the opinion, or of a material fact that was not considered when the report was prepared and could reasonably affect the opinion, as soon as possible after arriving at the changed opinion or becoming aware of the material fact. These and the additional obligations placed on an expert by Rule 55.04(2) and (3) help to ameliorate the impact resulting from the elimination of discovery or the use of interrogatories in cases that rely on the need for expert reports to assist a trier of fact in reaching a decision.

[19] As previously indicated, answers were provided by the experts for 30 of the 56 questions put to them by Plaintiffs' counsel. When one looks at the questions that were not answered (based on the advice of counsel for the Defendant Doctors), there is justification for the refusal in most instances. Many of the questions ask for new opinions or pose hypotheticals or alternate theories for the expert to consider and address. Clearly these questions are outside the ambit of Rule 55.11(3)(a), (b), and (c). As argued by defence counsel, these questions "… are, in effect, an attempt to examine the Experts in a manner akin to discovery and cross examination." (See Response Brief of the Defendant Physicians filed on October 12, 2022, at p. 6, para. 24). I agree with the position advanced by counsel for the Defendant Doctors but with some exceptions.

[20] Previously, during the hearing of the Plaintiffs' motion to declare portions of experts' reports filed by counsel for NSHA and the Defendant Doctors inadmissible (which took place over two days beginning on October 27 and concluding on November 9, 2022), I ordered that written questions, pursuant to Rule 55.11(3), could be put to Dr. Ernest Phillipos regarding his reliance on a study he participated in, the results of which were first presented at a pediatric academic society

conference in Baltimore in 2016 but which has not yet been published. A question regarding the unpublished research was included in the questions presented to Dr. Phillipos (question number 6). The question was answered but regardless of this I determined that additional questions could be put to him. At the time, I indicated to counsel that if there were any disagreements over the wording of the questions, I could be called upon to resolve them. I have not heard from counsel in this regard.

[21] I will now focus on the questions put to each expert that were not answered based on the advice of counsel. I will begin with Dr. Ernest Phillipos who, as previously indicated answered 16 of the 31 full and multiple-part questions put to him leaving 15 unanswered. The 15 unanswered questions include:

2a, 2b, 2bi;

3b;

4c, 4d;

5;

7;

8a, 8b, 8c;

9a;

11ai, 11b; and,

13a.

[22] Of the 15 questions that were not answered I find there is justification for refusing to answer questions 2a; 2b; 2bi; 3b; 4d; 7; 9a; 11ai; and, 13a. All of these questions attempt to elicit answers or seek opinions beyond the scope of Dr, Phillipos' report. They call for opinions based on hypotheticals or literature not considered by the author of the report. They do not seek answers to questions pertaining to the factual assumptions made by the expert nor do they delve into the basis for an opinion expressed in the expert's report. They are more akin to questions one would likely expect to hear at discovery or during cross-examination at trial. Rule 55.11(3) does not contemplate questions such as these. The limited jurisprudence supports this interpretation of the rule. None of these questions fall within the parameters set out in the rule and, therefore, need not be answered.

[23] I do not find justification for refusing to answer questions 4c; 5; 8a; 8b; 8c; and, 11b. These questions relate to the opinions and the factual assumptions made

by Dr. Phillipos in preparing his report. They ask him to expand on his opinions based on the factual assumptions he relied on and fall within two of the categories set out in Rule 55.11(3)(b) and (c). These questions should be, once again, put to Dr. Phillipos and answered assuming he can answer them.

[24] In respect to Dr. Lawrence Oppenheimer, he answered 9 of the 21 full or multiple-part questions put to him by Plaintiffs' counsel. The 12 questions that he refused to answer (on the advice of counsel) include:

4b, 4c;

5c;

6;

7a, 7b;

8a, 8b;

9a, 9b, 9c; and,

10b.

I am satisfied that there was justification for refusing to answer questions 4b; 4c; 5c; 6; 7a; 7b; 8a; and, 8b. My reasons are the same as those stated in respect of the questions Dr. Phillipos was instructed not to answer. They are non-compliant with Rule 55.11(3) and are best left to cross-examination at trial.

[25] I am not of the same mind as regards to questions 9a; 9b; and, 9c. They are compliant with the rule and should be answered.

[26] This leaves only question 10. b. Which, if read as a stand-alone question, asks for an opinion based on assumed facts suggested by opposing counsel. The question, however, must be read in the context of the immediately preceding question – number 10a Dr. Oppenheimer answered that question and I read question 10b as a corollary to that question. As such, I believe it should be answered.

[27] I next turn my attention to the questions presented to Dr. Ian Wilson. In total, there were six either full or multiple-part questions of which he refused to answer three. The three unanswered questions are:

1;

3; and,

4.

All three of these questions clearly seek additional opinions regarding the standard of care expected of a "reasonably prudent consultant pediatrician" or simply a "reasonable" or "reasonably prudent" pediatrician. They are not confined to the three categories set out in Rule 55.11. They present alternative factual scenarios and are not designed to seek out the basis for an opinion expressed in the expert's report. Counsel for the Defendant Doctors was correct in advising Dr. Wilson not to answer these questions.

**Conclusion**

[28] Plaintiffs' counsel request to declare inadmissible the expert reports of Drs. Phillipos, Oppenheimer, and Wilson is denied.

[29] The alternative remedy of declaring "… the opinions about which the Defendant Physicians' experts refused to answer questions inadmissible at the trial of this action" is also denied.

[30] I do not believe the situation warrants such drastic and potentially prejudicial relief as is being sought by Plaintiffs' counsel. I say this for a couple of reasons.

[31] Firstly, Counsel for the Defendant Doctors did not instruct their experts to refuse to answer all the questions put to them. The majority of questions were answered in a timely manner as required by the rules. The only exception being the answers provided to three of the six questions put to Dr. Ian Wilson. There was a valid reason offered for this delay and, in any event, the delay was really not all that long.

[32] Secondly, the decision to refuse to answer some of the questions was justified. Those that were rejected without proper justification will have to be presented, once again, to the appropriate expert to be answered. A deadline of Monday, January 16, 2023 is set for this purpose.

[33] In *Fiola*, supra, Justice Campbell stated the following, at para. 13:

> 13 Rule 55.11(7) is the section that permits the party receiving the questions to make a motion to set aside or limit the questions. The Rule does not say that if the party does not make such a motion every question asked is then deemed to comply with Rule 55.11. If the party receiving questions fails to make a motion to set aside or limit the questions, under Rule 55.11(7), the impermissibility of the questions

> may still be raised in response to a motion brought under Rule 55.11(8) seeking to have the expert report ruled inadmissible for failure to answer those questions. The failure of the party receiving the questions to object to those questions does not compel the expert to answer questions that are outside the scope of those that may properly be asked to an expert.

[34] Justice Campbell went on, at para. 14, to state:

> 14 The Rules must be applied practically. …

[35] I agree with Justice Campbell's approach. Even though counsel for the Defendant Doctors did not advance a motion under Rule 55.11(7) leaving it instead to counsel for the Plaintiffs to bring their own motion under Rule 55.11(8), the practical solution is not to declare the expert reports (or portions of them) inadmissible, but rather to order some of the rejected questions be answered. This, in my opinion, is not only a practical application of the rules, it also makes for a fair and just result.

McDougall, J.