

SUPREME COURT OF NOVA SCOTIA

Citation: *Theriault v. Wamboldt*, 2024 NSSC 46

Date: 20240216

Docket: 497031

Registry: Halifax

Between:

Shawn Theriault

Plaintiff

v.

Brian Wamboldt and Ship-Shape Cleaners Limited,
a body corporate

Defendants

Motion to Extend Time to File Expert Report
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Judge: The Honourable Justice Gail L. Gatchalian

Heard: February 9, 2024, in Halifax, Nova Scotia

Oral Decision: February 16, 2024

Counsel: Adam R. Downie, for the Plaintiff
Joseph F. Burke, for the Defendants

By the Court:

Introduction

[1] This is a motion by the Plaintiff, Shawn Theriault, for permission to file a late expert report. The central question is whether he has established the existence of exceptional circumstances that would justify the late filing of the report.

Background

[2] On March 6, 2018, Mr. Theriault was driving a vehicle in the course of his employment when he was rear-ended by the Defendant, Brian Wambolt. Mr. Theriault claims that he suffered an injury to his left shoulder in the accident. Mr. Theriault received Workers' Compensation Board ("WCB") benefits. WCB commenced a subrogated action in the name of Mr. Theriault against the Defendants, Mr. Wambolt and Mr. Wambolt's employer, Ship-Shape Cleaners Limited, for recovery of those benefits.

[3] The Date Assignment Conference was held on October 14, 2022. The Honourable Justice Ann Smith scheduled the trial to take place on June 17-20 and 24-27, 2024. The Finish Date is March 1, 2024, in two weeks. Smith J. did not set a specific deadline for the filing of expert reports. Expert reports were therefore

due on September 1, 2023. The Plaintiff delivered and filed an expert report from an orthopedic surgeon, Dr. Charalabos Karabatsos, on November 7, 2023, nine weeks after the deadline.

The Rules and Legal Principles

[4] *Civil Procedure Rule 55.02* says that a party may not offer an expert opinion at trial unless an expert report is filed in accordance with the Rules. Rule 55.03(1) requires such a report to be filed no less than six months before the Finish Date, or by a deadline set by a judge. These Rules use wording that is imperative. They must be strictly followed. These Rules exist to ensure predictability, to provide consistency as to the form of the opinion offered, to avoid surprise or ambush, to ensure scarce trial time is not lost due to the need for adjournments caused by late-filed expert reports, and to promote settlement by giving each side sufficient time to address the content of an expert's report and obtain reasoned instructions.

[5] Rule 51.03(1)(d) uses imperative language when it says that a judge who presides at a trial "must exclude" expert opinion not disclosed under Rule 55. Rule 51.03(1)(d) provides the judge with discretion to admit the evidence if it would be "unjust" to exclude it. The burden is on the party seeking to offer the expert report to satisfy the judge that it would be in the interests of justice to allow the late

report. It is a high burden. In exercising its discretion, the court must consider the probative value of the expert report, the prejudicial effect on the other party of the late filing of the report, and whether there are any exceptional circumstances to warrant its late filing.

[6] The list of what might constitute exceptional circumstances is not closed. Exceptional circumstance could be where facts come into the knowledge of a party that could not, with reasonable diligence, have been learned in time to be included in an expert report. Another example might be when the plaintiff in a personal injury claim has a significant change in their health such that new expert evidence is required. However, the party seeking to file a late expert report must establish that circumstances are in fact “exceptional,” for example, that the circumstances were out of the control of the party or unforeseen despite reasonable diligence.

[7] For the foregoing principles, I rely on *Cole v. Strum Environmental Services Ltd.*, 2024 NSSC 16 (Arnold J.) at paras.15-20; *LaMarche v. Campbell*, 2022 NSSC 338 (Campbell J.) at paras.16-18 and 37; *Aly v. Personal Care Holdings Ltd.*, 2022 NSSC 108 (Jamieson J.) at paras.16-18, 21-24 and 42-43; *Nichols v. McGillis*, 2019 NSSC 85 (Brothers J.) at paras.33-34 and 49; *Conrad v. A.F.L. Manufacturing Limited*, 2018 NSSC 52 (Smith J.) at para.63; *Banfield v. RKO*

Steel Ltd., 2017 NSSC 315 (Chipman J.) at paras.30 and 33; and *Corkum v.*

Sawatsky, (1993) 118 N.S.R. (2d) 137 (Saunders J., as he then was) at paras.44-45.

The Position of the Parties

[8] The Plaintiff says that the late expert report should be accepted because the report is highly probative, the Plaintiff will be prejudiced if the report is not accepted, the Defendant still has time to obtain a rebuttal report, and there are exceptional circumstances. The Plaintiff acknowledges that they cannot point to one particular exceptional circumstance, such as new information or a change in Mr. Theriault's health. Rather, the Plaintiff points to the circumstances as a whole, including the fact that the Defendants were aware of the Plaintiff's intention to obtain an expert report, the Plaintiff's alleged diligence in obtaining an expert report, and counsel's difficulty obtaining instructions.

[9] The Defendants oppose the motion. They do not concede the probative value of the report, but say that probative value is not determinative. The Defendants say that they will suffer prejudice if the expert report is filed late. The Defendants assert that there are no exceptional circumstances here, stating that the Plaintiff could have, with reasonable diligence, filed an expert report on time, and that there is no evidence to justify the Plaintiff's delay in obtaining the report.

Probative Value

[10] The expert report of Dr. Karabatsos has high probative value. Causation is in dispute. The Defendants will be relying on the opinion of another orthopedic surgeon, Dr. David Johnson, that the accident did not cause Mr. Theriault's shoulder injury. The opinion of Dr. Karabatsos is to the contrary. This factor pulls in the direction of permitting the late filing of the report.

Prejudice

[11] The Defendants will suffer prejudice if the Plaintiff is permitted to rely on the expert report of Dr. Karabatsos. If I permit the Plaintiff to file the report late, the Defendants will want to file a rebuttal expert report. They cannot realistically do so before the Finish Date of March 1, 2024. The Defendants' attention will be diverted from preparing for trial. The Defendants will have difficulty preparing a witness list, participating in the Trial Readiness Conference and preparing a pre-trial brief without knowing the full extent of their evidence. Late acceptance of the expert report will place the trial dates at risk. Prejudice to the Defendants caused by a late-filed expert report pulls in favour of excluding the report.

[12] The Plaintiff did not offer to indemnify the Defendants should they require an adjournment of the trial dates in order to respond to the late report. Even if such

an indemnity were offered and even if it could have remedied any prejudice arising from accepting the late report, I would still have to consider whether exceptional circumstances exist that would warrant acceptance of the late report.

Exceptional Circumstances

The Plaintiff's Argument

[13] The Plaintiff asserts that the exceptional circumstances justifying the late report are borne out by the circumstances as a whole, including:

- A change in Plaintiff's counsel in February of 2021.
- Notification by the Plaintiff that they intended to rely on an expert report in the Plaintiff's May, 2022 request for a Date Assignment Conference.
- Confirmation in the Date Assignment Conference memo from Smith J. that the Plaintiff intended to call an expert witness in the area of orthopedic surgery.
- An attempt to obtain an expert report from a local orthopedic surgeon in April of 2022, which did not result in the retention of that expert.
- Difficulty obtaining timely instructions from WCB.
- Retention of Dr. Karabatsos in July of 2023.
- Timely provision of documents to Dr. Karabatsos.
- Scheduling of the IME to take place on September 20, 2023.

- Delivery of the unfiled expert report to the Defendants on November 7, 2023, filing of the expert report on November 7, 2023, and delivery of the filed expert report to the Defendants on November 9, 2023.

[14] The following assertions in the Plaintiff's brief were not supported by the affidavit evidence filed by the Plaintiff:

- That the change of Plaintiff's counsel in early 2021 "inevitably entailed a transition period for the Plaintiff's current counsel to familiarize with the materials, correspond with the client, strategize, and get instructions": para.66.
- That, once the Plaintiff commenced efforts to find an expert in 2022, "Plaintiff's counsel conducted research into viable experts, expanding its search into Ontario" and that "[t]hese efforts took time ...": at para.56.
- That, "[h]ad there been a qualified expert in Nova Scotia with availability, the Plaintiff might have filed a Rule 55 report sooner" and that "[d]ue to the lack of available experts in the field of orthopedics, the Plaintiff sought an expert in Ontario": at para.69.

Analysis

[15] The change of Plaintiff's counsel in February of 2021 does not explain the Plaintiff's delay in retaining an expert, which occurred approximately two-and-a-half years later.

[16] There is also no satisfactory explanation for why it took approximately 15 months, from April of 2022 when the Plaintiff contacted a local expert to July of 2023 when they contacted Dr. Karabatsos, for the Plaintiff to retain an expert.

[17] I rely on the following uncontested facts to conclude that the Plaintiff has not established the existence of exceptional circumstances justifying the late filing of Dr. Karabatsos' expert report:

1. WCB has known since May of 2018 that causation of Mr. Theriault's alleged injury was at issue.
2. The Plaintiff has known since November of 2020 that the Defendants would be relying on Dr. Johnston's report to challenge causation.
3. The Defendants followed up repeatedly with the Plaintiff about the planned expert report, and reminded the Plaintiff on numerous occasions about the deadline for expert reports.
4. From January of 2022 to July of 2023, Plaintiff's counsel was having difficulty obtaining instructions.
5. Even when the Plaintiff retained Dr. Karabatsos in July of 2023, it was only to conduct a paper review and give an oral opinion, despite the looming September 1, 2023 deadline.

1. WCB has known since May of 2018 that causation of Mr. Theriault's alleged injury was an issue

[18] It was in the context of Mr. Theriault's claim for WCB benefits that WCB asked Dr. Johnston to examine Mr. Theriault. Dr. Johnston assessed Mr. Theriault on May 11, 2018. In his May 11, 2018 letter to WCB, Dr. Johnston suggested that Mr. Theriault's injury was not acute, but rather arose from repetitive use over time.

The Plaintiff included Dr. Johnston's report in its Affidavit of Disclosing Documents in October of 2020.

2. The Plaintiff has known since November of 2020 that the Defendants would be relying on Dr. Johnston's report to challenge causation

[19] The Defendants raised Dr. Johnston's report during the Plaintiff's discovery in November of 2020. On April 6, 2022, counsel for the Defendants, Mr. Burke, emailed counsel for the Plaintiff, Mr. Downie, specifically noting that the findings in Dr. Johnston's report were not favourable to the Plaintiff. On April 22, 2022, Mr. Burke emailed Mr. Downie, indicating that the Defendants intended to rely on Dr. Johnston's report by stating that "Dr. Johnston's opinion and the MRI result cannot be ignored ..." In the Defendants' Memorandum for Date Assignment Judge filed on June 7, 2022, the Defendants identified Dr. Johnston as a witness at trial.

3. The Defendants followed up repeatedly with the Plaintiff about the planned expert report and reminded the Plaintiff about the deadline for expert reports

[20] In an email to Mr. Downie on December 22, 2022, Mr. Burke inquired about the Plaintiff's plan to obtain an IME to address the causation issue, and asked that they "move the needle" in early 2023.

[21] In an email to Mr. Downie on April 12, 2023, Mr. Burke followed up again.

[22] In an email to Mr. Downie on June 21, 2023, Mr. Burke again referred to Dr. Johnston's report, noting that "at this time we do not have a contrasting opinion," and noting the September 1, 2023 deadline.

[23] In an email to Mr. Downie on July 25, 2023, Mr. Burke again noted the September 1, 2023 deadline.

4. Difficulty obtaining instructions from WCB

[24] From January of 2022 to July of 2023, Mr. Downie had difficulty obtaining instructions from WCB in relation to the potential for settlement, as well as with respect to the expected IME.

[25] In an email to Mr. Burke dated January 10, 2022, Mr. Downie responded to an inquiry from Mr. Burke regarding an expected settlement proposal from the Plaintiff, stating that he was following with his client, and that "[i]t has been tough getting instruction on this one."

[26] In an email to Mr. Burke dated April 5, 2022, Mr. Downie responded to an inquiry from Mr. Burke regarding the status of the matter, stated that he just followed up with his client, and that "instruction has been difficult."

[27] In an email to Mr. Burke dated April 7, 2022, Mr. Downie responded to an inquiry from Mr. Burke, and stated “I will continue my quest for instruction.”

[28] In an email to Mr. Burke dated February 11, 2023, responding to Mr. Burke’s December 22, 2022 email about the expected IME, Mr. Downie stated that he was waiting for instructions.

[29] In an email to Mr. Burke dated July 25, 2023, Mr. Downie said that he had been trying to get in touch with his client, but that, unfortunately, “she is just very busy.”

5. As of July of 2023, the Plaintiff had still not requested an IME and expert report

[30] On July 17, 2023, Mr. Downie emailed Dr. Karabatsos to request a paper review and an oral opinion, after which the Plaintiff might request an IME and an expert report. Dr. Karabatsos cleared his conflicts on July 18, 2023. Mr. Downie’s office provided the documents to Dr. Karabatsos on July 26, 2023. Mr. Downie had a telephone call with Dr. Karabatsos on or around August 29, 2023, at which point the Plaintiff decided to request that he perform an IME and provide an expert report. On August 29, 2023, Mr. Downie informed Mr. Burke of the decision of the Plaintiff to retain Dr. Karabatsos and to “move forward” with an IME. Mr. Downie stated that he expected the IME to take place mid to end of September, and an

expert report to be filed in early October, 2023. On August 30, 2023, Mr. Downie informed Mr. Burke that the IME had been scheduled to take place on September 20, 2023 in Toronto.

Lack of Surprise?

[31] The Plaintiff argues that the prejudice to the Defendants caused by a late report is reduced because it was no surprise to the Defendants that the Plaintiff intended to rely on an expert report. I do not agree. When the Plaintiff did not file an expert report by late August, despite repeated prompting by the Defendants and reminders by the Defendants of the deadline for the filing of expert reports, it was reasonable in the circumstances of this case for the Defendants to assume that the Plaintiff was not going to be relying on an expert report and not to have a rebuttal expert ready to respond. When the report was filed late, it was reasonable for the Defendants to wait for the outcome of this motion before spending the time and money to respond: see *Conrad v. A.F.L. Manufacturing Limited* at para.66 and *Cole v. Strum* at para.19. Therefore, even though the Plaintiff had previously indicated that it intended to file an expert report, the prejudice that a late-filed report would cause the Defendants still exists.

Failure to Object until Two Days Before Deadline?

[32] The Plaintiff also asserts that the Defendants failed to object to the filing of the late expert report by the Plaintiff until two days before the deadline. This is not a fair characterization of the facts. Mr. Burke repeatedly reminded the Plaintiff of the deadline. The Defendants did not know until August 29, 2023, that the Plaintiff had retained Dr. Karabatsos and that the Plaintiff intended to file a late report.

Cases Relied on by Plaintiff

[33] The Plaintiff relies on the decisions in *Marshall v. Annapolis (County)*, 2009 NSSC 376 (Pickup J.) and *Stroh v. Blakeney*, 2020 NSSC 327 (Chipman J.). Those decisions are distinguishable.

[34] In *Marshall*, the plaintiff had objected to the admission of the defendants' expert report. When the plaintiff lost the motion, the plaintiff took steps to obtain an expert report that was responsive to the defendants' expert report. Justice Pickup was not satisfied that there was undue delay by the plaintiff in these circumstances. See para.25.

[35] In *Stroh*, Chipman J. found that the responsibility for the delay rested with the plaintiffs, who were not responsive to repeated requests by the defendants for hospital records. Chipman J. found that it was entirely reasonable for the defendant

to insist on receipt of these records before finalizing their expert evidence. See para.30.

Other Issues Raised by the Plaintiff

[36] The Plaintiff asserted that it would be unfair to disallow the Karabatsos report, but to allow the Defendants to rely on a late Treating Physician's Report. I disagree. The Plaintiff has not objected to the late filing of the Defendant's Treating Physician Report.

[37] In oral argument, the Plaintiff requested an alternative remedy: that the Court allow the Plaintiff to file a late Rebuttal Expert Report from Dr. Karabatsos. As there was no such motion before me, and as the Defendants did not have the opportunity to respond to any such motion, I decline to consider this alternative relief.

Conclusion

[38] The circumstances were not exceptional. They were not out of the control of the Plaintiff or unforeseen despite reasonable diligence. The Plaintiff did not exercise reasonable diligence. The Plaintiff had more than ample time, after the first attempt to retain an expert in April of 2022, to file an expert report before the

September 1, 2023 deadline. There was no satisfactory explanation for the delay. Even when the Plaintiff retained Dr. Karabatsos in July of 2023, the Plaintiff was not sufficiently concerned about the September 1, 2023 deadline. The Plaintiff delayed making the decision to request an IME and expert report until they obtained an oral opinion from Dr. Karabatsos on August 29, 2023, two days before the deadline.

[39] In light of these facts, the Plaintiff has not satisfied me that it would be unjust to exclude the expert report of Dr. Karabatsos. This is despite the probative value of the expert report, the fact that the report, while filed late, was filed seven months before the trial dates, and despite the possibility that an award of costs might remedy the prejudice to the Defendants should an adjournment of the trial dates be necessary.

[40] The motion is dismissed. The Defendants are entitled to their costs of this motion in the amount of \$1500, payable forthwith. Counsel for the Defendants is to prepare the draft order.

Gatchalian, J.