
CANADA / JUDGMENT

Alnoor v. Colgate-Palmolive Canada Inc.

2012 BCSC 1342

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 1324 Alnoor v. Colgate-Palmolive Canada Inc

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Alnoor v. Colgate-Palmolive Canada Inc.,

2012 BCSC 1342

Date: 20120104

Docket: S073286

Registry: Vancouver

Between:

Saliha Alnoor

Plaintiff

And

Colgate-Palmolive Canada Inc.

Defendant

Before: The Honourable Madam Justice Wedge

Oral Reasons for Judgment

Appearing on her own behalf:

S. Alnoor

Counsel for the Defendant:

K.J. McLaren

G. Sexton

Place and Date of Trial:

Vancouver, B.C.

January 3 and 4, 2012

Place and Date of Judgment:

Vancouver, B.C.

January 4, 2012

- [1] THE COURT: This action arises from an alleged defect in a toothbrush manufactured by the defendant Colgate-Palmolive Canada. Ms. Alnoor alleges that she was seriously injured when the toothbrush fractured in two places while she was brushing her teeth. She claims substantial damages for injuries she says she suffered as a result.
- [2] Ms. Alnoor has raised three preliminary issues that require determination before the calling of evidence can commence in the trial. The first issue is the effect of the failure of the defendant to produce its named representative for examination for discovery on December 20, 2011. The second issue is whether, as the plaintiff asserts, the failure of the defendant to produce at trial its president, Scott Jeffery, pursuant to the plaintiff's notice to call him as an adverse witness, should result in judgment in favour of the plaintiff pursuant to Rule 12-5 of the Rules of Court. The third issue is whether certain alleged defects in the service of the defendant's expert reports should bar the defendant from relying on those reports.
- [3] The first two issues are somewhat related for reasons that should become apparent in due course. As a result of the alleged failure of the defendant to produce Mr. Wong for examination for discovery, Ms. Alnoor seeks a declaration that the defendant is deemed not to have filed a defence to her claim. I will deal with that and the adverse witness notice first.
- [4] By way of background, Ms. Alnoor filed her claim on May 11, 2007, making certain amendments to her claim in December 2009. In her claim, she alleged that on October 25, 2006, while using a toothbrush manufactured by the defendant, known as the Active Angle toothbrush, it suddenly fractured in two places, creating a hazardous instrument which caused injury to her mouth and gums.
- [5] In her amended statement of claim, the plaintiff alleges as follows at paragraphs 5 to 7:
5. The Defendant owed a duty of care to the Plaintiff and others to ensure that the toothbrush was safe and suitable for the purpose for which it was to be sold.
 6. The Defendant failed in its duty of care owed to the Plaintiff and others to properly test the suitability and safety of the Active Angle toothbrush before releasing the said product into the marketplace.

7. The Active Angle toothbrush suffered from serious mechanical design flaws which were known or ought to have been known by the Defendant at all times material to this claim.
- [6] The above pleadings were drafted by legal counsel retained by Ms. Alnoor at the time. Those are the grounds upon which the plaintiff has advanced her claim. Accordingly, those grounds provide the parameters for the preliminary applications brought by the plaintiff concerning the discovery of the defendant's representative and the adverse witness notice issued with respect to the defendant's president, Mr. Jeffery.
- [7] On September 16, 2011, the plaintiff unilaterally filed a notice of trial, setting the matter for four days commencing January 3, 2012. At that time, Ms. Alnoor had not yet conducted an examination for discovery of a defendant representative. The chronology of events concerning the discovery is instructive. In 2008, the plaintiff named Mr. Scott Jeffery, the defendant's president, as her chosen representative to examine for discovery. The defendant brought an application before Master Taylor of this Court for an order that Mr. Jeffery was not an appropriate representative of the defendant to examine for discovery, due to his lack of knowledge of any issue engaged in the litigation. Master Taylor agreed and ordered the defendant to nominate an appropriate discovery representative. The defendant nominated Mr. Chi Shing Wong, a member of the Research and Development Department and a Ph.D. in chemistry who, within the defendant corporation's structure, dealt with the testing of the toothbrushes to ensure they were safe for use.
- [8] The defendant proposed a discovery date for Mr. Wong of February 11, 2009. On the basis of that discovery date, the defendant's litigation counsel and Mr. Wong booked flights and made hotel accommodation arrangements. However, on February 9, the plaintiff cancelled the examination for discovery, claiming that the date had not been confirmed in time for her to serve the appointment notice.
- [9] The defendant then made several attempts to reach a mutually agreeable discovery date, but they ended with the plaintiff advising that she was going to set the discovery date unilaterally. The last attempt was made by the defendant in December 2009, when its counsel advised the plaintiff that Mr. Wong could be available January 28 or 29, 2010. However, the plaintiff did not indicate her agreement to either date. Thereafter the issue of Mr. Wong's discovery lay dormant for almost two years.
- [10] It was not until a case planning conference on December 5, 2011, before Madam Justice Russell, that the plaintiff indicated her intention to conduct the discovery of Mr. Wong before the trial, which was set to commence January 3, 2012. Madam Justice Russell ordered that any discovery must be conducted by the plaintiff by December 20, 2011.

- [11] The plaintiff advised the Court in the course of her present application that Russell J. ordered the defendant to produce Mr. Wong for discovery on December 20. That is not an accurate description of what occurred. The clerk's notes of the case planning conference clearly indicate that Russell J. was directing the plaintiff to either conduct the examination for discovery by December 20 or forego discovery altogether.
- [12] Ms. Alnoor advised the defendant of her intention to examine Mr. Wong on December 20, but neither took out an appointment nor provided conduct money for Mr. Wong's attendance. She advised the defendant that she had booked an airline ticket for Mr. Wong, which he could pick up at the airport in New York on the day of his flight. That arrangement was not in accordance with the Rules. In any event, when Mr. Wong was contacted by defendant's counsel, he advised that he had long before booked holiday plans and was scheduled to be travelling with his family by December 20. At that point, counsel for the defendant advised the plaintiff that the defendant was willing to adjourn the January 3, 2012 trial date to permit her to examine Mr. Wong in the New Year. The plaintiff refused the offer.
- [13] At the same case planning conference on December 5, 2011, the plaintiff advised that she intended to issue adverse witness notices to certain individuals she believed to be employees of the defendant. One of those was Mr. Jeffery, the president of the company. At the trial management conference the following day, December 6, the presiding judge, Mr. Justice Harris, ordered that the plaintiff advise the defendant by December 9 as to whether she was in fact intending to issue adverse witness notices to these individuals, in which case the defendant was entitled to apply under Rule 12-5 to set the notices aside. Mr. Justice Harris also ordered that any such application be heard by December 14, 2011.
- [14] On December 9, the plaintiff advised of her intention to call Mr. Jeffery and two other individuals, a Mr. Cook and a Mr. Holland. The defendant brought on the application on December 14, seeking orders both with respect to the issue of the examination for discovery of Mr. Wong, and the notices filed by the plaintiff with respect to the calling of the named adverse witnesses.
- [15] With respect to the examination for discovery of Mr. Wong, the defendant sought an order that the trial be adjourned so the discovery could take place on a mutually agreeable date, or alternatively an order that the plaintiff had foregone her right to examine a representative of the defendant before trial. With respect to the adverse witness notices, the defendant sought an order that all three be struck. With respect to Mr. Holland and Mr. Cook, the defendant argued that these individuals were not employees of the defendant and therefore not adverse parties. With respect to Mr. Jeffery, the defendant argued that his evidence was unnecessary within the meaning of Rule 12-5.

- [16] The master hearing the application on December 14 inquired of Ms. Alnoor whether she intended to proceed with the trial on January 3, whether or not she first examined Mr. Wong. Ms. Alnoor advised the master that she did intend to proceed to trial, regardless of whether she examined Mr. Wong. On that basis, the master appears to have declined to issue any order concerning the discovery.
- [17] On the issue of the adverse witness notices, the master agreed with the defendant that neither Mr. Holland nor Mr. Cook was employed by the defendant, and accordingly they were not adverse witnesses. Those notices were struck accordingly.
- [18] The affidavit evidence concerning Mr. Jeffery was that he had no knowledge concerning the testing, design or manufacture of toothbrushes and had no other knowledge concerning the issues in the litigation.
- [19] The learned master observed in his reasons that he "frankly doubted" that Mr. Jeffery could provide any evidence of assistance to the plaintiff. Nevertheless, he declined to strike the notice.
- [20] The plaintiff provided defendant's counsel with a cheque for \$1,200 which she advised was sufficient to cover Mr. Jeffery's airfare to Vancouver on January 2, arriving at 1:00 a.m. January 3, returning the evening of January 3 on a red-eye flight to Toronto, and to cover, as well, one night's accommodation in a motel.
- [21] Counsel for the defendant advised the plaintiff that \$1,200 was far from adequate or reasonable conduct money in the circumstances. He advised that an amount of \$3,000 was a realistic amount. The plaintiff declined to provide further conduct money.
- [22] Counsel for the defendant advised the plaintiff that he intended to apply at the commencement of this trial for a ruling setting aside the adverse witness ruling of the master. The defendant did make that application yesterday. The defendant argued that it was not obligated to produce Mr. Jeffery because, first, the plaintiff had failed to provide reasonable conduct money, and secondly, and in the alternative, the master was clearly wrong to decline to set aside the adverse witness notice.
- [23] The first issue, then, is whether to sustain the plaintiff's position concerning the failure of the defendant to produce Mr. Wong for examination for discovery on December 20, 2011. The plaintiff resisted any suggestion that the trial ought to be adjourned to permit the discovery to take place. I am satisfied that the plaintiff's position concerning the discovery of Mr. Wong cannot be sustained. There is no reasonable basis for the plaintiff's failure to pursue Mr. Wong's examination in the two years prior to trial.
- [24] Ms. Alnoor argued that the defendant failed to produce documents necessary for the preparation of Mr. Wong's discovery. There were ongoing disputes about document production, but the plaintiff rejected any offer by the defendant to produce the requested documentation under certain conditions. She instead sought an order for unconditional production. Master Scarth, in an order dated October 31, 2011, ordered production on the

very conditions offered earlier by the defendant. Even then, the plaintiff failed to review the documents with her expert until last month.

- [25] I am satisfied that Ms. Alnoor waited until the last possible moment to seek discovery of Mr. Wong, and when she did demand his attendance on December 20, failed to both issue an appointment and provide reasonable conduct money. She knew or ought to have known that Mr. Wong would unlikely be in a position on 10 days' notice to travel from New Jersey to Vancouver, a mere few days before Christmas. It was equally unreasonable to advise the defendant that he could pick up his airline ticket at the airport in New York. That does not comply with the requirements that a witness be provided reasonable conduct money.
- [26] The defendant suggested, both at the case planning conference and the trial management conference in December, that the trial be adjourned to give the plaintiff the opportunity to examine someone within the corporation with knowledge of the design, manufacture, and testing of the toothbrush brand in question. That discovery would then give the plaintiff a proper basis to select witnesses for trial. However, the plaintiff declined and has chosen to proceed with the trial in the absence of any pre-trial examination of an appropriate defendant representative.
- [27] Further, the defendant has tried on numerous occasions to produce Mr. Wong. It is Ms. Alnoor who has failed to take the opportunity provided to her under the Rules. Her objection is accordingly dismissed.
- [28] I turn then to the question of the adverse witness notice issued to Scott Jeffery. The adverse witness rules are contained in Rule 12-5 of the Rules of Court. The relevant provisions of Rule 12-5 are subrules (20), (21), (23), and (24). They provide as follows:
- (20) Subrules (21) to (24) apply if a party wishes to call as a witness at the trial
- (a) an adverse party . . .
- (21) If a party wishes to call as a witness a person referred to in subrule (20) (a) . . . the party must serve on the adverse party a notice in Form 45 together with proper witness fees at least 7 days before the date on which the attendance of the intended witness is required.
- . . .
- (23) The court may set aside a notice served under subrule (21) on the grounds that
- (a) the adverse party is unable to procure the attendance of the person named in the notice,
- (b) the evidence of the person is unnecessary,
- (c) it would work a hardship on the person or the adverse party to require the person to attend the trial, or
- (d) the person named in the notice is not a person referred to in subrule (20) (a) or (b).

- (24) On an application under subrule (23), the court may make any order it considers will further the object of these Supreme Court Civil Rules, including, without limitation, an order adjourning the trial.
- [29] The recent decision of Mr. Justice Butler in *Dawson v. Tolko Industries Ltd.*, 2010 BCSC 1384, examines the meaning and effect of these provisions in detail. He observed at para. 18 that the Court is granted only limited jurisdiction to set aside an adverse witness notice. It is only where the evidence of the person is "unnecessary" that the Court can set aside the notice.
- [30] Further, as the Court noted at para. 19, it is only in a clear case that a judge should exercise his or her discretion to set aside a subpoena on the ground that the evidence is unnecessary. That is because the Court should be very cautious about second guessing the litigants concerning the benefits they may derive from calling a particular witness.
- [31] I agree with those comments. However, the Court is also granted discretion under subrule (24) which provides that where an application is made to strike an adverse witness notice, the Court may make any order it considers will further the objects of the rules.
- [32] As I noted earlier, Ms. Alnoor first attempted over two years ago to issue an appointment to examine Mr. Jeffery for discovery. However, the Court ruled that Mr. Jeffery was not the appropriate representative on the basis that his position in the company is strictly managerial. He has no knowledge pertaining to any of the issues arising in the litigation. Ms. Alnoor has been clear that she wants to call Mr. Jeffery, not because he has any knowledge of the issues in the lawsuit, but because he is the person within the corporation who is ultimately responsible for the corporation's actions, its consumer safety policies, and its recall policies. She points to the various mission statements on the defendant's website, published over Mr. Jeffery's signature.
- [33] Ms. Alnoor wishes to question Mr. Jeffery about his statement that the defendant is committed to consumer safety, about his responsibility for product safety, and its recall policies. She wants to ask Mr. Jeffery why the company did not recall the toothbrush model in question before she purchased one. Because Mr. Jeffery is the president, submits the plaintiff, he must be the one ultimately responsible to recall products and warn consumers, and she wants to question him about those responsibilities.
- [34] The difficulty with Ms. Alnoor's argument is that the evidence she seeks to elicit from Mr. Jeffery is not relevant to the proof of her claim. She has brought a negligence action against the defendant. She must establish that the defendant was negligent in the manufacture, design, and/or testing of the toothbrush such that it was defective, and that the defect caused the harm the plaintiff alleges she suffered when using it. Any acknowledgment by Mr. Jeffery that he is the person ultimately responsible for the defendant's actions, including its recall policies, will not advance the plaintiff's claim in any way.

- [35] The identity of the person ultimately responsible and any acknowledgment by that person that he is ultimately responsible by virtue of his management position within the company is simply irrelevant to the negligence factors the plaintiff must prove in order to succeed in her claim.
- [36] In the event that Ms. Alnoor does establish her claim, the corporation, not Mr. Jeffery or any other senior management person, will be held liable for the damages flowing from the corporation's negligence. That is so whether or not Mr. Jeffery acknowledges the various responsibilities he has as the corporation president. The company will be liable whether or not Mr. Jeffery had any idea that his company was manufacturing a defective product.
- [37] In short, the evidence Ms. Alnoor intends to elicit from Mr. Jeffery is not relevant to the issues in the lawsuit. Irrelevant evidence is not admissible. It is unnecessary evidence within the meaning of the Rule.
- [38] Further, and in any event, Ms. Alnoor failed to comply with the Rule which states that proper witness fees must be tendered prior to the date on which the witness is to attend the trial. The amount tendered by Ms. Alnoor was not reasonable. It was not reasonable to calculate the witness fee based on airfare flights that require a witness to travel during the night and stay in accommodations outside Vancouver's downtown core.
- [39] The notice is accordingly set aside on that basis. Further, I conclude that the master was clearly wrong when he declined to set aside the adverse witness notice, and I order that the notice be set aside on that basis as well.
- [40] I turn then to the final preliminary matter raised by Ms. Alnoor. She has asked the Court to rule inadmissible the expert reports on which the defendant intends to rely, on the basis that they were formally served on her outside the time limits set by the Rules.
- [41] The defendant relies on two expert reports. The first is a report by an engineering expert, a Mr. Bailey, whose opinion is responsive to the opinions filed by the engineering expert retained by the plaintiff, Mr. West.
- [42] The second is a report of a dental expert, Dr. Tobias, whose opinion is responsive to the medical opinions of two doctors retained by the plaintiff.
- [43] The affidavit material establishes the following: With respect to the opinion of Mr. Bailey, by letter dated July 5, 2010, counsel for the defendant provided the plaintiff's former legal counsel with a copy of Mr. Bailey's report, which was dated June 18, 2010.
- [44] The plaintiff's former counsel, by letter dated September 10, 2010, provided defendant's counsel with the expert engineering report of Mr. West. That report was dated September 17, 2009. On March 10, 2011, the plaintiff produced to the defendant a second report of Mr. West which was dated June 9, 2009. As I have noted earlier, on September 16, 2011, the plaintiff served the defendant with the notice of trial, scheduling it unilaterally for January 3, 2012. That trial date triggered the timelines for the formal service of expert reports.

Under the Rules, reports must be filed 84 days in advance of the trial, or in this case by October 11, 2011, in accordance with the Rules. Rebuttal responsive reports are required to be served on or before November 22. The defendant formally served Mr. Bailey's report on October 20, nine days after the 84-day deadline. On October 24, the defendant filed a second Bailey report which was specifically formatted as an opinion offered in response to the report of Mr. West.

- [45] I am satisfied that both reports are in fact responsive to the reports of Mr. West, and therefore not in breach of the timelines under the Rules. Even if they were not responsive reports, they were filed soon after the 84-day deadline, such that there has been no prejudice whatsoever suffered by the plaintiff.
- [46] Accordingly, the plaintiff's objection to Mr. Bailey's reports cannot be sustained.
- [47] I turn then to the medical report of Dr. Tobias on which the defendant relies. On March 10, 2011, the plaintiff provided to the defendant the medical reports of Dr. Lum, a family physician, and a dentist, Dr. Kennedy. On August 18, 2011, counsel for the defendant requested of the plaintiff by letter that Dr. Lum and Dr. Kennedy produce their complete medical files pertaining to the treatment of the plaintiff. As noted earlier, the plaintiff issued the notice of trial on September 16. On September 19, counsel for the defendant advised the plaintiff by letter that he opposed the notice of trial and may not be able to produce any expert medical report in response to those of Doctors Lum and Kennedy prior to the deadline, because she had not yet produced her full medical records.
- [48] On November 8, 2011, 56 days before trial, the defendant formally served on the plaintiff the report of Dr. Tobias, which is responsive to the reports of the plaintiff's medical experts. The report was completed and filed, although the plaintiff had not yet produced her complete medical records.
- [49] I am satisfied that the Tobias report is in fact responsive to the reports of the plaintiff's medical experts, and is therefore timely. Alternatively, as it was filed 56 days before trial and largely addressed the issues raised in the plaintiff's experts' reports, there was no prejudice suffered by the plaintiff in receiving the reports at that time. Accordingly, the plaintiff's objection to the admissibility of the report is dismissed.
- [50] The formal service by the plaintiff of her expert reports are also in technical breach of the timelines under the Rules. However, the defendant has advised that it agrees to waive any objection to those breaches.

[51] Those are my rulings with respect to the preliminary objections.

[DISCUSSION RE PROCEDURE]

[PROCEEDINGS ADJOURNED]

[PROCEEDINGS RECONVENED]

[SUBMISSIONS]

[PROCEEDINGS ADJOURNED]

[PROCEEDINGS RECONVENED]

[SUBMISSIONS]

[PROCEEDINGS ADJOURNED]

[PROCEEDINGS RECONVENED]

[52] THE COURT: Mr. McLaren?

[53] MR. McLAREN: My Lady, I just advise the Court that over the break I was able to obtain instructions that our clients are willing to waive costs, in exchange for a consent dismissal order and a release being executed by the plaintiff. I conveyed that offer to the plaintiff.

[54] THE COURT: Ms. Alnoor?

[55] SALIHA ALNOOR: I agree with Mr. McLaren.

[56] THE COURT: All right, very good, thank you, Ms. Alnoor. There will be an order dismissing Ms. Alnoor's claim against the defendant. That order is going by consent of the parties.

[57] MR. McLAREN: My Lady, I do have a draft order.

[58] THE COURT: Oh, you do, very good.

[59] MR. McLAREN: I also have a copy of a proposed release.

[60] THE COURT: All right, why do you not hand that up.

[61] MR. McLAREN: Would you like to see both the order and the release, or just the --

[62] THE COURT: Yes.

[63] MR. McLAREN: Okay.

[64] THE COURT: Of course the consent order will go on the condition that there will be no costs against Ms. Alnoor.

The Court orders that:

- (1) the within proceedings be dismissed against the defendant, Colgate-Palmolive Canada Inc., without costs; and
- (2) such dismissal will be for all purposes, of the same force and effect as if judgment had been pronounced at the trial of this action on its merits.

That is a usual, customary form of consent order.

[DISCUSSION RE TIME FOR MS. ALNOOR TO REVIEW RELEASE]

[PROCEEDINGS ADJOURNED]

[PROCEEDINGS RECONVENED]

[65] MR. McLAREN: Yes, My Lady, Ms. Alnoor has reviewed the release. I believe the only comment is with respect to a confidentiality term. Ms. Alnoor has requested that I make it clear that the paragraph in the release regarding her disclosure of documents indicates that they are not responsible for any documents that may have become a matter of public record already, and that if other persons are to access documents that are of public record, that there is no responsibility on Ms. Alnoor for that. I am going to write a term to that effect, and then I believe that the release will then be satisfactory and we can conclude. So I just -- I'll just take 30 seconds to do that.

[66] THE COURT: All right. In the meantime, I will pass back the order for the parties' signature, and then I will endorse it.

[67] MR. McLAREN: There's a question to the first term of the order. It says without costs. Ms. Alnoor is inquiring whether that refers to without costs to either party. In my submission --

[68] SALIHA ALNOOR: It refers to me?

[69] MR. McLAREN: Yes.

[70] SALIHA ALNOOR: I just wanted to be clear, for the plaintiff.

[71] ABE ALNOOR: For both parties.

[72] SALIHA ALNOOR: Without cost to the plaintiff.

[73] MR. McLAREN: I can add the -- just to fix it, without costs to either party.

[74] THE COURT: Yes, that is fine.

[75] MR. McLAREN: I will initial that and I will ask Ms. Alnoor to initial that.

[76] THE COURT: I will initial it as well.

[77] MR. McLAREN: I have added the following term to page 2 of the release, and I think this should satisfy the concerns, I will initial this, as well, and ask Ms. Alnoor to initial it. I have added: Any documents that have already become a matter of public record and are accessed or released by other parties not at the direction of the releasor shall not be the responsibility of the releasor.

[78] THE COURT: That is acceptable, Ms. Alnoor?

[79] MR. McLAREN: You should just initial that change as well. Mr. Alnoor, if you could sign as a witness to that.

[80] THE COURT: Once the consent order is signed, if it could be just passed back up and I will endorse it.

The Honourable Madam Justice C.A. Wedge

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