

CANADA / JUDGMENT

Calver v. 1020781 B.C. Ltd. (Harbour Event Centre)

2020 BCSC 923

COURT

Supreme Court of British Columbia

DECIDED

19 June 2020

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2020 BCSC 923 Calver v. 1020781 B.C. Ltd. (Harbour Event Centre) IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Calver v. 1020781 B.C. Ltd. (Harbour Event Centre), 2020 BCSC 923 Date: 20200619 Docket: S172354 Registry: Vancouver Between: Krystal Calver Plaintiff And: 1020781 B.C. Ltd. dba Harbour Event Centre, AMHM entertainment Group dba Prive Nightclub, Leigh A Cousins dba Flygirl Productions, Canadian Metropolitan Properties Corp., Richell Brea Trelenberg, Dallas Anastacia Madge, John doe #1, John Doe #2 and ABC Company Defendants And: 1020781 B.C. Ltd. dba Harbour Event Centre, Leigh A. Cousins dba Flygirl Productions, Canadian Metropolitan Properties Corp., Richelle Brea Trelenberg, Dallas Anastacia Madge, John Doe #1, John Doe #2 and ABC Company Third Parties Before: The Honourable Mr. Justice G.C. Weatherill Decision on Application by way of Written Submissions Counsel for the Plaintiff: R. Dasanjh Counsel for the Defendants and Third Parties: C. Kennedy Written Submissions filed: June 16, 2020 Place and Date of Decision: Vancouver, B.C. June 19, 2020

[1] The plaintiff claims to have suffered multiple injuries as a result of being assaulted on August 1, 2016 while a patron at the defendants' nightclub facility ("Incident"). The alleged injuries include:

- a) head and neck injury;
- b) concussion;
- c) strangulation;
- d) binocular vision dysfunction;
- e) neuro-ocular vestibular dysfunction;
- f) body soreness;
- g) contusion to her ribs;
- h) nausea;

- i) light sensitivity;
 - j) anxiety; and
 - k) depression.
- [2] This is an application by the defendants under Rule 7-6 of the Supreme Court Civil Rules [SCCR] for an order that the plaintiff appear at the offices of Ms. Theresa Wong, Occupational Therapist, located at 500-1199 West Hastings Street, Vancouver, BC on Monday, June 29, 2020 at 9 a.m. and submit to a functional capacity evaluation ("FCE") and, as part of that evaluation, answer questions asked of her by Ms. Wong for the purpose of ascertaining the extent of the plaintiff's injuries and/or disabilities resulting from the incident which is the subject matter of this action.
- [3] The 15-day trial of this action is scheduled to commence on November 15, 2020. Accordingly, the deadline for service of expert reports under the SCCR is August 21, 2020.
- [4] On May 5, 2020, the plaintiff served the following expert reports on counsel for the defendants:
- a) Medical-Legal Reports of Dr. George Medvedev, Neurologist, dated October 20, 2017 and April 21, 2020;
 - b) Medical-Legal Reports of Dr. Jaymi Dumper, Otolaryngologist, dated March 25, 2019 and April 21, 2020;
 - c) Medical-Legal Report of Dr. Hendre Viljoen, Psychologist, dated April 29, 2020;
 - d) Cost of Future Care Report of Ms. Giovanna Boniface, Occupational Therapist, dated April 20, 2020; and
 - e) Loss of Earnings and Cost of Future Care Reports of Mr. Kevin Turnbull, Economist, dated April 23, 2020 and May 4, 2020 respectively.
- [5] It is apparent from these expert reports and, in particular, that of the economist, Mr. Turnbull, that the plaintiff will be seeking significant damages at trial including in respect of loss of future earning capacity and the costs of future care. She will be doing so on the basis that she is unable to work in any capacity as a result of the Incident.
- [6] On May 20, 2020, counsel for the defendants wrote to counsel for the plaintiff requesting that the plaintiff attend independent medical assessments ("IMEs") with a neurologist (Dr. Frank Kemble), a psychiatrist (Dr. Darcy Muir), and an FCE with Ms. Theresa Wong. Plaintiff's counsel responded that the plaintiff would attend the IMEs with Drs. Kemble and Muir but she would not attend the FCE with Ms. Wong.

- [7] The plaintiff takes the position that the FCE will overlap the combined areas of expertise of Drs. Kemble and Muir who collectively are qualified to opine of the plaintiff's functional capacity to work. In addition, the plaintiff submits that an FCE by the defendants is not necessary because she will not be tendering her own FCE at trial but, rather, only a cost of future care report (albeit prepared by an occupational therapist),
- [8] A significant issue at trial will be whether the plaintiff suffered a loss of function and earning capacity as a result of the Incident and, if so, to what extent. That issue necessarily raises the extent to which the plaintiff is both emotionally and physically capable of working. Drs. Kemble and Muir will presumably be opining on the former. The latter is within the area of expertise of an occupational therapist, not a neurologist or a psychiatrist.
- [9] The order sought is discretionary. In my view, the defendants are entitled to conduct an independent assessment of the plaintiff's physical functional capacity regardless of whether the plaintiff intends to conduct one herself. Such an assessment is not only appropriate but necessary in this case. It will even the playing field and allow the defendants an opportunity to adequately prepare for trial, the very purpose of Rule 7-6: *Stainer v. Plaza*, 2001 BCCA 133 at paras. 13-15; *Hamilton v. Pavlova*, 2010 BCSC 493 at paras. 10-16. I do not accept that an FCE will be a duplication of or an attempt to bolster the opinions of Drs. Kemble and Muir. Each will bring to bear different qualifications and expertise for the purpose of assisting the court, particularly given the likely quantum of damages that will be claimed: *Kim v. Lin*, 2010 BCSC 1386 at paras. 26-27, 33-35.
- [10] The application is granted. The defendants will pay all reasonable fees and expenses incurred by the plaintiff for travel to and from the FCE.
- [11] The defendants are entitled to their costs of this application in any event of the cause, at Scale B. "G.C. Weatherill J."

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