
CANADA / JUDGMENT

Fox v. Merricks

2020 BCSC 1178

COURT

Supreme Court of British Columbia

DECIDED

10 August 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1178 Fox v. Merricks

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fox v. Merricks,

2020 BCSC 1178

Date: 20200810

Docket: M33520

Registry: Chilliwack

Between:

Nikkita Fox

Plaintiff

And

Philip Merricks and Kathleen Joan Anderson

Defendants

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

N. Cooper

Counsel for the Defendants:

J.T. Dunning

Place and Date of Hearing:

New Westminster, B.C.

August 4, 2020

Place and Date of Judgment:

Chilliwack, B.C.

August 10, 2020

Introduction

- [1] On an application in Chambers, the defendants seek an order, pursuant to Rules 1-3(1), 7-6 and 14-1 of the Supreme Court Civil Rules, that the plaintiff attend and participate in an independent medical examination ("IME") in the offices of Dr. John Watterson, rheumatologist, at 839 West Broadway, Vancouver, BC, V5Z 1J9, on August 14, 2020, commencing at 9:00 am. The defendants also seek costs in any event of the cause.
- [2] The plaintiff opposes the application, and the plaintiff has advised the defendants that she will not attend the IME without a court order requiring that she attend the IME.

Factual Background

- [3] This case arises out of a motor vehicle accident which occurred on May 14, 2016. The plaintiff filed a Notice of Civil Claim on October 30, 2017, claiming the defendants were at fault for her injuries sustained that day. The Notice of Civil Claim included 22 numbered items alleging physical injuries and pain resulting therefrom, as well as psychological injuries including anxiety and sleep disruption.
- [4] The examination for discovery of the plaintiff took place on October 25, 2019. The trial of this action was originally scheduled to take place in Chilliwack, BC, over five days commencing May 11, 2020. Like many other cases, that trial date was adjourned because of the COVID-19 pandemic. The trial of this action has been re-scheduled for March 22, 2021.
- [5] In preparation for trial, the plaintiff served two expert medical reports. The first was a report of Dr. Robinson, a neurologist, dated December 5, 2017. The second report was prepared by Dr. Shuckett, a rheumatologist, dated January 2, 2020.
- [6] In the report of Dr. Robinson, note was made of the plaintiff reporting soft tissue injuries to her neck and back, and headaches from a previous motor vehicle accident likely aggravated in the current motor vehicle accident. Dr. Robinson also expressed the view that it was unlikely the plaintiff suffered a mild traumatic brain injury (concussion).

- [7] Dr. Shuckett diagnosed the plaintiff as having suffered headaches, dizziness with vertigo and tinnitus, neck pain, suspected left thoracic outlet syndrome, musculoligamentous upper and mid back pain with mechanical low back pain and right sacroiliac sprain with some irritability on motion of the right hip, knee pain, Joint Hypermobility Syndrome, and fibromyalgia with central sensitization. Dr. Shuckett described that the plaintiff told the doctor she has had Ehlers-Danlos Syndrome ("EDS") all of her life and had difficulties from this with joint mobility (Exhibit "G" to the Affidavit of Angela Shannon, para. 2).
- [8] In the same Exhibit at p. 40, para. 23, the plaintiff is reported to have advised Dr. Shuckett that she was on long-term disability before the motor vehicle accident because of severe anxiety and depression and for symptoms that have now been diagnosed as EDS. The EDS was just diagnosed in her this year. I am not clear as to whether, for some intervals, she may have worked part-time to supplement her long-term disability before the 2016 MVA.
- [9] On p. 41 of the same Exhibit, in paras. 31 and 32, the plaintiff has provided descriptions of the symptoms of the EDS.

[10] While giving an opinion in the same Exhibit, Dr. Shuckett at p. 58 states:

Her [Ehlers]-Danlos syndrome (EDS), with joint hypermobility, probably rendered her neck and other areas of the body including the back and shoulder area to be more vulnerable to effects of each of the MVAs including the old 2011 MVA and the current claim 2016 MVA. Patients with loose joints or joint hypermobility syndrome are more vulnerable to ligament[o]us sprain around the spine and peripheral joints in the setting of injury.

[11] In the same document at p. 60, Dr. Shuckett states:

She has a history of joint dislocations. She does fulfil the Beighton's criteria for joint hypermobility. I do believe she probably has EDS of the joint hypermobility type. Her son appears to have this as well and may have a more severe form of EDS, with some abnormality of the aortic vessel.

This EDS would've been pre-existing as an inheritable disorder. I do not believe that it is accounting for her musculoskeletal systems of its own accord. However it would probably rendered her ligaments to be more vulnerable to stretching and being strained in the setting of an MVA injury.

- [12] On the same page as the quote above, Dr. Shuckett opined on the plaintiff's symptoms of fibromyalgia and central sensitization.
- [13] Dr. Shuckett's report was served on counsel for the defendants on February 12, 2020. The defendants had already served medical legal reports by Dr. Yu, an orthopaedic surgeon, on January 6, 2020 and Dr. Spivak, a physiatrist, on January 25, 2020. Neither Dr. Yu nor Dr. Spivak discussed nor opined on the plaintiff's rheumatic condition or fibromyalgia. Dr. Yu provided advice in Exhibit "Q" to the Affidavit of Angela Shannon that diagnosis of fibromyalgia and EDS is outside the expertise of an orthopaedic surgeon and that "EDS is a

genetic disorder of connective tissue characterized by loose joints and ligaments where diagnosis is made clinically by hypermobility of joints and ligaments which has to be confirmed by a skin biopsy".

- [14] On April 7, 2020, counsel for the defendants advised counsel for the plaintiff that an IME of the plaintiff had been scheduled on July 9, 2020 with Dr. John Watterson, a rheumatologist. Counsel for the plaintiff replied by email on April 17, 2020, that the plaintiff would not attend the scheduled examination.
- [15] Counsel for the defendants wrote to plaintiff's counsel on April 17, 2020, explaining that the interaction of the EDS and soft-tissue injuries suffered by the plaintiff were the proper subject for examination by a rheumatologist.
- [16] By letter dated May 5, 2020, plaintiff's counsel repeated that the plaintiff would not be attending any further IMEs unless ordered to do so by the court. This letter did not contain any further reason for the plaintiff's refusal.
- [17] The defendants have scheduled a further IME of the plaintiff by Dr. Watterson for Friday, August 14, 2020. The plaintiff's counsel again advised that the plaintiff would not attend unless ordered to do so by the court.
- [18] By letter dated June 17, 2020, Dr. Watterson answered questions posed by counsel for the defendants concerning the diagnosis and treatment of EDS and whether the diagnosis and treatment of EDS is within the expertise of a rheumatologist. Dr. Watterson described this syndrome as "a group of genetic disorders involving connective tissue disease characterized by features of the joint hypermobility, tissue fragility and skin hyper extensibility". He continued that rheumatologists diagnose and treat patients with EDS in conjunction with physiatrists and sports medicine practitioners. Important in the case at bar, Dr. Watterson also stated:

As mentioned above there is no specific genetic test, laboratory test or imaging studies which can make a diagnosis of hypermobility or hyper mobile subtype of EDS. For this reason, the assessment and diagnosis is based on clinical parameters, a thorough history and physical examination would be necessary.

- [19] Counsel for the plaintiff has suggested that Dr. Watterson could read the opinion of Dr. Shuckett and review other clinical records to reach a diagnosis. Dr. Watterson clearly states a physical examination of the plaintiff is a necessity for a clinical opinion to be formed. Also, Dr. Shuckett's diagnosis of fibromyalgia is the first such diagnosis of the plaintiff.
- [20] Counsel for the plaintiff stated in his own Affidavit that the plaintiff would suffer discomfort driving to a medical appointment. Counsel also asserts in his Affidavit that the plaintiff's in-person attendance is not necessary. Plaintiff's counsel does not offer any expertise in the diagnosis of EDS. This assertion is contrary to the medical assertions of Dr. Yu and Dr. Watterson. I can give this statement by counsel for the plaintiff no evidentiary weight.

Applicable Law

- [21] The defendants rely upon the Supreme Court Civil Rules, including rule 7-6, which provides that if the physical or mental condition of a person is an issue in an action, the court may order that person to submit to an examination by a medical practitioner. The medical practitioner performing the IME may ask relevant questions concerning the medical condition or history of the person being examined.
- [22] The case of *Tran v. Abbott*, 2018 BCCA 365, is a case in which the plaintiff attended an IME with a neurologist. The neurologist opined on a number of issues including musculoskeletal injuries. The defendant then sought to have the plaintiff attend an IME with an orthopedic surgeon. The Chambers Judge concluded that it was inappropriate to have a second IME where the neurologist had strayed outside of his expertise and into issues normally covered by an orthopedic surgeon. The Chambers Judge declined to order that the plaintiff attend an IME with an orthopedic expert.
- [23] The defendant appealed and the appeal was successful. The Court of Appeal ordered the plaintiff to attend the IME with the orthopedic expert. In doing so, the Court overruled a line of authority of some standing where the Court had previously required a higher standard to be met by the party seeking a second or further IME. In cases where the plaintiff displays multifactorial injuries, the Court approved the finding of Blok J. in *Kenny v. Bateman*, 2017 BCSC 900, that a number of specialist IMEs may be required.
- [24] In *Tran*, the Court states:
- [32] In my view, it is well-established that the purpose of an IME is to put the parties on an equal footing with respect to the medical evidence and Rule 7-6 specifically contemplates more than one IME: *Wright v. Life Insurance Co. of Canada*, 2014 BCCA at para. 31.
- [33] Multiple examinations may be appropriate and necessary where a variety of injuries are alleged, or the etiology of illness is not straightforward. In exercising its discretion on an application pursuant to rule 7-6, the court must consider the effect of refusing the order sought on the conduct of the trial.
- [25] In the case of *Kim v. Lin*, 2010 BCSC 1386, Voith J. noted that where, as in the case before this Court, an injured party claims damage in more than one area of medical expertise, the effect of precluding a further IME would preclude the calling of medical opinion from an appropriate expert, effectively rendering the trial unfair.
- [26] This issue was discussed in the *Kenny* decision where four factors were identified to assist the court in exercising its discretion pursuant to Rule 7-6(2). Those four factors are:
- (a) Fairness and equality - The purpose of Rule 7-6 is to ensure "reasonable equality" between the parties. This does not mean a one-to-one matching of reports, nor does it restrict the defendant to the sorts of experts the plaintiff has chosen.

- (b) New, Unforeseen or Different Matter or Issue - The court will not order subsequent IMEs to give an expert the opportunity to bolster his earlier opinions or re-explain himself. There must be something not covered previously to justify a subsequent examination. The burden on an applicant is lighter if the subsequent IME involves a different specialty or subject matter, or if the medical picture of the plaintiff is complicated and requires multiple experts to fully assess.
- (c) Proportionality - Where the damages claimed by a plaintiff are significant, courts will more likely exercise their discretion to order further IMEs.
- (d) Timeliness - The ability to respond to any new report and the effect a new report may have on trial preparation or on the trial itself are factors to be taken into account.
- [27] The case of *Clower v. Poeckert*, 2006 BCSC 287, bears a remarkable similarity to the case at bar. In that case, the Court considered an application by a defendant to have the plaintiff attend an IME with a rheumatologist. The plaintiff had already been examined by an orthopedic surgeon who opined with respect to the plaintiff's orthopedic injuries. The plaintiff then served a report from a rheumatologist, coincidentally the same Dr. Shuckett as in the case at bar. The defendant applied to obtain a report from a rheumatologist to deal with new issues raised in the report of Dr. Shuckett, who found a variety of rheumatic issues including fibromyalgia and thoracic outlet syndrome. Dr. Shuckett's report had not been obtained to comment on orthopedic injuries but matters within the expertise and competence of a rheumatologist. In *Clower*, the Court determined that the defendant was entitled to have a rheumatologist examine the plaintiff, principally because the report of Dr. Shuckett went well beyond the areas of expertise of the defendant's present expert.
- [28] Based on a review of the reports submitted and pursuant to the consistent reasons for judgment in *Tran*, *Kenny*, and *Clower*, it appears that the evidence of Dr. Watterson is necessary to determine whether the plaintiff has EDS; the effect, if any, of EDS on the plaintiff's current presentation and prognosis; whether the plaintiff also suffers from fibromyalgia; and, if so, whether the fibromyalgia was impacted by the accident. I am of the view that this examination is necessary because, as noted above, the report of Dr. Shuckett was served after the IMEs of Drs. Spivak and Yu had already occurred.
- [29] The plaintiff in this case has a complex medical history which seems to require consideration by a number of medical specialties. Without permitting the defendants to meet the case of the plaintiff involving the expertise of a rheumatologist, I am satisfied the trial in this action would not meet a reasonable standard of fairness and equality between the parties.
- [30] Therefore, having considered all of the affidavit evidence, written argument and oral submissions of counsel, I order that the plaintiff attend and participate in an IME by Dr. John Watterson, rheumatologist, on August 14, 2020, commencing at 9 am at 839 West Broadway in Vancouver, BC.

[31] The costs of this application are awarded to the defendants, payable by the plaintiff in any event of the cause.

[32] By the Court.

"Ball J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/11/2020BCSC1178.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/fox-v-merricks-2020>

Prepared on 26 October 2026 · Esheria