
CANADA / JUDGMENT

Grant v. Tremel

2020 BCSC 1246

COURT

Supreme Court of British Columbia

DECIDED

7 July 2020

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2020 BCSC 1246 Grant v. Tremel

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Grant v. Tremel,

2020 BCSC 1246

Date: 20200707

Docket: M180360

Registry: Vancouver

Between:

Sean Robert Grant

Plaintiff

And

Marcel Alain Tremel

Defendant

Before: Master Vos

Oral Reasons for Judgment

In Chambers

(Hearing proceeded via teleconference)

Counsel for the Plaintiff:

B. Therrien

Counsel for the Defendant:

S.S. Kang

Place and Date of Hearing:

Vancouver, B.C.

July 7, 2020

Place and Date of Judgment:

Vancouver, B.C.

July 7, 2020

- [1] THE COURT: The defendant applies for an order that would compel the plaintiff to attend for a functional capacity evaluation by Thomas Watson, an occupational therapist, on July 23, 2020. The application is pursuant to Rule 7-6 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the "Rules"). The plaintiff opposes the order sought by the defendant.
- [2] This decision is being delivered as oral reasons on the day the application was heard, as the matter in dispute requires a timely resolution. If the oral reasons are transcribed, I may edit them to include references to background information and to clarify the decision for readers. The result and the core analysis will not change.

Background

- [3] The plaintiff claims damages for personal injuries and consequent losses he sustained as a result of three motor vehicle accidents. This action concerns his claims arising from an accident that occurred on November 4, 2016. Supreme Court of British Columbia, Action VA M180359, Grant v. McCall, concerns his claims relating to an accident that occurred on February 6, 2017. Supreme Court of British Columbia Action VA M195129, Grant v. Lok, concerns his claims relating to an accident that occurred on February 22, 2019. An order entered May 19, 2020 directs that the three actions be tried at the same time.
- [4] The joint trial of the three actions is scheduled for a ten day hearing starting on October 19, 2020. The 84-day deadline for service of expert reports pursuant to Rule 11-6(3) is July 24, 2020.
- [5] The plaintiff has not yet served his expert reports for this action.
- [6] The defendant has not served any expert reports for this action.
- [7] The plaintiff has agreed to attend at a medical examination the defendant scheduled with Dr. Timothy McDowell, a neurologist, on July 11, 2020. It is the only other expert examination requested by the defendant.

- [8] The defendants to the Grant v. McCall and the Grant v. Lok actions take no position with respect to this application.

Analysis

- [9] If the plaintiff's physical or mental condition is in issue in the action, a defendant can apply under Rule 7-6 for an order to compel the plaintiff to submit to an examination by a medical practitioner or other qualified person.
- [10] Rule 7-6 is designed to balance the plaintiff's advantage in obtaining expert reports by providing defendants with access to the plaintiff in order to obtain the expert assistance they require: *Tran v. Abbott*, 2018 BCCA 365, at para. 17. The primary purpose of Rule 7-6 is to put the parties on an equal footing with respect to medical evidence: *Tran* at para. 40.
- [11] Multiple medical examinations may be appropriate and necessary where a variety of injuries are alleged, or the etiology of illness is not straightforward: *Tran* at paras. 32-33.
- [12] A defendant applying for an order under Rule 7-6 bears the onus to establish that the proposed examination is necessary to put the parties on an equal footing with respect to expert evidence needed to determine an issue in the action. Where the plaintiff's expert evidence is not well known to the defendant, as apparently is the case here, the defendant bears the onus to establish that the proposed expert examination is required to properly discover a matter in issue involving the physical or mental condition of the plaintiff. The proof required is more than what is set out in the pleadings, which, in a personal injury action, are often prepared before the consequences of the plaintiff's injuries, and therefore the real issues, have evolved. The defendant must show why the proposed examination of the physical or mental condition of the plaintiff is required to provide expert evidence needed to properly discover and assess a matter clearly in issue in the action.
- [13] In the notice of civil claim filed for this action, the plaintiff claims damages for "loss of earnings and earning capacity, past present and future". Identical claims are presented in the notices of civil claim he filed regarding his claims in the other two actions. The defendants for each action have put those claims in issue.
- [14] At Part 4, paras. 9-11 of his application response, the plaintiff indicates that he attended for an examination for discovery on February 24, 2020. During that examination for discovery, he said that, at the time of the first accident, he was working as a Prep Assistant Location Manager in the television and movie trade in BC. This position involved assisting the on-set Assistant Location Manager in preparing sets for filming. The plaintiff testified that he returned to work right after the first accident and did not miss any time from work due to the injuries he sustained in the first, second or third accidents.
- [15] At Part 3, para. 15 of his notice of application, the defendant submits that the proposed functional capacity evaluation ". . . is important to evaluate the plaintiff's work history and his ability to perform his pre-accident duties. . ."

- [16] During the hearing, the defendant's counsel clarified that the functional capacity evaluation is sought because of the notices of civil claim filed for the three actions claim damages for future loss of earnings and earning capacity. However, the defendant has not presented any evidence, either examination for discovery testimony or medical evidence, indicating why an evaluation of the plaintiff's work history and work duties is needed in order to assess that potential claim. The only information before the court on this hearing is that the plaintiff returned to his pre-accident employment right after the first accident and has not missed any time from work because of the injuries he sustained in the accidents. In the absence of any other evidence, this work history suggests that the plaintiff's ability to perform his pre-accident work duties would not be a matter in issue.
- [17] The defendant's argument boils down to a proposition that if a plaintiff in a personal injury action claims damages for loss of future earning capacity, a defence requested functional capacity evaluation is automatically justified. This submission cannot be accepted as it ignores the evidentiary burden the defendant must satisfy in order to obtain the order.
- [18] The application materials do not establish that the proposed functional capacity evaluation is required to put the defendant on an equal footing with the plaintiff regarding medical evidence. Indeed, the defendant's application materials do not include any medical reports, medical records or examination for discovery testimony indicating that the plaintiff will rely on medical evidence on issues the functional capacity evaluation might address.
- [19] The defendant's materials do not indicate how the findings of the proposed functional capacity evaluation might assist the court or provide expert evidence the defendant requires to properly prepare for the issues at trial.
- [20] In addition, the defendant has not provided any information from the proposed examiner, Mr. Watson, indicating the nature of the expert evidence the proposed functional capacity evaluation would provide for this case. Although it is not a requirement that a defendant seeking an order for a Rule 7-6 examination have such a letter, they often are worthwhile. They usually assist the court in determining whether the proposed expert examination is necessary in order for the defendant to properly deal with a matter in issue.
- [21] In all the circumstances, the defendant's materials do not satisfy the onus the defendant bears to establish that the proposed functional capacity evaluation is needed to put the defendant on an equal footing with the plaintiff regarding medical evidence or to provide expert assistance the defendant requires in order to deal with a matter in issue.

Result

- [22] The application presented in Part 1 of the defendants' notice of application filed July 2, 2020, seeking an order that would compel the plaintiff to attend for a functional capacity evaluation, is dismissed.
- [23] Are there submissions on costs?

[Discussion re: Costs]

[24] The plaintiff was successful on this application. He is awarded costs relating to the application, those costs to be assessed at Scale "B", payable at the conclusion of this litigation.

"Master Vos"

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