

CANADA / JUDGMENT

Hou v. Kirmani,

2009 BCSC 1943

COURT

Supreme Court of British Columbia

DECIDED

19 November 2009

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2009 BCSC 1943 Hou v. Kirmani and others IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Hou v. Kirmani and others, 2009 BCSC 1943 Date: 20091119 Docket: M052800 Registry:

Vancouver Between: Guo You Hou Plaintiff And: Syed Faisai Kirmani and Syed Moizuddin

Kirmani Defendants Before: Master Scarth Oral Reasons for Judgment In Chambers Counsel for

Plaintiff M. Neathway Counsel for Defendants S. Read Place of Date of Hearing: Vancouver, B.C.

November 19, 2009 Place of Date of Decision: Vancouver, B. C. November 19, 2009

- [1] THE COURT: The application this afternoon is by the defendant for an order that the plaintiff attend an independent medical examination with a Dr. Calvert on Thursday, March 11, 2010.
- [2] This matter involves a claim for damages arising out of a motor vehicle accident in which the plaintiff was injured apparently as a pedestrian struck in a crosswalk. She suffered a number of injuries and, as Mr. Read for the defendants submitted, has seen many, many experts. It is a complicated case with multiple injuries including traumatic brain injury.
- [3] Recently the defendants have received a report from their expert, Dr. Arthur, an orthopaedic specialist who conducted an examination of the plaintiff. They seek the order today for an examination of the plaintiff by Dr. Calvert as a result of Dr. Arthur's statement in his report that she should be seen by an orthopaedic surgeon with a specialty in "foot and ankle". Dr. Arthur's report is at page 21 of the exhibit to the affidavit of Mr. Cave, who is counsel for the defendants.
- [4] Dr. Arthur says: Her main ongoing musculoskeletal problem in my opinion is the left foot and ankle region. He goes on to discuss the treatment the plaintiff has had. He says: In my opinion she would benefit from an opinion from a foot and ankle orthopaedic surgeon, as further surgical intervention may be of benefit to her and this might include surgical correction of her deformity so as to allow her to weight bear and walk short distances more appropriately. I did recommend this to her daughter. I feel that an orthopaedic surgeon with subspecialty training in foot and ankle would be appropriate. I do not feel further passive treatment for her left foot and ankle will be of any benefit to her.

- [5] The submission is, in essence, that Dr. Arthur has declined to opine on her foot and ankle problem and that the defendants require an expert as recommended by Dr. Arthur to address this issue, which they say is an important one given that it may impact the quantum of damages.
- [6] The application is opposed by the plaintiff. She submits that the line of cases addressing second IMEs is relevant and that the defendants have not met the test set out there. She says that there is an opinion of an orthopaedic surgeon already and the proposed second examination is by a physician of the same specialty. Dr. Arthur has been practising since 1990 as an orthopaedic specialist, and he was chosen as the defence expert in this area with the knowledge that the plaintiff had foot and ankle problems and there was a possible need for surgery.
- [7] MS. NEATHWAY: Your Honour, with respect, it was since 1980.
- [8] THE COURT: My apologies. Since 1980. It is Dr. Calvert and Dr. Calvert is since, I think you said -
- [9] MS. NEATHWAY: 2007 was the subspecialty.
- [10] THE COURT: 2007. Thank you. As I say, I have been referred to some case authority in the area. The defendants concede that the purpose of Rule 30, the cases say, is to put the parties on equal footing and that there is at this time no expert report disclosed by the plaintiff here, while that is not conclusive of the matter. What is problematic in my view is that I am not of the view that Rule 30 is intended to allow follow-up on every issue which is raised by experts who examine the plaintiff.
- [11] Dr. Arthur was chosen, and I accept the submissions of the plaintiff in this regard, with the knowledge that there were concerns regarding this plaintiff's ankle. There is, it is fair to say, nothing new since Dr. Arthur was retained, apart from his reticence to provide an opinion. And he does not say, I do not believe, that he is not qualified to give the opinion which is missing, if it is missing. He simply says, I think it is fair to conclude, that in the best of all worlds she would be seen by an orthopaedic surgeon with a subspecialty training. In my view that is not the purpose of Rule 30. Dr. Arthur does provide an opinion of sorts when he says: I do not feel further passive treatment for her left foot and ankle will be of any benefit to her. It seems to me that Dr. Arthur may well be persuaded to provide a more expansive opinion given that I am dismissing the application for a further IME by Dr. Calvert.
- [12] It is open to the defendants to reapply in the event there are new facts which would warrant such an application, but today I am dismissing the application, and the plaintiff is entitled to her costs. "Master Scarth"

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