

CANADA / JUDGMENT

Kherani v. Da Silva

2024 BCSC 1777

COURT

Supreme Court of British Columbia

DECIDED

3 June 2024

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2024 BCSC 1777 Kherani v. Da Silva IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Kherani v. Da Silva, 2024 BCSC 1777 Date: 20240603 Docket: M193001 Registry: Vancouver Between: Femida Kherani Plaintiff And: Max Antonio Da Silva and Keith Rollins Defendants Before: The Honourable Justice G.C. Weatherill Oral Ruling Re: Admissibility of Dr. Zarkadas' Report Counsel for the Plaintiff: A.E. Maragos K. Hennebery Counsel for the Defendants: J.P. Cahan B. Devlin A. Alimadad Place and Date of Trial: Vancouver, B.C. June 3, 2024 Place and Date of Judgment: Vancouver, B.C. June 3, 2024

- [1] THE COURT: I am not going to repeat the background to this proceeding. It was laid out in the submissions, but in a nutshell, it seems that it became apparent to the plaintiff and plaintiff's counsel after the plaintiff underwent right shoulder surgery in February of 2023 that the surgery was not as successful as had been hoped.
- [2] The plaintiff says that, as a result, she is unable to work in her specialty field as fully as she had done before the motor vehicle accident. She attributes the shoulder injury, which I gather comprises a labral tear and/or a paralabral cyst, to the motor vehicle accident in question. The plaintiff says that, as a further consequence of the shoulder injury, she had to shut down her clinical and surgical practice in Calgary.
- [3] In the result, the plaintiff's claim for past and future income-earning capacity that has increased by a factor of three or four times. The plaintiff commissioned the opinion of an orthopaedic surgeon, Dr. Peter Zarkadas, on the cause of her shoulder injury.
- [4] As counsel for the defendants has asserted, the issue of the causation of the labral tear and paralabral cyst in the plaintiff's right shoulder will be central to this case. Hence, the question of the admissibility of Dr. Zarkadas' report is a critical issue to be determined at the trial of this action.
- [5] It is undisputed that Dr. Zarkadas' report is not a responsive report but, rather, a full independent medical examination ("IME") report. There is also no question that it was served beyond the 84-daytime limit. In particular, it was served on April 15, 2024, 42 days before the trial of this action.

- [6] I am sympathetic to the defendants because, as I have said, if indeed it is demonstrated that the right shoulder issue was caused by the motor vehicle accident, the defendants' exposure in this action increases significantly.
- [7] I do have a discretion under Rule 13-6(7) of the Supreme Court Civil Rules to admit late expert reports if fairness demands it. The cases are clear that exercising the discretion should not be done except in circumstances that are compelling, where the non-compliance is unlikely to cause prejudice and where the interests of justice require admission of the report.
- [8] I am not convinced that allowing the plaintiff to rely upon the report will unduly prejudice the defendants. There was a trial management conference in this action on April 30, 2024 during which, at the request of the defendants, the court ordered that the parties particularize any objections to the other side's expert reports on or before May 17, 2024.
- [9] Although defendants' counsel wrote immediately upon receipt of Dr. Zarkadas' report that he would be objecting to its admissibility on the basis of the timing of its service, his letter dated May 17, 2024, purportedly in compliance with the trial management conference order of April 30, 2024, did not include any mention that the timing of service of the report would be raised as an objection. Rather, the May 17, 2024 letter went on at some detail setting out the objections to the admissibility of Dr. Zarkadas' report for other reasons.
- [10] Regardless, it is my view that the interests of justice require that Dr. Zarkadas' report be admitted, but on the following condition: the defendants will have reasonable opportunity to conduct a full IME of the plaintiff by their own expert, Dr. Jordan Leith, an orthopaedic surgeon, who, in turn, will have a reasonable opportunity to provide a responsive report to that of Dr. Zarkadas.
- [11] If the defendants wish to conduct such an IME, I am directing that defendants' counsel to take steps to do so at the earliest opportunity, and if either the IME or Dr. Leith's responding report cannot be conducted and served during the course of this trial, and if additional time is necessary, then this trial will be adjourned in order to accommodate it.
- [12] In the result, I am going to allow Dr. Zarkadas' report to be admitted, but the defendants will be entitled, if they so choose, to conduct an IME of the plaintiff by Dr. Leith and provide a responding report. "G.C. Weatherill J."

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