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CANADA / JUDGMENT

## Kringhaug v. Men

2021 BCSC 358

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COURT

Supreme Court of British Columbia

DECIDED

8 February 2021

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2021 BCSC 358 Kringhaug v. Men

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kringhaug v. Men,

2021 BCSC 358

Date: 20210208

Docket: M186385

Registry: Vancouver

Between:

Kristen Sara Kringhaug

Plaintiff

And

Li Men

Defendant

Before: The Honourable Madam Justice McDonald

Mid-trial Ruling

Re application to cross-examine Dr. Giantomaso

In Chambers

Counsel for the Plaintiff:

J.M. Rice

Counsel for the Defendant:

P.K. Hamilton

A. Mihailovic

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 1-4, 8 & 9, 2021

Place and Date of Judgment:

Vancouver, B.C.

### **February 8, 2021**

- [1] THE COURT: During the trial, counsel for the plaintiff raised an objection to the defendant's request to conduct a cross-examination of Dr. Giantomaso who authored an expert opinion regarding the plaintiff. This is my mid-trial ruling with respect to that objection. Should the parties request a transcript of my reasons for this ruling, I reserve the right to edit and add citations, although the result will not change.
- [2] Dr. Giantomaso is a physiatrist, initially retained by the defendant, who conducted an independent medical examination of the plaintiff. Dr. Giantomaso then prepared a medical-legal report dated October 27, 2020.
- [3] Counsel for the defendant served Dr. Giantomaso's report on the plaintiff's counsel pursuant to Rule 11-6(3). Initially, the plaintiff requested that Dr. Giantomaso attend trial for cross-examination by the plaintiff's counsel. Later, that request was withdrawn and the plaintiff's counsel re-served Dr. Giantomaso's medical-legal report on the defendant pursuant to Rule 11-6. In submissions, the plaintiff's counsel advised that this was done because the plaintiff also wanted to rely on the report.
- [4] There was no issue with respect to the timeliness of the initial service or re-service of the report. The plaintiff's counsel had assumed that by re-serving Dr. Giantomaso's report, it would be admissible into evidence, with leave of the court, by consent and without cross-examination.
- [5] However, the defendant's counsel then advised the plaintiff's counsel that if the plaintiff wished to rely on Dr. Giantomaso's report, the defendant would require Dr. Giantomaso to attend trial for cross-examination. There was no objection to the defendant's cross-examination based on the timeliness of this request, as I have mentioned earlier.
- [6] Approximately two weeks later, at the trial management conference, counsel for the plaintiff learned that Dr. Giantomaso had not been included as an expert witness listed in the defendant's trial brief.

- [7] The plaintiff's counsel submits that Dr. Giantomaso's report should be admitted into evidence without giving the defendant an opportunity to cross-examine Dr. Giantomaso, because otherwise I would be allowing the party who appointed the expert the opportunity to cross-examine her own expert. The plaintiff submits this is an absurd result which would provide the party who appointed and instructed the expert an opportunity to conduct a "softball" cross-examination of that expert.
- [8] Finally, the plaintiff's counsel also submits that the proposed cross-examination is prohibited without leave of the court by Rule 11-7(5)(b), and that it would be contrary to the object and intention of the Supreme Court Civil Rules as a whole. Counsel also advised that if I overruled the plaintiff's objection, the plaintiff intended to withdraw her reliance on Dr. Giantomaso's report.
- [9] There does not appear to be any cases directly on point. *Karpowicz v. Glessing*, 2018 BCSC 887 is a case that deals with tendering an expert report at trial and the right to demand attendance for cross-examination in a slightly different factual scenario than the case at bar. In *Karpowicz*, Justice MacNaughton stated as follows at paragraph 43:
- [43] . . . The rules with respect to tendering experts' reports must be read as a whole, and it is the decision of a party to tender an expert's evidence at trial which triggers the right of the other party or parties to demand the attendance of the expert for cross-examination. [Emphasis added]
- [10] Therefore, *Karpowicz* suggests that the key issue, or trigger, in relation to the right to cross-examine the expert at trial is the decision of a party to tender the evidence at trial.
- [11] It is worthwhile reviewing the rule governing the appointment of an expert. Rule 11-4 describes when each party may appoint their own experts and it states:

Subject to Rule 11-1 (2), parties to an action may each appoint their own experts to tender expert opinion evidence to the court on an issue.

- [12] If a party intends to tender an expert report or responding expert report at trial, they must serve it on the other parties in accordance with Rule 11-6(3)(a) or Rule 11-6(4). These rules do not restrict service of reports to those prepared by the parties' appointed experts. As I already mentioned, each party in the case at bar served and re-served Dr. Giantomaso's report on the other side in a timely way pursuant to Rule 11-6.
- [13] Rule 11-7(3) governs the cross-examination of an expert. Paragraph (b) of Rule 11-7(3) authorizes a party of record to demand an expert attend trial for cross-examination where the report was served as required by Rule 11-6, stating as follows:
- (b) if the expert was appointed by a party under Rule 11-4 or by a party with leave of the court granted under Rule 11-3 (9), any party of record who is adverse in interest to the party who appointed that expert may, within the demand period referred to in subrule (2) (a) of this rule, demand the attendance of the expert for cross-examination.

- [14] Rule 11-7(5) contains restrictions on calling an expert as a witness at trial, and it provides as follows:
- (5) Unless the court otherwise orders, if a party appoints an expert under Rule 11-3 (9) or 11-4,
    - (a) the party must not call the expert to give oral evidence at trial unless
      - (i) the expert's attendance has been demanded under subrule (3) of this rule, or
      - (ii) the expert's report has been served in accordance with Rule 11-6, the party believes direct examination of the expert is necessary to clarify terminology in the report or to otherwise make the report more understandable and any direct examination of that expert is limited to those matters, and
    - (b) the party must not cross-examine the expert at trial.
- [15] Some additional context comes from the fact that the defendant has requested that Dr. Hawkeswood attend for trial for cross-examination by the defendant's counsel. Dr. Hawkeswood is the physiatrist appointed by the plaintiff. Dr. Hawkeswood has prepared two expert reports that the plaintiff intends to tender at trial. Dr. Hawkeswood has not yet testified in this trial.
- [16] I have not read Dr. Giantomaso's report, save for the parts put to the other witnesses during the trial so far. I understand from the plaintiff's counsel that he views Dr. Giantomaso's report as helpful to the plaintiff's case. As I mentioned, the plaintiff is concerned that the defendant is attempting to gain a tactical advantage by conducting a cross-examination of Dr. Giantomaso.
- [17] As I understand it, this concern is partly related to the instruction letter that counsel for the defendant sent to Dr. Giantomaso. The letter asked Dr. Giantomaso, prior to preparing the report, to contact counsel for the defendant to discuss the findings of the independent medical examination. The plaintiff's counsel also points out that Dr. Giantomaso may have had other discussions with counsel for the defendant that are covered by litigation or solicitor-client privilege.
- [18] Finally, counsel for the plaintiff submits that allowing cross-examination of the expert by the party who initially appointed and instructed him would be contrary to the object and purpose of the Rules and it would unleash a great deal of mischief and game playing into the trial system.
- [19] It is clear that Rule 11-7(5) does contain restrictions on calling an expert as a witness at trial, including restrictions on cross-examining a party's own expert in Rule 11-7(5)(b). However, all of these requirements and restrictions are subject to the court ordering otherwise.
- [20] I have considered counsel for the plaintiff's submission that I ought to deny the defendant's counsel the right to cross-examine Dr. Giantomaso, instead admitting Dr. Giantomaso's report into evidence as if by consent, without either party conducting a cross-examination.

- [21] After considering all of the circumstances and the decision of our Court of Appeal in *Tong v. Lanser*, 2013 BCCA 239, I have concluded the course of action proposed by the plaintiff would be inappropriate in the circumstances.
- [22] In *Tong*, the plaintiff intended to call his doctor to testify. Shortly before trial, counsel for the plaintiff became aware that the doctor was too ill to attend and plaintiff's counsel decided not to tender the doctor's letters into evidence and advised defence counsel of this. Defence counsel then took the position it would tender the two letters as defence evidence. However, the plaintiff's counsel objected on the basis that the doctor would be unavailable for cross-examination, relying on the Evidence Act and Rule 11-7(3). The application judge ruled that it would be simply unfair to the plaintiff to admit the letters without opportunity for plaintiff's counsel to cross-examine the doctor.
- [23] On appeal, the Court of Appeal held that the order to admit or exclude was based on the Rules, which afford a trial judge discretion. It was appropriate for the trial judge to find that the lack of opportunity for cross-examination would be unfair to the plaintiff since, had the roles been reversed, this would have been seen as unfair to the defence. The Court of Appeal therefore did not give effect to this ground of appeal and the appeal was dismissed.
- [24] I am also mindful of Justice MacNaughton's reminder in *Karpowicz*, at para. 45, regarding the burden of proof. It is the plaintiff that is required to prove her case. The defendant is not required to prove anything and if the defendant elects not to call any evidence, no adverse inference can be drawn from that failure.
- [25] In the present circumstances, given that witnesses have already been taken to parts of Dr. Giantomaso's report, and given that the purpose of expert opinion is to assist the court, I am not prepared to deny the defendant an opportunity to cross-examine Dr. Giantomaso when the defendant has decided not to tender this opinion at trial.
- [26] At the end of the day, I must keep in mind that expert evidence is meant to assist the court and experts have specific duties in that regard. To be admissible, an expert opinion must comply with the Rules and it must not be an advocacy piece for the party who hired the expert.
- [27] While I appreciate the concerns expressed by the plaintiff's counsel on behalf of the plaintiff that the defendant's cross-examination of Dr. Giantomaso may be intentionally soft, it seems to me that if such an issue arose during cross-examination, it would go to the weight of the evidence.
- [28] Further, given the circumstances related to Dr. Giantomaso's report, I have concluded it would be appropriate to allow both parties to conduct a cross-examination of Dr. Giantomaso. In my view, this would level the playing field and address the bulk of the plaintiff's concerns, while also preserving the right of the defendant, who decided not to tender Dr. Giantomaso's expert evidence at trial, to cross-examine the expert.

"McDonald J."

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Prepared on 29 October 2026 · Esheria