
CANADA / JUDGMENT

Wohlleben v. Dernisky

2016 BCSC 976

COURT

Supreme Court of British Columbia

DECIDED

6 May 2016

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2016 BCSC 976 Wohlleben v. Dernisky

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wohlleben v. Dernisky,

2016 BCSC 976

Date: 20160506

Docket: M147731

Registry: Vancouver

Between:

Christine Wohlleben

Plaintiff

And

Kurtis J. Dernisky and Houle Electric Limited

Defendants

Before: Master Harper

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

J. Shabestari

Counsel for the Defendants:

M.D. Murphy

Place and Date of Hearing:

Vancouver, B.C.

May 6, 2016

Place and Date of Judgment:

Vancouver, B.C.

May 6, 2016

- [1] THE COURT: The defendants apply for an order that the plaintiff attend an examination by a neurologist, Dr. Rehan Dost. The plaintiff has already agreed to attend an independent medical examination with an orthopaedic surgeon. Therefore, this application is for a subsequent independent medical examination. The plaintiff concedes that a subsequent independent medical examination with a neurologist is justified. However, she objects to being examined by Dr. Dost.
- [2] The narrow issue on this application is whether the plaintiff's subjective concerns about Dr. Dost based on her review of case law provided to her by her counsel are sufficient to dismiss the application.
- [3] The plaintiff's affidavit at paragraphs 8 through 14 sets out her position concerning Dr. Dost:
8. Upon my request, my counsel has provided me with copies of the decisions in recent cases in which Dr. Dost has acted as an expert. In the following paragraphs, I give a few examples of the passages that deal with Dr. Dost's expert evidence.
9. In her decision in *Gabor v. Boilard*, 2015 BCSC 1724, Madam Justice Ballance of this Honourable Court identified "many shortcomings of Dr. Dost's opinion" including, but not limited to, the following:
- (a) On two different occasions, Dr. Dost made errors in recording the plaintiff's report to him about the accident. On another occasion, Dr. Dost recorded something that the plaintiff testified she did not believe she had told Dr. Dost (paragraph 438);
- (b) Dr. Dost's report "strangely" failed to make reference to an entry in the plaintiff's family physician's notes which contained a diagnosis of concussion (paragraph 439);
- (c) Dr. Dost emphasized that the post-accident gap in the Plaintiff's memory was "extremely brief"; however, this Honourable Court noted that "the preponderance of the evidence" did not establish that (paragraph 440); and
- (d) Dr. Dost placed reliance on how "litigation effect" contributed to the development of the plaintiff's cognitive deficits; however, in cross-examination he acknowledged that he had not canvassed the topic with the plaintiff (paragraphs 449 and 450).

10. In his decision in *Reimer v. Bischoff*, 2015 BCSC 1876, Mr. Justice Cole of this Honourable Court noted at paragraph 42 that, "Dr. Dost was combative and tended to be more of an advocate than an independent expert".
11. In his decision in *Hsu v. Choquette*, 2015 BCSC 1123, Mr. Justice Schultes of this Honourable Court noted at paragraph 72 that, "both Dr. Dost's reports and his testimony were more combative, and seemed strategically directed to defeating the availability of this disputed form of TOS [thoracic outlet syndrome]. The portion of his evidence that actually dealt with Ms. Hsu was rather superficial by contrast".
12. On account of the foregoing, as well as other decisions, unfortunately, I find myself unable to repose my trust and confidence in Dr. Dost, and offer him the level of cooperation necessary for the examination to reach a meaningful conclusion.
13. I further note that in the second paragraph of page 2 of Dr. Mackoff's medical legal report, he writes:

"There are two factors that complicate fully understanding the severity of her psychological and physical difficulties. First, Cst. Wohlleben is typical of elite athletes. She believes pain and physical limitations are artifacts of "not trying hard enough" and therefore should not be acknowledged or if acknowledged should be minimized".

And in the next paragraph he adds:

"Second, Cst. Wohlleben works as a police officer. Common amongst many police officers, Cst. Wohlleben is excessively stoic and clearly minimizes her physical and psychological distress".

14. On account of these findings, I believe my ability, or lack thereof, to repose trust and confidence in Dr. Dost assumes greater significance.
- [4] The extracts from the cases cited in the plaintiff's affidavit simply demonstrate that, in some trials, the trial judge has preferred the evidence of other experts to that of Dr. Dost.
- [5] In the present application, it is clear from the plaintiff's affidavit that the impetus behind the opposition to Dr. Dost comes from her counsel, and not from the plaintiff herself. It is highly unlikely, in my view, that plaintiff's counsel provided the plaintiff with copies of decisions in which Dr. Dost was a witness at the plaintiff's request. The selection of cases does not include the cases referred to before me by counsel for the defendants in which Dr. Dost's evidence was accepted.
- [6] Counsel for the defendants referred to other trial judgments in which the trial judge accepted Dr. Dost's opinion. For instance, in one case, the trial judge found him to be "clear, forthright, and helpful."

- [7] There is no demonstrated misconduct on the part of Dr. Dost, and indeed, the plaintiff does not suggest there is any. The plaintiff says that she finds herself unable to repose her trust and confidence in Dr. Dost and offer him the level of cooperation necessary for the examination to reach a meaningful conclusion. This evidence is simply a bare assertion and not based on any evidence of misconduct.
- [8] As for the relevance of Dr. Mackoff's statement in his report that the plaintiff is being "excessively stoic and clearly minimizes her physical and psychological distress", this description of her personality forms no reasonable foundation for the plaintiff's subjective view that she is unable to repose trust and confidence in Dr. Dost.
- [9] I quote from *Sinclair v. Underwood*, 2002 BCSC 354, at para. 5:
- [5] The authorities show that the purpose of a defence examination is to put the parties on a basis of equality. It is not for the Plaintiff to decide which doctor can examine him or her on behalf of the Defendant. And it is for the Trial Judge to determine "the fairness, partiality, credibility and objectivity of the physician conducting an independent medical examination". In my view the Defendant is clearly entitled to the Order sought unless the Plaintiff can demonstrate by a preponderance of evidence that there are sufficient grounds to justify the Court concluding that its discretion should not be exercised in favour of the appointment of the Defendant's nominee doctor.
- [10] Here, the plaintiff, in my view, has not demonstrated by a preponderance of evidence that there are sufficient grounds to justify that I should not exercise my discretion in favour of the order that Dr. Dost conduct the examination.
- [11] *Wheeler v. White*, [1983] B.C.J. No. 2494 is a case where the plaintiff objected to the psychiatrist chosen by the defendant. The master accepted the expert evidence provided by another psychiatrist that, to have a valid psychiatric examination, the plaintiff is required to open up and allow the psychiatrist into their private world. This requires great trust. Further, at para. 7 of the *Wheeler* decision at the chambers level:
- [7] It is sufficient, in my opinion, for the plaintiff to have a reasonable apprehension that the examination will be fraught with peril.
- [12] The plaintiff in the present case does not, in my view, have such a reasonable apprehension. If she does have an apprehension that the examination will be fraught with peril, which is not her evidence, her apprehension is not reasonable.
- [13] It is not the law that the plaintiff gets to choose the expert to examine him or her: *Sinclair* (para. 15). The names of alternatives would only come into play where the plaintiff demonstrates, by a preponderance of evidence, sufficient grounds to justify the court in concluding that its discretion should not be exercised in favour of the appointment of the defendant's nominee: *Sinclair* (paras. 16 and 17). Questions of fairness, partiality, credibility, and objectivity of a physician are matters for the trial judge, not the motions judge or master on an application: *Sinclair* (para. 21). Further, at para. 22 of *Sinclair*:

- [22] In my view, for the Plaintiff to succeed, there must be evidence of real or effective inappropriate conduct on the part of the nominee doctor, and not simply the whim or idiosyncrasies of the Plaintiff or similar views of his or her Counsel.
- [14] There is no evidence of inappropriate conduct on the part of Dr. Dost. The views of the plaintiff, in my view, do not reasonably support the opposition to Dr. Dost. For these reasons, I grant the order requiring the plaintiff to attend the examination by Dr. Dost.
- [15] Are there any further matters?
- [16] MR. MURPHY: Costs, My Lady -- or, sorry, Your Honour, costs?
- [17] THE COURT: You are asking for costs in any event?
- [18] MR. MURPHY: Yes.
- [19] THE COURT: Yes, any response to that?
- [20] MR. SHABESTARI: No objection, Your Honour.
- [21] THE COURT: Yes, the defendants will have their costs of this application in any event of the cause.

"Master Harper"

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Prepared on 25 October 2026 · Esheria