

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20100927
Docket: M085649
Registry: Vancouver

Between:

Steven Luedecke

Plaintiff

And:

Kent Francis Hillman

Defendant

Before: Master Scarth

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

G. J. Collette
E. Orr-Ewing
P. B. Seale

Counsel for the Defendant:

Place and date of Hearing:

September 27, 2010
Vancouver, B.C.

Place and date of Decision

September 27, 2010
Vancouver, B.C.

[1] **THE COURT:** This application is brought by the defendant pursuant to Rule 7-6. It is an application for an independent medical examination of the plaintiff in a motor vehicle accident action. The accident occurred in 2007. Liability is admitted. The trial is scheduled for December 13th, 2010, for five days.

[2] The issue on this application is whether it is appropriate to order an independent medical examination of the plaintiff by Dr. Reebye for purposes of the preparation of a responding report to the report of Dr. Armstrong which was delivered by the plaintiff at the 11th hour, on the 84-day deadline under Rule 11-6.

[3] Dr. Armstrong is a pain specialist, and in his report, he diagnoses, and I am reading here from the submissions of the defendant, "spinal pelvic instability due to hyper mobility and subluxation of the SI joints and spinal misalignment". Dr. Armstrong gives a prognosis that "the plaintiff will likely be eventually unable to work and will therefore experience a loss of earnings potential which will have profound repercussions for him". Dr. Armstrong also says that "the prognosis is very guarded indeed to successfully resume his life as it was before the MVA again and take up his career path to becoming an airline pilot".

[4] The defendant's position is that a responding report to Dr. Armstrong's report is required to rebut this opinion evidence. The defendant points to the definition of "rebuttal evidence" in *Stainer v. Plaza*, 2001 BCCA 133, that is, opinion evidence limited to subject matters addressed in medical evidence adduced by the plaintiff.

[5] The defendant has produced an affidavit from Dr. Reebye in which Dr. Reebye deposes that an examination is necessary to provide such a report.

[6] The plaintiff's position is that Dr. Reebye can provide a responding report without examination, and relies on the definition which was set out in *Wright v. Brauer*, 2010 BCSC 1282. In *Wright*, Savage J. refers to a decision of Mr. Justice Henderson for a definition of "reply reports" as being essentially a critical analysis of the methodology of the opposing expert, that being the only portion of responding reports which is admissible as responsive evidence: at para 20, citing *C.N. Railway v. HMTQ in Right of Canada*, 2002 BCSC 1669.

[7] It is the plaintiff's position that otherwise, a defendant can in each case wait until the 84-day deadline has passed in order to obtain an IME.

[8] I cannot properly summarize the submissions which were made in the brief time that is afforded to me. I will say that having reviewed the materials and the cases, I am satisfied that it is appropriate in these circumstances here to allow the application.

[9] Firstly, the application is for an IME for a responding report. The deadline set out in the rules for a responding report is 42 days, pursuant to Rule 11(6)(4). Based on the submissions of the defendant, the report will be delivered prior to that deadline. The examination is scheduled for this week, and I will point out that this application is brought on a short leave as a result.

[10] Secondly, the determination as to whether the report is properly responsive - whether the report is admissible and for what purpose - is for the trial judge. Savage J. in *Wright* considered the *CNR* case for purposes of interpreting what is appropriate as rebuttal evidence, but in my view, the definition is *CNR* is not conclusive here. As the defendant submits, *Stainer* suggests a broader approach to what is proper rebuttal. Dr. Reebye says he needs an examination to provide an opinion in response to the plaintiff's expert, and it is for the trial judge to determine whether or not the report which is ultimately produced falls within the scope of Rule 11-6(4).

[11] Thirdly, it has not been established that, to the extent a balancing of prejudice is to be conducted, the balance here favours the plaintiff. The examination will take place 74 days before trial, and as I said earlier, the report will arguably be in time under Rule 11-6(4). The plaintiff will have to attend for an examination, but the situation is not what it was in *White v. Gait*, 2003 BCSC 2023 where the examination was to take place within 30 days of trial. The concern of Master McCallum in *White* was that the plaintiff would be involved in preparing for trial. That kind of difficulty or prejudice is not present here.

[12] On the other hand, the defendant is prejudiced in not having a report for trial. While it was a deliberate choice on the part of the defendant not to obtain a report, it was based on the state of the medical evidence up until the 84-day deadline. The delivery of Dr. Armstrong's report at the 84-day deadline has altered that situation, and I am satisfied that the defendant would be prejudiced proceeding without a responding report in the circumstances.

[13] In my view, it is appropriate to order an examination for purposes of a responding report.

[14] It is my view that the order should read that the plaintiff shall attend at the office of Dr. Reebye for an examination at 8:30 a.m. on September 30th for purposes of a medical examination by Dr. Reebye, with some reference to the fact that it is intended to form the basis of a responding report pursuant to Rule 11-6(4).

[15] So do you have any submissions as to terms?

[16] UNIDENTIFIED MALE SPEAKER: For the purposes of a medical examination of Dr. Reebye.

[17] THE COURT: Yes.

[18] UNIDENTIFIED MALE SPEAKER: To prepare a responding -- an appropriate responding report.

[19] THE COURT: Well, I do not mind if it just says "responding report." It seems appropriate to use the language in the rules. All right.

[SUBMISSIONS AS TO COSTS AND A STAY]



Master Scarth