

**NOVA SCOTIA COURT OF APPEAL**  
**Citation:** *Szubielski v. Price*, 2013 NSCA 151

**Date:** 20131219  
**Docket:** CA 417911  
**Registry:** Halifax

**Between:**

Wanda Szubielski

Appellant

v.

Dr. Richard B. Price, Dr. Richard B. Price  
Dentistry Incorporated, a body corporate, Dr.  
Michael Roda, Dr. Sayed M. Mirbod, and Dr. Andrew  
F. Thompson, carrying on business in partnership as  
Park Lane Dental Specialists

Respondents

**Judges:** Saunders, Oland and Fichaud, JJ.A.  
**Appeal Heard:** December 4, 2013, in Halifax, Nova Scotia  
**Held:** Appeal dismissed per reasons for judgment of Saunders, J.A.;  
Oland and Fichaud, JJ.A. concurring.  
**Counsel:** Appellant in person  
Jocelyn M. Campbell, Q.C., for the respondents

**Reasons for judgment:**

[1] The appellant Ms. Wanda Szubielski sued a dentist, dental clinic and dental assistant for negligence surrounding the consultations and treatment she received relating to her periodontal disease.

[2] Ms. Szubielski's claim put forward two principal allegations. The first was that during the course of x-rays Dr. Price's assistant, Ms. Jessica White placed a "hazardous device" on the left side of the appellant's jaw, and also pointed it at her legs, without her prior consent or knowledge, which later caused cysts, lesions and tumors to form on several parts of her body, necessitating surgery, medication and rehabilitation. The second allegation concerned Dr. Price's supposed failure to properly diagnose or treat her developing periodontal disease.

[3] Both sides retained experts and their reports were exchanged and filed as part of the record in these proceedings.

[4] On May 21, 2013, the appellant filed a motion for summary judgment in respect of both of her allegations.

[5] A week later the respondents filed their own motion for summary judgment to dismiss that part of the claim relating to the "harmful device" on the basis that there was no evidence to prove that any such instrument existed, or if it did, that the mysterious device caused the lesions and various other afflictions for which the appellant claimed damages. As to Ms. Szubielski's second allegation, the respondents argued that her request for summary judgment should be refused because there *was* a genuine issue of material fact requiring a trial. Specifically they pointed to an expert's report from Dr. Scott Clark, endodontist, which contradicted the opinions on standard of care and causation reported by the appellant's expert, Dr. J. Crystal Baxter.

[6] The parties' motions were heard by Nova Scotia Supreme Court Justice John D. Murphy on June 17, 2013. At the hearing, the appellant who is self-represented, cross-examined Ms. White on her affidavit. The appellant and counsel for the respondents then presented extensive oral submissions to support their respective positions.

[7] On June 19, 2013, Murphy J. delivered a comprehensive oral decision, dismissing the appellant's and allowing the respondents' motions for summary judgment. The result terminated that part of her claim that was based on the alleged use of the "hazardous device" but preserved the other allegation of negligence against Dr. Price in treating her periodontal disease. The motions judge found that this discrete aspect of the lawsuit required a full trial on the merits because there was conflicting expert evidence concerning Dr. Price's conduct and whether his actions breached the requisite standard of care.

[8] It is from that decision and confirmatory order that Ms. Szubielski now appeals.

[9] Despite Ms. Szubielski's detailed and articulate arguments on her own behalf, I fail to see any flaw in Justice Murphy's analysis or conclusions which would cause us to intervene.

[10] Reading the transcript of Justice Murphy's thoughtful and comprehensive oral decision satisfies me that he understood and properly applied the law in disposing of the motions before him. **Coady v. Burton Canada Co.**, 2013 NSCA 95 is this Court's most recent iteration of the legal principles and analytical matrix that ought to be applied in summary judgment hearings. While our reasons in **Burton** were filed after Justice Murphy's decision in this case, I see no error in his legal analysis or disposition.

[11] Justice Murphy recognized that while the appellant had undoubtedly experienced significant health problems which led to a variety of medical interventions, the real question was whether those problems were caused by the professional services provided by Dr. Price and his assistant, Ms. White. The corollary question in the context of a summary judgment hearing was whether a trial was required to determine the outcome. The judge put it this way:

... Ms. Szubielski had been seeing Dr. Price for several years, going back to 2001 or 2002, but the claim really relates to the services which he was involved in providing between 2005 and 2007. Ms. Szubielski alleges that she didn't receive proper care or referrals from Dr. Price. She claims that she has suffered significant health problems and other damages as a result of her dealings with Dr. Price and Ms. White.

...

And I will say at the outset that I have no doubt, after reading the file and all the material in it, that the Plaintiff has experienced a great deal of difficulty with her

health and with her dental health and her physical health since her experiences with Dr. Price in 2005 and 2007. Certainly she has had serious dental problems and health issues which have affected all aspects of her life.

The issue, though, for the Court ultimately to determine is the connection between those problems and any activities by the Defendants, and the extent, if any, to which the problems are attributable to the Defendants and whether the Defendants' acts or their failure to do certain things were negligent or otherwise such type of activity that would attract liability.

So what I'm saying is I certainly understand and respect that the Plaintiff has had a difficult time in the last few years. That's very clear from the medical attention that she's received in many different locations in Canada and the United States and indeed overseas. But the question the Court will ultimately have to determine is whether they are those concerns arose from her dealings with the Defendants. And the questions that I have to determine today and I'll say a lot more about this is whether we're at a stage now where determinations can be made on those issues.

[12] Ms. Szubielski seeks damages for alleged dental malpractice. This is obviously the type of case where the trier of fact will need the assistance of an expert. The issues of causation and standard of care in the circumstances presented here are outside the experience of a judge or a jury. Accordingly, as Ms. Campbell makes clear in her excellent factum on behalf of the respondents, Ms. Szubielski bore the burden of presenting expert evidence establishing both of her principal allegations. Specifically, she had to adduce expert evidence demonstrating that the respondents had breached the appropriate standard of care, and that she had suffered compensable injuries because of the respondents' breach.

[13] Summary judgment motions in cases alleging medical or dental malpractice are typically brought (or opposed) by respondents (as defendants in the underlying action) who point to a lack of expert evidence in support of the plaintiff's position on the standard of care and/or causation. See for example, **MacNeil v. Bethune**, 2006 NSCA 21, and **Cherney v. GlaxoSmithKline Inc.**, 2009 NSCA 68, leave to appeal ref'd [2010] S.C.C.A. No. 17. Although there is no burden on a defendant to do so, a defendant may – in order to provide greater comfort to the Court – offer expert evidence establishing that the standard of care was not breached, and/or that the plaintiff's injuries were not caused by the defendant's acts or omissions. In such circumstances, if the plaintiff is able to present supportive expert evidence in answer to the defendants' motion, then she will have established a genuine issue of material fact requiring a trial, and the defendants' motion for summary judgment

will be denied; whereas if she fails to offer such evidence, the defendants' motion will often succeed: **Johansson v. General Motors of Canada Ltd.**, 2012 NSCA 120, paras. 112-115 and the authorities cited therein.

[14] At the hearing Justice Murphy had before him medical reports from Dr. Chad Robertson (an oral and maxillofacial surgeon), Dr. Sreenivas Koka (a dental surgeon), Dr. Ben Davis (an oral and maxillofacial surgeon), Dr. Alexander Mitchell (a surgeon), Dr. Rick Balys (an otolaryngologist) and Dr. Robert Tremaine (a dermatologist). None of these specialists was aware of any medical or dental x-ray device or other machine that has ever been implicated in the genesis of a nodule, cyst, lesion, or tumour of the type which the appellant alleges were caused by a device used by Ms. White, or otherwise provided any support for the appellant's position. Thus, there was no expert evidence before Murphy J. to suggest that the lesions on Ms. Szubielski's body were caused by treatment she received from the respondents. Rather, the experts either declined to comment on this issue, or directly refuted the existence of such a causal link.

[15] Perhaps this is best illustrated in the reports of Drs. Chad Robertson, Sreenivas Koka, and Ben Davis. In his letter dated November 26, 2009, Dr. Robertson opines:

Wanda went on to show me a photograph of a device she found on the internet as well as a schematic drawing of a device which she feels she saw in Dr. Price's office. She states that while having some dental radiographs she heard a noise and subsequently developed discomfort. She feels this noise was produced by the device shown in the pictures. Firstly, I personally have no idea what the device shown in the diagram is. Secondly, I have never seen such a device in any dental office. ...

[16] In his letter dated February 9, 2011, Dr. Koka writes:

The patient is also concerned about the use of the dental device in 2007 and the degree to which the use of this device, either properly or improperly, may have contributed to her current condition. Patient presented with a mock-up of the radiographic device. Unfortunately, I do not recognize the mock up as a device with which I am familiar. Therefore, I am unable to be able to assess the circumstances surrounding the use of the device as the patient describes. ...

[17] In his letter dated October 20, 2009, Dr. Davis writes:

I note in your September 21, 2009 letter that you are concerned that a device, most likely an x-ray unit, was used on a March 9, 2007 consultation with Dr.

Price at Park Lane and you feel that this may have contributed to the development of a left parotid pleomorphic adenoma. I can assure you that this would be extremely unlikely to cause such a tumour and in fact I do not believe that there is any documented evidence of this type of salivary gland tumour being the result of exposure to dental x-rays.

[18] I agree with the respondents when they say in their factum that this evidence inevitably led to the following conclusions:

- i. The appellant failed to satisfy the burden upon her on her motion for summary judgment, because she was unable to clearly prove causation, which was a material fact in her cause of action against the respondents. As such, Murphy J. did not err in dismissing her motion regarding her first allegation surrounding the “hazardous device”, and
- ii. The respondents were able to establish that there was no genuine issue of fact regarding causation which required a trial. As such, Murphy J. did not err in granting the respondents their motion for summary judgment, the effect of which was to dismiss that part of the claim relating to the “hazardous device”.

[19] As to the second allegation, Ms. Szubielski as the moving party bore the burden of showing there was no material factual dispute that Dr. Price’s professional services did not meet the requisite standard of care and that his breach of those standards caused her current dental pathology. This was her evidentiary burden under Stage 1 of the analysis (see **Burton**, at ¶ 38). At that point there was no onus upon the respondents to do anything. However, in this case the respondents chose to present their own expert evidence to counter Ms. Szubielski’s attempt to obtain summary judgment.

[20] In support of her motion, the appellant filed a report from Dr. J. Crystal Baxter, a dentist licensed to practise in Arizona, Illinois and Pennsylvania, who opines that had she seen the x-rays viewed by Dr. Price in 2005 and 2007, she would have referred the appellant to an endodontist for evaluation. Conversely, the respondents relied upon the report of Dr. Scott Clark, endodontist, who says Dr. Price’s decisions to continue to monitor the lesion evident in 2005 and 2007 were the best treatment choices for the appellant. Dr. Clark goes on to express the opinion that Dr. Price’s treatment did not cause or result in the appellant’s current dental pathology.

[21] From this it is obvious that the parties placed conflicting expert reports before the motions judge which bore on the key issues of alleged breach of the standard of care and causation. As such, Murphy J. was correct in his conclusion that there were genuine issues of material fact which would require a trial to resolve. In my respectful opinion he did not err by refusing to grant Ms. Szubielski's motion for summary judgment, the effect of which was to preserve that aspect of her claim.

[22] Because the appellant is a self-represented litigant Justice Murphy repeatedly took steps to ensure that Ms. Szubielski understood the impact of his decision. For example, we see this exchange:

.... As I said, I have not dismissed your case.

MS. SZUBIELSKI: Okay.

THE COURT: I have dismissed one aspect of your case, only one aspect of your case, the part involving the hazardous device allegation, but the rest of your case is still before the Court, and we can address how that will go forward. You may be able to resolve that in discussions with Ms. Campbell, and if not, I can give some directions. But you understand the decision that I have made today.

MS. SZUBIELSKI: Yes.

...

THE COURT: ...The practical aspect of the decision, Ms. Szubielski, is your claim against Dr. Price is still there. No, you don't have to get up. That's okay.

MS. SZUBIELSKI: Thank you, My Lord.

THE COURT: Your lawsuit against Dr. Price is still underway. There's no change in that. You didn't win it today. That's what you were looking for. You were looking for it to be all over. That didn't happen. I've decided that there's enough involved in it that it has to go to a full hearing. So your case is still there for Dr. Price, the same as it was last week. Your case involving what Ms. White did, your case against Ms. White and your claim against Dr. Price as employer of Ms. White, is out. I have decided that there was no basis for a claim a hazardous device was used which caused damage to your health. That's the effect of what I did today.

...

THE COURT: ... Your claim against Dr. Price that he acted wrongly or negligently or somehow in breach of his duty to you with respect to tooth 3.1 can go to trial.

[23] During her oral submissions in this Court, Ms. Campbell on behalf of the respondents averted to what she said might have been an error on the part of the motions judge when in the course of his oral decision he commented favourably upon the credibility of the dental assistant, Ms. Jessica White. In the face of what this Court said in **Burton** at ¶87, when enunciating the well-established legal principles that apply in summary judgment hearings:

...

[11] Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility.

Ms. Campbell urged that if the judge's comments amounted to an improper evaluation of credibility, it should be treated as a minor slip which did not affect the outcome.

[24] For the purposes of this appeal it is not necessary for me to consider whether Justice Murphy may have overreached by assessing credibility on an important, contested issue, specifically the appellant's repeated attack on the truthfulness of Ms. White's evidence. In the course of his reasons Justice Murphy said Ms. White's evidence "was thoroughly tested on cross-examination by Ms. Szubielski" and that he found Ms. White to be "a convincing witness .... confident with respect to the testimony she provided ... firm in her recollection ..." such that Ms. White was a person whom Murphy J. "... found ... to be a candid, forthright witness."

[25] Context is always important. Here Justice Murphy's observations were confined to the appellant's allegation that Ms. White had pointed "a hazardous device" at her face and legs, without her knowledge and consent, causing serious and lasting injury, as well as her claim that Dr. Price, Ms. White and other members of his staff had effectively conspired to tamper with the evidence and cover up their negligence as a defence to Ms. Szubielski's allegations. In this context, and given the fact that Ms. Szubielski is self-represented, there was little else the motions judge could do. He recognized that in order to deal with the appellant's first allegation based on the "hazardous device" and the competing motions for summary judgment brought by both the appellant and the respondents, he was obliged to carefully consider the testimony and affidavit evidence offered by Ms. White to determine whether as he stated in his reasons:

...in the context of that evidence ... look to the other evidence in the dispute, see whether Ms. White is contradicted. . I have done that, and I'm not satisfied that there is a dispute or any substantial contradiction of the evidence that she gave in



her affidavit or on cross-examination. There is the Plaintiff's suggestion, yes, that a device was used, and the Plaintiff has indicated what she believes happened, but that is not supported by the production of any device or by literature or by anything in the description of the office. ...

There is no other evidence to support the Plaintiff's allegation. Her allegation is very strongly contradicted by Ms. White, and I don't find any reliable evidence to support the Plaintiff's allegation with respect to the use of a hazardous device. There are medical and dental reports provided by both sides, but none of those reports indicate any knowledge of such a device. ...

Beyond that, beyond whether the device was used or existed, all the medical evidence which is available in the reports indicates that the type of lesions that the Plaintiff incurred on her body are not something which science would attribute to radiation or to the use of the sort of device which the Plaintiff says was employed ...

[26] Given the unique and rather peculiar circumstances facing the motions judge in this case, I see nothing wrong with the approach he took when applying the law to the evidence before him.

[27] In oral argument before this Court the appellant repeated her same allegations that Ms. White had "lied" in her testimony by recalling that the appellant had been treated and x-rayed March 9, 2007 in Operatory 7 (whereas the appellant insists that she was only ever in Operatory 9 and 3); by saying that she had her first contact with Ms. Szubielski in March 2007 (whereas Ms. Szubielski insists that it was in June 2006); and by denying that she had ever tampered or altered the appellant's dental records (when, according to Ms. Szubielski, she had hired a private investigator to conduct a forensic analysis of some of her charts and record labels which she said "proved" that two different pens or ink had been used by the suspected writer(s).) The appellant also complained that Justice Murphy had failed to account for the private investigator's "forensic analysis" in the course of his reasons. She claims this evidence was "crucial" and proves the conspiracy of silence and cover up which she says surround the "huge mystery" and "harrowing situation" she has encountered.

[28] Respectfully, the appellant's complaints really have little to do with the issues Justice Murphy was obliged to address and are not relevant to our assessment of the merits of this appeal.

[29] At the appeal hearing in this Court, while conceding that the expert opinions filed by Drs. Clark and Baxter were "completely different" Ms. Szubielski said Dr. Clark's report was "wrong" because he had not examined the right x-rays, as

compared to Dr. Baxter's assessment which had (she said) more broadly considered all of her x-rays. Respectfully, these attacks on Dr. Clark's opinion would – if borne out by the evidence – go to its reliability and the weight to be attached to it. Such deficiencies, if any, would properly be the subject of cross-examination and argument at trial, which is the proper forum to resolve contested factual disputes.

### **Conclusion**

[30] The appellant failed to present expert evidence to establish the existence or use of a “hazardous device” during her treatments or which would link such a device to the lesions and other afflictions for which she blames the respondents. The motions judge was correct in finding that there was no evidence to support the proposition: “... either that a device was used or that the lesions the Plaintiff encountered would be caused by such a device”. On that basis the motions judge was obliged to grant the respondents summary judgment, effectively dismissing that aspect of the appellant's claim. Because of the conflicting expert evidence surrounding the standard of care provided by Dr. Price with respect to her periodontal disease, Justice Murphy was correct in refusing to grant the appellant's motion for summary judgment, the effect of which was to preserve that aspect of her claim for trial.

[31] For these reasons I would dismiss the appeal with costs to the respondents in the amount of \$1,500 inclusive of disbursements.

Saunders, J.A.

Concurred in:

Oland, J.A.

Fichaud, J.A.