

**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** Tingley v. Wellington Insurance, 2008 NSSC 317

**Date:** 2008/10/09  
**Docket:** S.H. No. 115328  
**Registry:** Halifax

**Between:**

Patricia Tingley, Margaret Burton, Kelli Smith and Todd Smith

Plaintiffs

v.

Wellington Insurance and Larry Hay

Defendants

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**Judge:** The Honourable Justice A. David MacAdam

**Heard:** In Halifax, Nova Scotia

**Oral Decision:** October 9, 2008

**Written Decision:** October 30, 2008

**Subject:** Civil- Evidence - CPR 31 - Expert Opinion - Expert Not Testifying - Evidence Act - Business Records

**Summary:** The plaintiffs applied for the admission into evidence of file materials, reports and opinions of six physicians who treated or consulted with the plaintiffs, without the necessity of having the physicians attend at trial to testify. Two of the physicians were deceased, and several more were allegedly unavailable, or their attendance would be so expensive as to possibly preclude the plaintiffs calling them. The defendants opposed the application.

**Issue:** Should physicians records be admitted into evidence without the attendance of the physicians at trial?

**Result:** Based on *Ares v. Venner*, [1970] S.C.R. 608, and the Nova Scotia *Evidence Act*, the deceased physicians file materials were admissible under the “business records” exception to the hearsay rule. Their weight, however, would have to await all of the evidence, including an assessment of the extent their accuracy and reliability are challenged by the witnesses and the remaining evidence. However, statements of opinion, including diagnosis, by these physicians were inadmissible, other than as establishing that such statements and opinions were made and were available to other physicians with whom the plaintiffs consulted or were treated. Such opinions could not be admitted for their truth, without the opposing party having an opportunity for cross-examination.

The non-deceased physicians file materials were also admissible, but, where challenged, only to establish that the records were made, since the accuracy and reliability of many of the records were challenged including by the plaintiffs, who were seeking to file these records without the record-keeper testifying. The plaintiff, Patricia Tingley, testified that the physicians files were only 75% accurate. Since these physicians are available, although apparently only at a substantial cost to the plaintiff, and since their reports and opinions relate to one or more of the essential issues in dispute, namely, whether the plaintiffs have suffered from the spread of chemical toxins in Ms. Tingley’s home, and, if so, the effects on the plaintiffs, their presence in person, or by video conference, is necessary in order to afford the defendants an opportunity to cross-examine them.

The court left open the possibility of having some witnesses testify by video conference.

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