

SUPREME COURT OF NOVA SCOTIA

Citation: Wareham v. Ross, 2010 NSSC 140

Date: 20100407

Docket: Hfx. No. 237973

Registry: Halifax

Between:

Isabel M. Wareham

Plaintiff

v.

Joseph W. Ross

Defendant

DECISION

Judge: The Honourable Justice Suzanne M. Hood

Heard: April 7, 2010 in Halifax, Nova Scotia

Written Decision: April 16, 2010 (*written release of Oral decision of April 7, 2010*)

Counsel: Brian Hebert, for the plaintiff
Joey Palov, for the defendant

By the Court:

[1] The plaintiff seeks to have a deadline set under *Rule 55.03(1)* for filing an expert's report. The date assignment conference specifically dealt with the issue of when experts' reports would be filed and the expert report of Dr. Matheson was filed within that time limit.

[2] The order of Justice Murphy of June 17 provided that the plaintiff was to advise of her intention to obtain a report from her treating physician at the pain clinic and that that advice would be given to the defendant by July 31, 2009.

Obviously, there was some contemplation at that time that there would be a visit to the pain clinic and that there might be a report forthcoming but that did not occur by that date. It is perfectly clear from what is before me that in fact the plaintiff did not get into the pain clinic until February 1, 2010. However, that was not addressed at the date assignment conference and we are very close to the dates for trial at this point. The finish date is June 24 and Dr. Lynch would be unable to complete her expert report pursuant to *Rule 55.04* until perhaps only a week or two before that, two months from now. In my view, that jeopardizes the trial dates because it would severely prejudice the defendant to be able to review that report,

decide if they wish to have their own expert report, get that expert report done and in before the trial dates, which are the first part of October.

[3] In my view, the cases with respect to late experts' reports are still of application. The specific time limits mentioned of course in those cases are under the old *Rule 31.08* but it seems to me that the law with respect to when late experts' reports can be accepted would still be applicable. As Mr. Palov has pointed out in his brief, it is to allow for proper preparation time. The decision of Saunders, J. (as he then was) in *Corkum v. Sawatsky*, [1993] N.S.J. No. 24 (S.C.) talked about fairness and predictability demanding that the *Rule* be applied strictly save in exceptional circumstances. It seems to me that I have to determine, even under the new *Rule*, whether there are exceptional circumstances why this should be done and why this late report should be allowed.

[4] I have to be satisfied that the interests of justice merit its late reception and that the issue of potential prejudice to the defendant about late reception has been met. In *Fowler v. Schnider National Carriers Ltd.*, [2000] N.S.J. No. 116, Wright, J. said the previous *Rule* conferred discretion about admitting late filed reports but that decision also went on to say that there was a burden of persuasion upon the

defaulting party to address, among other things, the weighing of probative value against prejudicial effect. In my view, there has been very little evidence of how the probative value of this report outweighs the prejudicial effect and I see substantial prejudicial effect to the defendant in admitting this report late. In my view, there are no exceptional circumstances here. It is unfortunate that there was such a long delay getting the plaintiff into the Pain Clinic. However, I cannot imagine that she did not know some time before February 1 that she was going there, particularly since it seems to have been contemplated that she was going there in July of the previous year and may in fact have gone on the wrong date. In my view, I do not see that exceptional circumstances exist for the admission of a late expert's report.

[5] I therefore dismiss the plaintiff's motion to do so.

Hood, J.