SUPREME COURT OF NOVA SCOTIA
Citation: *Gendron v. Delano*, 2018 NSSC 226

Date: 2018-10-04
Docket: *Hfx* No. 458970
Registry: Halifax

Between:

Gena Leger Gendron

Plaintiff

v.

Gillian Delano and Shawn Hurlburt

Defendants

Decision on Chambers Motion

Judge:	The Honourable Justice Robin C. Gogan
Heard:	September 13, 2018 in Halifax, Nova Scotia
Counsel:	Colin D. Bryson, Q.C., for the Plaintiff Karen N. Bennett-Clayton, for Defendant Gillian Delano Clarence A. Beckett, for Defendant Shawn Hurlburt

By the Court:

Introduction

[1] This motion arises in the context of the discovery examination of Shawn Hurlburt. Hurlburt is a defendant in this proceeding. He was one of several parties involved in a motor vehicle collision on February 5, 2014. Liability is a contentious issue in the proceeding.

[2] Hurlburt's discovery examination began uneventfully, by consent, on October 25, 2017. Hurlburt was asked to describe the collision and did so. He was then asked to draw or "sketch out" the intersection where the collision occurred. His counsel objected. Counsel were unable to resolve the objection at discovery, or subsequently. This motion is now brought to resolve the objection and provide directions for the completion of discoveries in the proceeding.

[3] At the core of this motion is whether a deponent can be compelled to draw a sketch, picture, diagram, or the like in response to a question posed during discovery.

Background

[4] On September 13, 2018, the Defendant, Gillian Delano, moved for the following relief:

1. To compel counsel for the Defendant Shawn Hurlburt to provide the basis for his objection to a question at discovery and a determination of the objection in accordance with *Civil Procedure Rules* 18.17(5) and (7); and
2. Provide directions for the resumption of the discovery of the Defendant Shawn Hurlburt.

[5] In support of the relief sought, Delano provided an Affidavit of counsel attaching the transcript of Hurlburt's discovery examination of October 27, 2017, as well as the subsequent exchanges between counsel on the objection. Hurlburt responded with an Affidavit of counsel confirming the objection and the attempts to resolve the matter. Unfortunately, almost one year later, the Hurlburt discovery, and the proceeding, remain stalled as a result of the unresolved objection.

[6] A review of the evidence on the motion reveals that Hurlburt was asked questions about the collision and he answered those questions. Subsequently, Hurlburt was asked to "sketch out, or draw out" the intersection where the collision occurred. Hurlburt's counsel then objected, offering to resolve the objection by permitting Hurlburt to mark "on a plan, that's to scale". The discovery was

adjourned and two Google maps with a scale were forwarded to Hurlburt's counsel. Hurlburt's counsel then advised that his consent to the use of the scale map was conditional upon having a discussion with his client about the map before resuming the discovery. This proposal was not acceptable to Delano.

Position of the Parties

[7] Delano says that the objection raised by counsel for Hurlburt must be overruled. It is submitted that the "question" posed is relevant, or would lead to relevant evidence, and is not privileged. On this basis, Delano says that there is no basis to sustain Hurlburt's objection. Delano relies upon the decision of Justice Rosinski in ***Maple Trade Finance Inc. v. Euler Hermes Canada***, 2015 NSSC 37 adopting the reasons of Bateman, J.A. in ***Wall v. Horn and Abbot Ltd.***, 2003 NSCA 129. Reliance is also placed on the reasons in ***Healy v. Halifax (Regional Municipality)***, 2017 NSSC 82.

[8] Counsel for the Plaintiff Gendron agrees, saying that a carte blanche objection to a drawing or sketch is not appropriate, and adding that discovery should not be interrupted to allow counsel to review a publicly available document with his client.

[9] Hurlburt submits that the issues raised on this motion are of a more fundamental nature going to the fairness of the discovery process. First, it is submitted that witnesses are required only to answer questions on discovery examination. There is no positive obligation to create a document in either the disclosure process or in answer to a discovery inquiry. Second, the spirit of the *Civil Procedure Rules* requires disclosure of any document on which the witness will be questioned during discovery examination.

Issue

[10] Having heard the motion I would reframe the issue to some degree. The main question is whether a witness can be compelled to sketch or draw or mark on a map during discovery examination. Secondarily, an issue arises as to notice of intended use of documents not contained in an Affidavit of Documents.

Analysis

[11] This motion is brought seeking relief in the context of an examination for discovery.

[12] It must be said that this proceeding involves claims for damages arising from a motor vehicle collision between several vehicles. Liability is a very contentious

issue. Discovery questions about the location of the collision, the surrounding sequence of events, and the extent of the witness's recollection, are clearly relevant. There is no claim of privilege.

[13] In this context, Hurlburt was asked to sketch or draw the intersection where the collision occurred or mark on a scaled Google map. Presumably, there would have been follow up questions. In the absence of consent or agreement, the issue becomes - can the witness be compelled to do any of these things? In answering this question, it is recognized that a widespread practice exists to ask deponents to make such drawings or mark on maps or plans during the course of a discovery examination. It is further recognized that such a request is often resolved by consent. In this case, counsel were unable to reach such a consent resolution.

[14] In the absence of consent, the conduct of an examination for discovery is governed by the *Civil Procedure Rules*. Rule 18.13 sets out the scope of discovery examination:

> **Scope of Discovery Examination**
>
> **18.13** (1) A witness at a discovery examination must answer every question that asks for relevant evidence or information that is likely to lead to relevant evidence.
>
> (2) A witness at a discovery must produce, or provide access to, a document, electronic information, or other thing in the witness' control that is relevant or provides information that is likely to lead to relevant evidence.

> (3) A witness who cannot comply with Rule 18.13(2) may be required to make production, or provide access, after the discovery or at a time, date, and place to which the discovery is adjourned under Rule 18.18.
>
> (4) A party who withholds privileged information but decides to waive the privilege must disclose the information to each party and submit to discovery if required by another party.
>
> (5) An expert retained by a party is not subject to discovery, except as permitted under Rule 55 – Expert Opinion.
>
> (emphasis added)

[15] Part 5 of the *Civil Procedure Rules* (Rules 14 – 21) deals with disclosure and discovery generally. The Rules detail general principles, concepts of relevancy and privilege, the presumption of full disclosure, disclosure of documents, electronic information and other things, interrogatories, admissions and medical examinations. There are both procedural requirements and substantive considerations contained within these Rules. The discovery rules clearly contain an obligation to answer relevant, non-privileged questions. They require a witness to prepare and become informed of all discoverable information. They mandate conduct that is consistent with the just, speedy and inexpensive resolution of the proceeding. What is not contained in the Rules is any obligation to create evidence.

[16] During the motion hearing, all counsel relied upon basic principles in support of their various positions. Delano argued that discovery examinations

should be free-flowing exercises with rare interjections in very limited circumstances.

[17] Hurlburt submitted that the underlying philosophy of the *Civil Procedure Rules* generally is one of fundamental fairness. This concept is embedded in the Rules and in the expectations as to how litigants conduct legal proceedings. Fairness underscores the responsibility to be fully prepared to answer relevant questions, and to make full disclosure. It also underscores the right to receive such answers and disclosure, all of which is designed to avoid trial by ambush, and to encourage resolution of disputes at the earliest possible opportunity.

[18] The fundamental concepts referred to are all correct and all inform the interpretation of Rules generally and the conduct of discovery examinations. In my experience, counsel rely upon the Rules and the basic concepts of litigation fairness to drive practical and timely solutions to issues arising in the discovery process. This is something the Court must encourage. Unfortunately, counsel were unable to find such a resolution in this case.

[19] During the hearing, Counsel were asked for specific authority to support the relief sought. None was provided. I am satisfied that the authorities are scant on this issue. The absence of such decisions no doubt reflects a culture of cooperation

and professional courtesy underscoring the day to day disclosure and discovery process.

[20] The basic Rules for disclosure and discovery must be interpreted broadly and liberally and in a manner consistent with purpose of the Rules generally and the goals of the discovery process. In my view, this drives an interpretation that discourages tactical maneuvers and encourages full and timely disclosure. Some further guidance comes from the reasons in ***Peck v. Glendinning*** (1985), 23 D.L.R. (4th) 472 (B.C.C.A.), ***Lacalamita v. McCarthy Tetrault LLP***, 2010 ONSC 3724, and ***Ceci (Litigation guardian of) v. Bonk*** (1992), 89 D.L.R. (4th) 444 (Ont. C.A.).

[21] I conclude that the Rules require a litigant to be fully prepared and informed for a discovery examination and to answer all relevant, non-privileged questions. I further conclude that there is no authority in Rule 18 requiring a litigant to do anything more than answer those questions. There is no obligation to create documents. A deponent is obligated to give evidence but not make evidence.

[22] Much was made of the scaled Google map being a public document. Delano argued that an intention to reference a public document in a discovery examination did not require notice under the Rules. I decline to make any general

determination about the use of publicly available documents at discovery. I do however conclude that there is no obligation to make any marks on such maps under our present Rules. I further find notice of such an intention is consistent with the spirit of the Rules and would likely assist the parties in proceeding by consent.

[23] None of the conclusions in this decision are intended to circumscribe the free-flowing nature of discovery examinations or limit the use of consent based resolutions that allow discovery to proceed in a timely and efficient manner. Resort to judicial intervention at the discovery stage of a proceeding should remain a very rare event.

Conclusion

[24] For the foregoing reasons, I dismiss the motion and sustain the objection raised during the Hurlburt discovery. Pursuant to Civil Procedure Rule 18.17(8), the Hurlburt discovery shall resume as soon as practicable. In the absence of consent, Hurlburt shall not be required to sketch or draw or otherwise create evidence during the course of his discovery examination.

Gogan, J.