SUPREME COURT OF NOVA SCOTIA
Citation: *Fiola v. MacDonald*, 2021 NSSC 262

Date: 20210901
Docket: Hfx No. 471956
Registry: Halifax

Between:

Alexandra Fiola

Plaintiff

v.

Nicole MacDonald

Defendant

DECISION

Judge: The Honourable Justice Jamie Campbell

Heard: August 25, 2021, in Halifax, Nova Scotia

Counsel: Michael Dull and Basia Sowinski, for the Plaintiff
Erin McSorley and Calvin DeWolfe, for the Defendant

By the Court:

[1] This motion has been brought by the Plaintiff, Alexandra Fiola. She is asking that the expert report filed on behalf of the Defendant, Nicole MacDonald, be ruled inadmissible in the trial scheduled to begin September 27, 2021. Ms. Fiola's counsel says the expert failed to answer a written question that they put to him.

[2] Ms. Fiola was involved in a motor vehicle collision and has claimed damages arising from that collision. She has complained about pain and sought treatment from several medical professionals. Ms. Fiola was also sent to see Dr. Edvin Koshi, a physiatrist, for an Independent Medical Examination on January 4, 2021. Dr. Koshi issued a report, and it is that report that is the subject matter of this motion.

[3] Dr. Koshi described what the Plaintiff had reported to him about her pain. When asked about whether the injuries were likely suffered in the motor vehicle collision, he said that the Plaintiff suffered Whiplash Disorder Grade 1 in the accident. That is the mildest form of soft tissue injury. Dr. Koshi said that he was unable to determine an anatomical diagnosis or source of the pain that could be identified with objective findings. He disagreed with the ulnar neuropathy diagnosis put forward by Ms. Fiola's treating neurologist because that diagnosis was based on Ms. Fiola's subjective complaints. Dr. Koshi said that Ms. Fiola's complaints were difficult to explain based on any organic pathology because they were inconsistent with the natural history of trauma in general and with the natural history of soft tissue injuries in particular. In summary, Dr. Koshi said that Ms. Fiola's self-reported limitations were not in keeping with his objective findings, his experience or the medical literature.

[4] Ms. Fiola had complained of pain and sought treatment for it for about 5 years after the collision. So, her counsel now argues that Dr. Koshi is either saying, without directly expressing it, that the complaints are likely valid, but he cannot explain them based on his knowledge, or the Plaintiff's complaints are the result of malingering or lying.

[5] The Plaintiff posed written questions to Dr. Koshi, as permitted under *Nova Scotia Civil Procedure* Rule 55.11. One of those questions reads as follows,

> At age (sic) 26 of your report you write that Ms. Fiola's "self-reported limitations are not in keeping with my objective findings, my experience or the medical

> literature". At page 23 of your report you describe "inconsistencies in her self-report". Please be more clear:
>
> (a) Is it your opinion, based on the lack of "objective findings, your experience and the medical literature" that Ms. Fiola is lying or malingering about her self-reported, "subjective" symptoms and limitations?
>
> (b) If you do not know whether Ms. Fiola is lying or malingering about her self-reported, "subjective" symptoms and limitations, do you agree that you require more information to assess her truthfulness?
>
> (c) If you do not know whether Ms. Fiola is lying or malingering about her self-reported, "subjective" symptoms and limitations, do you agree that it would be helpful to see what people regularly around her have observed in terms of changes to her behavior and activities since the 2016 motor vehicle accident?

[6] The questions were sent on January 15, 2021. They were forwarded to Dr. Koshi, and he replied promptly on January 17, 2021. No objection was made by Ms. MacDonald's counsel about the questions.

[7] As to question (a) Dr. Koshi said this,

> I believe that "age 26", it is meant to be "page 26". If so, I have the following comments:
>
> I defer to the factfinder to determine the credibility of Ms. Fiola's self-report (whether she is "lying or malingering"), as this is not my duty.
>
> However, in a medicolegal setting, it is the duty of an independent medical examiner to look for inconsistencies in the examinee's self-report to help the factfinder to determine the credibility. This is a very important feature of a quality IME report. It is also the duty of an independent medical examiner to not accept the subjective reports "at face value", but to instead compare them to the objective data from research, physical examination, and the examiner's experience.
>
> On the page 26 of my IME report, I stated that Ms. Fiola reported to me that her neck and shoulder pain have remained the same since the subject accident. I commented that her report was inconsistent with the injuries that she suffered in the subject accident, as well as the medical literature (Guides to the Evaluation of Disease and Injury Causation, American Medical Association, Melhorn, 2014 - one of the most respected sources for assessing disability and impairment, and the BC Whiplash Initiative 1995).
>
> On the page 26 of my IME report, I stated that Ms. Fiola told me that her upper left extremity pain reaches the level of 9/10 once a week. While I accepted that pain is entirely subjective, I commented that in my experience, individuals with such a high level of pain are seen in an Emergency Department, and that the

> information that I was given for review did not indicate that she was seen in the Emergency Department once a week. According to the research that I presented (Guides to the Evaluation of Disease and Injury Causation, American Medical Association, Melhorn, 2014), this unusual/extreme pain rating indicated it is likely that biopsycho-social factors or behavioral factors are at play.
>
> After identifying these inconsistencies and presenting them in my report, now I defer to the factfinder to determine the credibility of Ms. Fiola's self-report (whether she is "lying or malingering"), as this is not my duty.

[8] As to question (b), Dr. Koshi said that he had answered the question. As to question (c), he also said that his response to question (a) on lying and malingering had been provided.

[9] Ms. Fiola's counsel wrote to Ms. MacDonald's counsel alleging that Dr. Koshi had insufficiently addressed the question of whether Ms. Fiola had been "lying or malingering". Counsel for Ms. MacDonald replied that Dr. Koshi would not be reconsidering his written answers.

[10] When an expert fails to answer questions in compliance with Rule 55.11 the party who asks the questions may make a motion for an order that the report is inadmissible on that ground. Ms. Fiola says that the questions asked were "in compliance" with Rule 55.11 and that Dr. Koshi failed to answer them.

Procedure

[11] The ability of a party to ask questions of an expert pursuant to Rule 55.11 replaces the right of discovery which parties had under the former Rules. It replaces the right of discovery, but it is not the same as the right of discovery.

[12] The process involves the party whose expert has been asked questions having the right to bring a motion under Rule 55.11(7), to set aside or limit the questions. In this case it is not Ms. MacDonald, the party, who objected to the question. No motion was made to set aside or limit the questions. It was Dr. Koshi who objected. Ms. Fiola contends that where there is a disagreement about the appropriateness of the question the party who receives the questions should make a motion to set aside or limit them. There is nothing which would permit an expert to make the unilateral determination that the questions posed of him are illegal or improper. Ms. Fiola's counsel says that there is nothing in the Rules that would permit an expert to decide what is, or is not, a legally appropriate written question under Rule 55.11.

[13] Rule 55.11(7) is the section that permits the party receiving the questions to make a motion to set aside or limit the questions. The Rule does not say that if the party does not make such a motion every question asked is then deemed to comply with Rule 55.11. If the party receiving questions fails to make a motion to set aside or limit the questions, under Rule 55.11(7), the impermissibility of the questions may still be raised in response to a motion brought under Rule 55.11(8) seeking to have the expert report ruled inadmissible for failure to answer those questions. The failure of the party receiving the questions to object to those questions does not compel the expert to answer questions that are outside the scope of those that may properly be asked to an expert.

[14] The Rules must be applied practically. In this case, the questions were sent to Ms. MacDonald's counsel and immediately forwarded to Dr. Koshi on January 15, 2021. Dr. Koshi answered them on January 17, 2021. Those answers were sent to Ms. Fiola's counsel on February 2, 2021. And an objection was made by Ms. Fiola's counsel the next day, February 3, 2021. From a practical perspective, the process used did not result in added delay or expense. Had Ms. MacDonald's counsel objected to the questions asked of Dr. Koshi and made a motion to have that resolved, the process would not have been much more efficient or expeditious than the process that has been used. The Plaintiff's counsel did not "slow walk" the questions through the process. They were received and forwarded to the expert immediately. A response was received very promptly and sent to Ms. Fiola's counsel without significant delay.

[15] The remedy sought by Ms. Fiola to have the expert report ruled inadmissible is the only one available under the Rule. That is a consequential remedy. It would be unfair to impose it only because the prompt objection to the question came from Dr. Koshi with the concurrence of Ms. MacDonald's legal counsel and not directly from counsel upon receipt of the written questions.

What is an Answer?

[16] Rule 55.11(8) provides that the "opinion of an expert who fails to answer questions in compliance" with the Rule is inadmissible and the party who asks the questions may make a motion for an order that the opinion is inadmissible on that ground. That raises the question as to, what is an answer? Presumably words in free association not related to the question, but prompted by it, do not constitute an answer. Otherwise, the statement that one will not answer a question would paradoxically constitute the answer that the person was refusing to give. The

statement was prompted by the question but was not responsive to it in a meaningful way.

[17] An answer, to be an answer, need not provide the information that the questioner has sought. “I don’t know”, is an answer. It does not give the information sought but addresses the subject matter of the question.

[18] In the context of the Rule an answer must be more than a statement prompted by the question though entirely unresponsive to the subject matter of the question. In this context, offering no response or making a statement that no response will be given, is a failure to answer. Providing a response that does not address the subject matter of the question would be a failure to answer. Saying that information sought would require the expert to provide an opinion that is outside the scope of their expertise is an answer that addresses the subject matter of the question.

[19] Dr. Koshi’s response was not unrelated to the subject matter of the question or unresponsive to it. He addressed the question. He said that the issue was not one that was within the scope of what he had been retained to assess. He was not retained to assess Ms. Fiola’s truthfulness or credibility, or whether she was lying or malingering. He was asked to give opinion on those issues and he declined to do that. That may, or may not, be an “answer”.

[20] What is, or is not, an “answer” in a general sense may not be entirely clear. It may be more productive to go at it from the other end. The uncertainty as to whether the response was an answer arises from the nature of the question itself.

What Questions Can Be Asked?

[21] The non-answer, or failure to answer, must be in response to a question asked in compliance with Rule 55.11.

[22] The question that Ms. Fiola wanted answered was whether, in Dr. Koshi’s expert opinion, she was lying or malingering about her symptoms. Malingering could be described as a particular kind of deceit. It describes the actions of a person who has consciously feigned or exaggerated an illness or condition. There is usually an external motivation such as obtaining compensation or benefits, avoiding work, or having drugs prescribed. In Nova Scotia courts doctors have routinely given evidence providing opinions about whether malingering can be identified in a particular case.

[23] But experts are not retained to give opinions on whether people are lying. Witnesses generally cannot be asked about whether another witness or a party is, or is not, lying. That is an issue for the trier of fact to determine. Having an expert provide an opinion on the ultimate issue, particularly credibility, would be objectionable in a trial. That may not be an objection to it being provided in pre-trial discovery. "Malingering" in the context of personal injury cases appears to have been carved out as an aspect of credibility that does allow for comment by medical professionals, if not as a diagnosis, then as a clinical observation or note.

[24] Counsel for Ms. Fiola has argued that Dr. Koshi's report implied that Ms. Fiola was malingering, and he should not be allowed to hide behind innuendo and insinuation. Ms. Fiola is entitled to know before the trial whether there is going to be a suggestion that she is lying or malingering. Any such suggestion would not come from Dr. Koshi, who has said that it was not an issue that he addressed.

[25] Experts can no longer be required to submit to discovery examination. Interrogatories cannot be delivered to an expert. Both of those would allow for a broad scope of questioning on matters that are potentially relevant. Rule 55.11(3) limits the written questions that can be asked of an expert. The questions can only call for information that is not privileged and relevant to one of three things. Those are the expert's qualifications, a factual assumption made by the expert, or the basis for an opinion expressed in the expert's report. If a question falls outside the scope of those permitted areas of inquiry, it is not a question that can be asked, and it is not a question that requires an answer.

[26] The information sought about whether, in Dr. Koshi's opinion, the Plaintiff was lying or malingering is not privileged. It is clearly not relevant to Dr. Koshi's qualifications. It is not relevant to a factual assumption that Dr. Koshi made in reaching the conclusions that he did reach. The question is not relevant to the basis for an opinion expressed in the expert report. Dr. Koshi's opinion as set out in his report was summarized in the questions put to him. He concluded that the symptoms were not consistent with his objective findings, his experience, or the medical literature. That is as far as he went. He did not say that Ms. Fiola was lying or malingering, and his opinion was not based on any factual assumption or opinion that she was. Dr. Koshi, as a physiatrist, assessed the evidence for physical causes of Ms. Fiola's symptoms. He did not offer an opinion about whether she may be malingering or whether there may be other non-physical causes for those symptoms.

[27] To ask Dr. Koshi whether, in his opinion, Ms. Fiola is malingering or lying, is not to ask him about something that was relevant to the basis of the opinion he expressed. It is calling for another opinion which Dr. Koshi did not offer in his report.

[28] Ms. Fiola's counsel says that the questions were intended to provide clarity on the innuendo and implications contained in the report. It does not address the expert's reasoning process or the basis of any opinion that he offered. It asks for another opinion.

Conclusion

[29] When written questions are posed to an expert the party who receives them may make a motion to limit or set aside questions. Failure to make such a motion does not then extend the scope of questions beyond the limits imposed by Rule 55.11(3). Written questions replace discovery but they are not a form of written discovery. The questions that can be asked are limited to three general areas. They must be relevant to the expert's qualifications, to a factual assumption made by the expert, or to the basis for an opinion expressed in the report.

[30] The question about whether, in Dr. Koshi's opinion, Ms. Fiola was malingering or lying, clearly is not relevant to Dr. Koshi's qualifications, or to any factual assumption made by Dr. Koshi in his report. It is not relevant to the basis for an opinion expressed by Dr. Koshi in the report but instead is asking for an opinion that Dr. Koshi did not express in the report. Dr. Koshi gave an opinion on the physical evidence and that was the limit of his remit. He was not engaged to offer an opinion about Ms. Fiola's truthfulness or credibility and did not offer such an opinion. Asking him to provide an opinion on that matter is beyond the scope of permissible questions under Rule 55.11(3).

[31] The Defendant has been successful on the motion and is awarded costs of $750.

Campbell, J.