

SUPREME COURT OF NOVA SCOTIA

Citation: *Croft v Nemis*, 2022 NSSC 211

Date: 20220726

Docket: *KEN*, No. 481262

Registry: Kentville

Between:

Michael Burnum Croft and Brenda Croft

Plaintiffs

v.

Corey Ryan Nemis

Defendant

Judge: The Honourable Justice Gail L. Gatchalian

Heard: June 23, 2022 and July 19, 2022, in Kentville, Nova Scotia

Counsel: Ali Imran Raja, for the Plaintiffs
Sarah-Jo Briand, for the Defendant

By the Court:

Introduction

[1] This is a personal injury case arising out of a motor vehicle accident. Michael Burnam Croft, one of the Plaintiffs, claimed that he suffered injuries in the accident, including a soft tissue injury to his right shoulder. He claimed general damages for pain and suffering as well as damages for loss of past and future wages, loss of earning capacity, and loss of valuable services, including housekeeping. Mr. Croft attended an Independent Medical Examination (“IME”) with two different physiatrists: one with Dr. Edwin Hanada, retained by Mr. Croft, and one with Dr. Edwin Koshi, retained by Mr. Nemis. An MRI disclosed muscle tears in Mr. Croft’s right shoulder. Dr. Hanada recommended that Mr. Croft be referred to an orthopedic surgeon. Mr. Nemis asked Mr. Croft to attend a further IME with Dr. Michael Gross, an orthopedic surgeon. The request was made after the April 1, 2022 deadline for filing expert reports set by the Date Assignment Judge. Mr. Croft refused to attend. Mr. Nemis filed a motion for an order requiring Mr. Croft to attend the IME with Dr. Gross. Mr. Nemis had secured a new appointment date of July 12, 2022. Mr. Croft objected based on timeliness. I made an interim order requiring Mr. Nemis to file a motion seeking permission from this Court to file a late expert report, which I would decide before deciding whether to require Mr. Croft to attend the IME.

[2] In determining these two motions, I will first discuss the principles that apply to a motion to require a plaintiff to attend an IME, and then I will discuss Mr. Nemis’ request for leave to file a late expert report.

Request for Order Requiring that Mr. Croft Attend IME

[3] Mr. Nemis, as a defendant contesting a personal injury claim, has a *prima facie* right to require Mr. Croft to attend an IME conducted by a qualified medical professional chosen by Mr. Nemis, and the burden is on Mr. Croft to satisfy the court that he should not be required to comply: Civil Procedure Rule 21.02(1) and (2), and see *Saccary v. Vonhammerstein*, 2018 NSSC 135 at paras.11-13.

[4] Under Civil Procedure Rule 21.03, I may order that Mr. Croft attend more than one examination if different physical or mental conditions in issue pertain to

different medical specialties, if the same condition clearly calls for opinions from different specialties, or if justice will be served by permitting an additional examination.

[5] The burden remains on Mr. Croft to satisfy me that he should not be examined, even though he already attended an IME: see *Goodwin v. Lunn*, 2016 NSSC 165 at para.22.

[6] I am satisfied that either Mr. Croft's shoulder injury falls within the purview of different medical specialties – physiatry and orthopedic surgery, or that his shoulder injury calls for opinions from those different specialties. I therefore have the discretion to order this second IME.

[7] Mr. Croft said that the motion to require him to attend the IME should be rejected, as the request and anticipated report of Dr. Gross were beyond the deadline for the filing of expert reports. At the Date Assignment Conference held in this matter, the Honourable Justice John Keith set a deadline of April 1, 2022 for the filing of expert reports, on the agreement of the parties. Counsel for Mr. Nemis indicated that they would only be filing rebuttal expert reports. October 6, 2022 was set as the finish date, and the trial dates were scheduled for January 9 to 23, 2023.

[8] As mentioned, I made an interim order requiring Mr. Nemis to file a motion seeking permission from this Court to file a late expert report from Dr. Gross.

Request for Permission to File Late Expert Report

The Test

[9] *Civil Procedure Rule 55.03(1)* requires expert reports to be filed no less than six months before the finish date, or by a deadline set by a judge. At this point, a report from Dr. Gross will be filed well past the filing deadline. Mr. Nemis bears the burden of persuading me that the interests of justice justify the late filing of the anticipated report of Dr. Gross: see *Corkum v. Sawatsky*, 1993 CanLII 4687 (N.S. T.D.) per Saunders J., as he then was, at pp.9-10, rev'd on other grounds in *Corkum v. Sawatsky*, 1993 NSCA 201. I must consider three factors in determining whether to allow the late filing of Dr. Gross' report: (1) whether it will have probative value, (2) whether there are there exceptional circumstances that warrant its late filing and (3) the prejudicial effect on Mr. Croft if I allow the report to be filed late: see *Nichols v. McGillis*, 2019 NSSC 85 at paras.46-62.

[10] There is not a closed list of what constitutes exceptional circumstances. They could exist where:

- facts come into the knowledge of a party which could not, with reasonable diligence, have been learned in time to be included in an expert's report; or
- where a plaintiff in a personal injury claim has a significant change in his or her health, such that new expert evidence would be needed to properly put the plaintiff's state of health before the trial judge.

See *Conrad v. A.F. L. Manufacturing Limited*, 2018 NSSC 52 at para.63

[11] The circumstances need to be “exceptional,” for example, outside of one's control or unforeseen, despite reasonable diligence: see *Aly v. Personal Care Holdings Ltd.*, 2022 NSSC 108 at para.43. In determining whether circumstances are exceptional, the court takes into account a number of factors, including:

- when the evidence became known to the party, and
- the explanation for its failure to file the opinion evidence earlier.

See *Aly, supra* at para.43.

Probative Value

[12] The report from Dr. Gross is likely to be probative. An MRI shows that Mr. Croft has “partial-thickness tears in the supraspinatus, infraspinatus and subscapularis” in his right shoulder. Dr. Hanada recommended that Mr. Croft be referred to an orthopedic surgeon.

Exceptional Circumstances

[13] Mr. Nemis says that exceptional circumstances exist because:

- had Mr. Croft consented to the IME, the report would have been on time, because the filing deadline and the finish date were extended by virtue of the Court's suspension of filing deadlines in the spring of 2021 due to the COVID-19 pandemic, and

- new information about Mr. Croft’s medical condition became available in February of 2022 when Dr. Hanada reviewed the MRI and recommended a referral to an orthopedic surgeon.

Extension of Deadline?

[14] I do not agree that the April 1, 2022 deadline for filing expert reports was extended by virtue of the court’s suspension of filing deadlines in the spring of 2021.

[15] First, neither the April 1, 2022 deadline nor the April 11, 2022 request that Mr. Croft attend an IME with Dr. Gross occurred within a period of suspension of filing deadlines. The suspension of filing deadlines relied on by Mr. Nemis took effect on April 28, 2021 and expired at 11:59 p.m. on June 6, 2021, almost one year before the April 1, 2022 filing deadline and Mr. Nemis’ request that Mr. Croft attend the IME with Dr. Gross.

[16] Second, if I were to accept Mr. Nemis’ argument, then both the deadline for filing expert reports and the finish date would be extended by 13 calendar days. This has the potential to jeopardize the January, 2023 trial dates.

[17] Also relevant is the fact that at the time he made the request on April 11, 2022 that Mr. Croft attend an IME with Dr. Gross, Mr. Nemis knew that the filing deadline was April 1, 2022. Counsel for Mr. Nemis wrote to counsel for Mr. Croft on April 11, 2022, stating “I appreciate that this report will be provided past the deadlines for the filing of expert reports ...” and “I intend to file Dr. Gross’ IME report upon its receipt and am hopeful that you will consent to this late filing.”

[18] The decision of the Honourable Justice Jamie Chipman in *Stroh v. Blakeney*, 2020 NSSC 327 to extend the deadline for the filing of expert reports is distinguishable because the deadline in that case fell during a period of suspension of filing deadlines.

New Information

[19] Mr. Nemis says that he received new information on February 7, 2022, when he received an addendum to the expert report of Dr. Hanada. Both parties had been waiting for Dr. Hanada to review the MRI results. In the addendum, Dr. Hanada wrote:

My answers to the questions in my original report remain the same, except for more detailed diagnosis of the right shoulder injury that Mr. Croft sustained in the subject collision, as above from the MRI of the right shoulder report.

Furthermore, in terms of treatment, I would recommend that Mr. Croft be referred to an orthopedic surgeon with special expertise in upper extremity injuries.

[20] I do not agree that this is new information justifying Mr. Nemis' very late request that Mr. Croft attend an IME with an orthopedic surgeon. In Dr. Hanada's original expert report, authored on February 26, 2021 and received by Mr. Nemis on May 17, 2021 he recommended that Mr. Croft undergo further diagnostic imaging "to rule out a rotator cuff tear" and recommended at two different points in the report that Mr. Croft be referred to an orthopedic surgeon. Dr. Hanada wrote that "[d]epending on the outcome of the ultrasound on his right shoulder, Mr. Croft may require a referral to an orthopaedic surgeon for further intervention..." and that "a referral to an orthopaedic surgeon for further assessment and treatment ... may be beneficial to Mr. Croft in the future." Mr. Croft was unable to get an ultrasound, but did have an MRI, and the MRI results were provided to Mr. Nemis on October 15, 2021. Mr. Nemis had Dr. Hanada's addendum report on February 7, 2022. He waited another two months, until after the deadline for filing expert reports, before asking Mr. Croft to attend an IME with Dr. Gross.

[21] In these circumstances, Mr. Nemis has not satisfied me that he acted with reasonable diligence or that the situation he now finds himself in was outside of his control or unforeseen. He knew that Mr. Croft might have a muscle tear and that Dr. Hanada was recommending a referral to an orthopedic surgeon well before the April 1, 2022 filing deadline.

[22] I do not find, in the circumstances of this case, that exceptional circumstances exist that would justify the late filing of a report from Dr. Gross.

Prejudicial Effect

[23] At this point, if I grant leave to Mr. Nemis to file a late report, and if I order Mr. Croft to attend the IME, the January, 2023 trial dates will be at risk. Mr. Croft should have three months to file a rebuttal expert report. This would take us beyond the finish date of October 6, 2022. I understand that this is the case in part

because of the delay inherent in scheduling, hearing and deciding the motions, and that had the motions been heard and decided sooner, and a late report permitted, the trial dates might not have been at risk. However, Mr. Nemis took the risk that Mr. Croft would refuse to attend the IME when the request was made and the IME appointment was scheduled to take place after the deadline for filing expert reports, and that it would take some time to schedule and hear a motion for an order requiring him to attend the IME.

Conclusion re: Permission to File Late Expert Report

[24] In the circumstances of this case, Mr. Nemis has not satisfied me that it is in the interests of justice to permit the late filing of a report from Dr. Gross. Leave to file a late report from Dr. Gross is denied.

Reason Why Mr. Croft Should Not Be Examined by Dr. Gross

[25] Given my decision to deny Mr. Nemis leave to file a late report from Dr. Gross, Mr. Croft has satisfied me that he should not be examined by Dr. Gross.

Conclusion

[26] The motion of Mr. Nemis for permission to file a late report from Dr. Gross is dismissed, as is his motion for an order requiring Mr. Croft to attend an IME with Dr. Gross. Costs of both motions are payable to Mr. Croft. If the parties cannot come to an agreement on costs, I will receive costs submissions from Mr. Croft by August 22, 2022, and reply submissions from Mr. Nemis by September 5, 2022.

Gatchalian, J.