

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Croft v Nemis*, 2022 NSSC 275

**Date:** 20220926

**Docket:** *Kentville* 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:** 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. One of the Plaintiffs, Michael Burnum Croft, claims that he suffered injuries in the accident, including a soft tissue injury to his right shoulder. Mr. Croft attended an independent medical examination (“IME”) with Dr. Edwin Koshi, a physiatrist retained by the Defendant, Corey Ryan Nemis. In an earlier decision, I dismissed the motion of Mr. Nemis for an order requiring Mr. Croft to attend a further (“IME”) with an orthopedic surgeon and for permission to file the resulting expert report late: 2022 NSSC 211. This is a motion by Mr. Croft for an order excluding the expert report of Dr. Koshi.

[2] The factual basis for this motion is not in dispute and arises as a result of a telephone call that took place between Dr. Koshi and Sarah-Jo Briand, counsel for Mr. Nemis. Mr. Croft attended the IME with Dr. Koshi on April 7, 2022. On April 11, 2022, Ms. Briand informed Ali Raja, counsel for Mr. Croft, that Dr. Koshi had recommended that Mr. Croft also be assessed by an orthopedic surgeon. Mr. Raja objected to this communication between Dr. Koshi and Ms. Briand, and demanded that this communication be disclosed. Ms. Briand advised that there was no such disclosure. Dr. Koshi’s recommendation took place during a telephone call between Dr. Koshi and Ms. Briand on March 28, 2022, before the IME appointment. When Dr. Koshi ultimately authored his report, he did not recommend that Mr. Croft be seen by an orthopedic surgeon. Rather, Dr. Koshi’s opinion was that Mr. Croft’s right shoulder injury was not caused by the accident.

[3] Mr. Croft argues that Dr. Koshi’s report should be excluded from the evidence because:

1. Dr. Koshi failed to include everything he regarded as relevant to his opinion, he failed to notify the parties in writing of a change in his opinion, and he failed to identify the issues outside his expertise, contrary to Civil Procedure Rules 55.04(1)(c), (e) and 55.04(2)(b);
2. Mr. Nemis failed to provide disclosure of the communication between Dr. Koshi and Ms. Briand, contrary to Civil Procedure Rule 55.08; and

3. Dr. Koshi's recommendation that Mr. Croft also be assessed by an orthopedic surgeon impugns his independence because he gave an opinion to counsel when he is supposed to provide an objective opinion to the court, contrary to Civil Procedure Rule 55.04(1)(a).

### **Failure to Include Everything Relevant, Identify Issues Outside Expertise, or Notify of Change in Opinion?**

#### ***Failure to Include Everything Relevant?***

[4] Dr. Koshi stated in his expert report, as required by Civil Procedure Rule 55.04(1)(c), that he included everything he regards as relevant to the expressed opinion and that the report draws attention to anything that could reasonably lead to a different conclusion. Without more, Dr. Koshi's failure to mention his conversation with Ms. Briand in his report does not establish that he failed to include something he regarded as relevant to his opinion, or something that could have reasonably lead to a different conclusion. Mr. Croft has not presented sufficient evidence to establish a breach of Rule 55.04(1)(c).

#### ***Failure to Identify Issues Outside Expertise?***

[5] Mr. Croft has not pointed to any portion of Dr. Koshi's report that suggests that Dr. Koshi failed to identify the issues that fell outside his expertise. The fact that Dr. Koshi suggested to Ms. Briand, before he assessed Mr. Croft, that Mr. Croft also be seen by an orthopedic surgeon, without more, is insufficient to conclude that Dr. Koshi's report violates Rule 55.04(2)(b).

#### ***Failure to Notify of Change in Opinion?***

[6] Mr. Croft's argument that Dr. Koshi failed to notify the parties of a change in his opinion also fails.

[7] Civil Procedure Rule 55.04(1)(e) requires Dr. Koshi to notify each party in writing of "a change in the opinion" as soon as possible after arriving at the changed opinion:

#### **55.04 Content of expert's report**

- (1) An expert's report must be signed by the expert and state all of the following as representations by the expert to the court:

...

(e) the expert will notify each party in writing of *a change in the opinion*, or of a material fact that was not considered when the report was prepared and could reasonably affect the opinion, as soon as possible after arriving at the changed opinion or becoming aware of the material fact.

[8] The reference to “the opinion” in Rule 55.04(1)(e) is to the opinion expressed in Dr. Koshi’s report. The words of that subparagraph make it clear that it is referring to a state of affairs that exists after the expert report is signed: the expert report must be signed by the expert and state, in the report, that the expert “*will notify*” each party in writing of a change in the opinion or of a material fact that was not considered “*when the report was prepared ...*” (emphasis added).

[9] Furthermore, the words of Rule 55.04(1) as a whole lead me to conclude that “the opinion” in subparagraph (e) means the opinion expressed in the expert report. The requirement in subparagraph (e) in Rule 55.04(1) follows subparagraph (a), which requires the expert to state, in the report, that they are “providing an *objective opinion for the assistance of the court ...*,” and subparagraph (c), which requires the expert to state, in the report, that “the report includes everything the expert regards as relevant *to the expressed opinion ...*” (emphasis added).

[10] A reading of Rule 55 as a whole leads me to the same conclusion; for example, Rule 55.04(2)(a) requires that the expert report contain “details of the steps taken by the expert in formulating or confirming *the opinion*,” (emphasis added) i.e. the opinion expressed in the report.

[11] Dr. Koshi’s recommendation to Ms. Briand that Mr. Croft also be seen by an orthopedic surgeon was not an opinion that changed within the meaning of Rule 55.04(1)(e).

[12] Furthermore, Mr. Croft has not presented sufficient evidence to establish that Dr. Koshi’s recommendation to Ms. Briand was “an opinion.” Rather, the evidence suggests that Dr. Koshi made a suggestion to Ms. Briand before he formulated an opinion.

### **Failure to Disclose?**

[13] Mr. Croft says that Mr. Nemis is required, by Civil Procedure Rule 55.08, to provide a signed affidavit from Dr. Koshi and from Ms. Briand detailing the

contents of the telephone call between them. In my view, this argument must also fail.

[14] Civil Procedure Rule 55.08 provides as follows:

**55.08 Consequential disclosure**

- (1) A party who files an expert's report or a rebuttal expert's report must disclose, by supplementary affidavit of documents or the applicable method of disclosing electronic information, a document or electronic information considered by the expert that is in the control of the party.
- (2) The disclosure must be made no later than the day the report is filed.
- (3) The party must also disclose any real or demonstrative evidence considered by the expert that is in the control of the party.
- (4) The expert must provide a copy of the document or electronic information, or provide disclosure of another thing, that was considered by the expert and is in the control of the expert but not the party.

[15] Mr. Croft states that the requirement to disclose "another thing" in Civil Procedure Rule 55.08(4) should be interpreted to require the creation of affidavits in this case. He was unable to provide me with any authority to support this position. I conclude that the rule does not require a party to create a document. It does not require Mr. Nemis to create affidavits from Dr. Koshi and Ms. Briand detailing the telephone call between them.

**Lack of Independence?**

[16] The fact that Dr. Koshi recommended that Mr. Croft also be seen by an orthopedic surgeon does not, without more, establish that he has violated his duty to provide an objective opinion for the assistance of the court, contrary to Civil Procedure Rule 55.05(1)(a). As stated, I reject the assertion that Dr. Koshi's recommendation to Ms. Briand constituted an opinion. Moreover, Dr. Koshi has included in his report an explicit acknowledgement, as required by the foregoing rule, that he is providing an objective opinion for the assistance of the court. In these circumstances, I find that Mr. Croft has failed to establish that Dr. Koshi has

violated his duty of independence to the court by virtue of having suggested to Ms. Briand that Mr. Croft also be assessed by an orthopedic surgeon.

**Conclusion**

The motion of Mr. Croft is dismissed, with costs of to the Defendant in the amount of \$1000, payable forthwith.

Gatchalian, J.