SUPREME COURT OF NOVA SCOTIA

Citation: *Boyce v. Abousamak*, 2014 NSSC 160

Date: 20140501
Docket: Halifax No. 344479
Registry: Halifax

Between:

Michael Boyce and Kimberley Susan Arnold-Boyce

Plaintiffs

v.

Wael Abousamak and Allison Williamson

Defendants

Judge: The Honourable Justice Peter P. Rosinski

Heard: April 14, 2014, in Halifax, Nova Scotia

Counsel: Philip M. Chapman and Christine Nault, for the Plaintiffs
Wendy Johnston, Q.C., Kiersten Amos and
Katie Archibald (Articled Clerk) for the Defendants

By the Court:

Introduction

[1] The Plantiffs, Mr. and Mrs. Boyce, rented their house at 15 Abrams Way to Mr. Abousamak and Ms. Williamson from April 1, 2010 for a period of two years. On April 25, 2010, a fire started under the back deck at the house which consequently did significant damage to the dwelling.

[2] Mr. and Mrs. Boyce are now suing the tenants for negligence by the careless use and disposal of lit cigarette material and for breach of the tenancy agreement. The trial is scheduled for April 14 – 17, 2014.

[3] At a date assignment conference on July 26, 2013, Justice Wright set deadlines for the filing of experts' reports compliant with Rule 55, as follows:

Plaintiffs – September 30, 2013;

Defendants - December 31, 2013.

[4] The finish date was set as January 27, 2014; the trial readiness conference was scheduled for February 21, 2014.

[5] The Plaintiffs retained an expert from Contrast Engineering, Grant Rhyno, to give an opinion as to the cause and origin of the fire. His October 1, 2013, report was filed October 9, 2013. The December 19, 2013, report of the Defendant's expert, David Neal, was filed March 14, 2014.

[6] Neither party has objected to the timeliness of these reports, nor to the qualifications of the witnesses or the content of these reports. However, on April 7, 2014, the Plaintiffs filed with the Court a further document from Mr. Rhyno, entitled: "Supplemental Report". In the body of that supplement, Mr. Rhyno states:

> On Thursday, April 3, 2014, I received the following email from Mr. Philip Chapman of Ritch Durnford, solicitor acting on behalf of TD Insurance, the insurers of 15 Abrams Way at the time of Sunday, April 25, 2010 fire:
>
> > Mr. Rhyno, further to our telephone, discussions, this is to confirm the following:
> >
> > 1. The witness, Miss Bridgit O'Driscoll Burns is not now able to recall any conversation she may have had with the Defendants, (Mr. Abousamak and Miss Williamson) after the fire;
> >
> > 2. Another neighbor has recently advised me that, after the fire, Mr. Abousamak and Miss Williamson admitted that they were smoking on the back deck of the Boyce property 20 to 30 minutes prior to the outbreak of the fire.
>
> Please advise pursuant to *Rule* 55.04 of the *Civil Procedure Rule*s whether this information could reasonably affect your opinion.

[7] In his April 7 update, Mr. Rhyno outlines the effect of this information on his opinion. Although the specifics of his opinion changed, his general conclusion

remains the same: "I remain of the opinion that it is more probable than not that the fire was caused by the careless disposal or handling of smoking material".

[8] In response to receipt of this update, Defendants' counsel wrote to the Court that: "the Defendants object to the filing of the supplemental report as it is outside the deadline for filing of an expert's report pursuant to Rule 55.03".

[9] By letter dated April 9, the Defendants requested an advance ruling pursuant to *Rule* 55.10 regarding whether that supplemental report should be excluded from being evidence by the Court.

[10] A recorded pretrial telephone conference was held on April 11th based on the consequent correspondence received from counsel, and written arguments were received as late as 1:00 p.m. April 12. Oral arguments were heard on April 14, 2014.

Issues

1. Is *Rule* 55.10 applicable here such that an advance ruling is possible?

2. Is the April 7 "Supplemental Report" governed by Rule 55.04 as the Plaintiffs argue, or by Rule 55.03 as the Defendants argue?

Positions of the Parties

Plaintiffs

[11] The Plaintiffs argue that the Supplemental Report is not an expert's "report" as referred to in Rule 55.03; that is, although the October 1, 2013 Rhyno report is subject to Rule 55.03, they argue that Rule 55.04(1)(e) is applicable instead to the April 7 report. That Rule reads:

> 55.04 (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.

[12] The Plaintiffs say that Rule 55.04(1)(e) imposes an obligation on an expert to bring such matters to the attention of other parties by way of a "notification" of a change, rather than the creation of a new expert's "report".

[13] The Plaintiffs note that that Rule 55.04(1)(e) contains no fixed deadline, and that the obligation therein is triggered whenever there is 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". The obligation is to notify the other party "as

soon as possible after arriving at the changed opinion or becoming aware of the material fact".

[14] They point out that that subsection does not require that the information be "new" in the sense that it was only recently discoverable, but rather that it was only recently discovered.

[15] The Plaintiffs were unable to locate any cases directly of assistance in resolving the issue.

Defendants

[16] The Defendants object to the April 7 report and argue that it "should not be admitted into evidence."

[17] In support of their position they argue that either the April 7 report was not filed in accordance with the timeline set out in Rule 55.03, or it does not satisfy the requirements of Rule 55.04 as to form.

[18] On the latter point the Defendants argue that the potential evidence of Ms. Bridget O'Driscoll-Burns has not materially changed since she was first approached in April 2010. Further, they argue that Mr. Rhyno's April 7 report does not comply with Rule 55.04 because it does not disclose the identity of the

"neighbour" to whom the Defendants, shortly after the fire, allegedly made verbal utterances about their smoking cigarettes on the back deck on the day in question. I note that at the pretrial conference Plaintiffs' counsel confirmed this person's identity as Melvin Richard, from whom a statement had previously been taken shortly after the fire by an insurance company's representative, Jason Purdy, yet it did not contain the purported admission by the Defendants. The Defendants also argue that the most recent Richard statement relied upon, which was conveyed to Plaintiffs' counsel during trial preparation, is inadmissible hearsay. To that latter point the Plaintiffs in reply responded that utterances made by the Defendants to a witness who will be called the trial, would not be hearsay at trial.

[19] The Defendants rely on two cases to buttress their position that the report is late filed and should be excluded: *Wareham v. Ross,* 2010 NSSC 140, and *Shaw v. JD Irving*, 2011 NSSC 487.

[20] I find that both those cases are distinguishable, and not particularly helpful to the resolution of the issues in this case. In *Wareham*, Justice Hood stated:

> The plaintiff seeks to have a deadline set under *Rule 55.03(1*) for filing an expert's report. . . .
>
> . . . 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.
>
> . . .
>
> . . . 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. . . .
>
> I therefore dismiss the plaintiff's motion to do so.

[21] In *Shaw*, the Court was dealing with a "medical/legal type report" which was delivered to the Defendant ten weeks prior to trial. The Court stated, "To admit this report into evidence would, in my view, circumvent the rule relating to expert opinion. As a result, the report containing expert opinion fails to comply with *Rules* 55.03 and 55.04 relating to mandatory time lines for filing and contents.… [I therefore] exclude from evidence the medical report dated June 2010" (paras. 13-14).

[22] Thus both those cases dealt with the filing of the initial expert's reports. There were no updates triggered by the operation of the obligation on the expert in Rule 55.04(1)(e).

Is an advance ruling pursuant to Rule 55.10 available here?

[23] Rule 55.10 reads in part:

> (1) A party who receives a report and wishes to have the opinion evidence excluded at the trial or hearing on the basis that the report does not sufficiently conform with this Rule must, in a reasonable time, notify the party who delivers the report of the deficiency.
>
> . . .
>
> (3) An order under this Rule is binding at the trial of an action or hearing of an application only on the issue of conformity with Rule 55.04 or 55.05.

[24] In some respects a similar provision may be found in Rule 55.15:

> (1) A judge may determine whether a narrative, initial narrative, or supplementary narrative contain sufficient information to permit a treating physician to testify to an opinion stated in the narrative without delivering an expert's report.
>
> . . .
>
> (3) A determination that a narrative contains or does not contain sufficient information, and a direction that a condition must be fulfilled or a redaction must be made, is binding at a trial or hearing in which the expert opinion is offered.
>
> (4) Nothing in a determination or direction under this Rule 55.15 implies either of the following, and both are to be determined by the judge who presides at a trial or hearing in which the expert opinion is offered:
>
> (a) the qualification of a physician to express an opinion stated in a narrative;
>
> (b) the admissibility of the opinion as an exception to the rule of evidence against admitting opinions.

[25] When the new *Civil Procedure Rules* came into force on January 1, 2009, the rules regarding experts were radically redesigned. If the proposed expert opinions contain Rule 55-compliant written reports which were not contested, then, subject to few exceptions, the party presenting the expert evidence may not call that individual as an expert witness (although they may be called as a fact witness),

but only provide them for purposes of cross-examination. Thus, the reports would speak for the expert witness as if they were the witness's direct examination.

[26] In conjunction with the new reality, the wording in Rules 55.10 and 55.15 suggests that advance rulings are not intended to deal with issues of admissibility of expert reports. These Rules included phrases such as, "whether a report sufficiently conforms with this Rule to permit the purported expert to testify", and "whether a narrative, initial narrative, or supplementary narrative contain sufficient information to permit a treating physician to testify to an opinion stated in the narrative without delivering an expert's report". These references suggest a concern about the form and content of written expert opinion, in contrast to a concern about the admissibility of those opinions.

[27] That observation is somewhat confirmed in *Marshall v. Annapolis County District School Board*, 2009 NSSC 203, a decision of Justice Moir, at paras. 30 – 34; and by Justice Beveridge writing for himself and Justice Oland in *Abbott and Haliburton Co. Ltd. v. White Burgess Langille Inman*, 2013 NSCA 66 (leave to appeal to Supreme Court of Canada granted, [2013] S.C.C.A. No. 326 November 21, 2013), at paras. 108–109 and 161.

[28] My sense is that "advance" rulings, in relation to the issue of the conformity of expert reports with the reporting requirements of Rule 55, are intended to address deficiencies at an early stage once they are brought to the attention of opposing counsel, such that the trial timeline is not disrupted.

[29] It is arguable that the remedy of exclusion of evidence due to late filing of supplemental expert reports does not seem to be the express target of Rule 55 advance rulings. Under the heading "Scope of Rule 55", Rule 55.01 reads as follows:

> (1) This Rule provides procedure about expert opinion, and it does each of the following:
>
> (a) requires disclosure of an expert opinion to be offered on a trial or hearing;
>
> (b) provides for exclusion of expert opinion evidence that is not disclosed as required;
>
> (c) requires experts to make written representations to the court about the independence of the expert and the expert's participation in the proceeding;
>
> (d) limits discovery of experts.
>
> (2) This Rule does not affect the Rules of evidence by which expert opinion is determined to be admissible or inadmissible.
>
> (3) A party may offer an expert opinion as evidence, in accordance with this Rule.

[30] Rule 51 (conduct of trial), and specifically Rule 51.03 (exclusion of evidence for non-compliance) directly address the issue at trial. Rule 51.03 reads:

> (1) A judge who presides at a trial must exclude evidence of the following kinds, unless the party offering the evidence satisfies the judge it would be unjust to exclude it:
>
> (a) evidence for which notice is required, but for which notice is not given;
>
> (b) evidence required to be disclosed under, but not disclosed in accordance with, Part 5 – Disclosure and Discovery;
>
> (c) evidence offered by a party who fails to give the evidence, or to give information leading to the evidence, in response to a direct question asked at discovery or by interrogatory, such as by answering that the party does not know the answer and failing to make disclosure when the answer becomes known or by objecting to the question on the ground of relevancy;
>
> (d) expert opinion not disclosed under Rule 55 – Expert Opinion.
>
> [my emphasis]

[31] Whether Rule 55.10 permits an "advance" ruling to exclude expert opinion evidence that is arguably late filed, but otherwise compliant with Rule 55 deadlines (including 55.04(1)(e)), I need not decide, because I am the assigned trial judge and we have effectively started the trial.

[32] While in some circumstances there may be practical reasons why it is preferable not to make advance rulings to exclude such arguably late-filed expert opinion evidence under Rule 55.10, there is no obvious rationale why a court should be precluded from considering the issue in the all circumstances.

Is the April 7th, 2014 Supplemental Report of Grant Rhyno included in the language of Rule 51.03(1)(d) "not disclosed under Rule 55 – Expert Opinion"?

[33] I conclude that it is not. That is to say, the Plaintiffs' disclosure of the April 7 report was made in accordance with Rule 55.

[34] This answer requires us to go back and consider, in relation to the alleged "late" filing of the report, whether the April 7 report is governed by the deadline in Rule 55.03 (September 30, 2013) or the strictures of Rule 55.04?

[35] I conclude that the deadlines associated with Rule 55.03 must only relate to initial reports, unless otherwise determined by a judge.

[36] Deadlines are fixed to ensure that the pretrial process unfolds in a manner that does not disrupt the trial process. Rule 55.03 contains default filing deadlines for expert reports, and allows for customized deadlines to be set by a judge. It should not be unexpected that matters which could reasonably affect an expert opinion may arise after the filing of an initial expert report.

[37] The question arises whether in such situations the expert is required by Rule 55.03 to file with the Court a formal Rule 55-compliant updated report, or whether it is sufficient for the expert to merely notify each party in writing of a change in the opinion as soon as possible after arriving at the changed opinion or becoming aware of a material fact not considered when the report was prepared, pursuant to the obligation and Rule 55.04(1)(e). Rule 55.02 reads:

> A party may not offer an expert opinion at the trial of an action or hearing of an application unless an expert's report, or rebuttal expert's report, is filed in accordance with this Rule.

[38] In my opinion, it is in the interests of justice and consistent with the purpose of the Rules (Rule 1.01 – "These Rules are for the just, speedy, and inexpensive determination of every proceeding") that any updated expert opinion reports are disclosed in a written format consistent with Rule 55.04 and in a timely fashion, viz.: "as soon as possible after arriving at the changed opinion or becoming aware of the material fact".

[39] Furthermore, I would expect that generally such updated expert opinion reports should be filed with the Court by the "finish date" at the latest, or otherwise, as soon as possible after their completion thereafter – see Associate Chief Justice Smith's comments in *Garner v. Bank of Nova Scotia*, 2014 NSSC 63 at para. 24; and Justice Moir's comments in *Oxford Frozen Foods v. Leading Brands, Inc.*, 2014 NSSC 249 at paras. 43-44.

Application of these principles to the case at Bar

[40] The April 7, 2014, report of Grant Rhyno is not late-filed. The Defendants were notified substantially in accordance with Rule 55.04(1)(e) "as soon as

possible" after Mr. Rhyno arrived at the changed opinion or became aware of the material facts in issue here.

[41] The Defendants have argued that the expert witness, Mr. Rhyno, should himself have taken a statement from Mr. Richard, as he did in the case of Judy Nickel and Charles Kline, rather than relying on second-hand information from Plaintiffs' counsel, Mr. Chapman. This would make Mr. Rhyno a witness to the statement or answers given by Mr. Richard on facts that are not only material, but could be determinative.

[42] In my opinion, an expert is entitled to deference in leaving fact-finding of this nature to others. Moreover, it is often preferable for them to do so since there is a danger that the expert's credibility as a fact witness may be unnecessarily called into question.

[43] Specifically here, Mr. Rhyno acted appropriately in relying on the information that Mr. Chapman provided to him – as an officer of the Court, counsel would only do so if they were satisfied that the information was sufficiently reliable for introduction to the expert's report.

[44] As to the claims of nonconformity of the April 7th report otherwise with Rule 55.04, I conclude as follows:

1. While it is a matter of degree, in relation to the anticipated evidence of Melvin Richard, and Bridget O'Driscoll-Burns, the April 7th report does contain sufficient indications "of a material fact that was not considered when the report was prepared and could reasonably affect the opinion" to have prompted the updated report and notification to the Defendants;

2. While the report did not identify the "neighbour" to whom the Defendants purportedly made verbal statements about their smoking on the deck on April 25 2010, to the extent that that could be characterized as a deficiency, it has been remedied at the April 11 pretrial conference by Plaintiffs' counsel confirming the identity as that of Melvin Richard, who was expected to be a witness in any event.

3. Regarding whether the April 7th report relies on "hearsay" to Mr. Rhyno, because he received the information of the utterances the Defendants purportedly made to Mr. Richard, via an email from Mr. Chapman as Plaintiffs' counsel, I note that matters of the substantive admissibility underlying an expert report should be left for trial. Moreover, we must not lose sight of the fact that the evidence at trial

> may not conform exactly to the expectation of a witness' testimony based on their previous statements.

[45] In summary, therefore I conclude that the April 7th report is in substantial compliance with Rule 55.04, and that it meets the disclosure requirements thereof sufficiently to avoid being included in the wording of Rule 51.03.

Conclusion

[46] The Defendants' request for a ruling directing the exclusion from evidence of the April 7th, 2014, report of Grant Rhyno of Contrast Engineering, is denied.

Rosinski, J.