CITATION: Dunk et al v. Kremer et al, 2016 ONSC 3545
COURT FILE NO.: CV-12-140-00
DATE: 20160530

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
MEAGHAN DUNK and SHELBY DUNK	)	
	)	Robert Littlejohn and Marc Lemieux, for the
Plaintiffs	)	Plaintiffs
	)	
– AND –	)	
	)	
GEOFFREY MICHAEL KREMER,	)	Mary Teal, for the Defendants
MATTHEW RUSHTON and	)	
ROBERT RUSHTON	)	
	)	
Defendants	)	
	)	
	)	
	)	**HEARD:** May 27, 2016

ENDORSEMENT

Background

[1] The defendants move for relief under rule 53.03 (4) and rule 53.08 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for orders extending the time for service of a signed Acknowledgment of Expert's Duty (Form 53) by Dr. Rizek, an orthopedic surgeon, and an order granting leave to allow the defendants to admit evidence provided by Dr. Rizek at trial.

[2] This a mid-trial motion brought at the commencement of the defendants' evidence. The relief sought is opposed by counsel for the remaining plaintiff, Meaghan Dunk.

[3] In this action the plaintiff seeks damages for injuries arising from a motor vehicle collision that occurred on July 4, 2010, in which the plaintiff sustained fractures of her fibula and the subtalar joint in her right foot.

[4] The facts relevant to the motion are as follows: the plaintiff attended a defence medical examination undertaken by Dr. Rizek, an orthopedic specialist, on November 9, 2015. In the instruction letter sent to Dr. Rizek in advance of the plaintiff's assessment, Dr. Rizek

was advised that "provided that the report is signed by you, a copy of the report may be entered into evidence at the trial of this action". The defendants did not serve the report of Dr. Rizek forthwith as required by rule 33.06. As a result, the plaintiffs brought a motion seeking production of the report, which motion was served on February 5, 2016. A mediation was held on February 8, 2016; the report was not served in advance of or at the mediation. The defendants' former counsel, Ms. Vieira, served an unsigned copy of Dr. Rizek's report on February 10, 2016 in advance of the return date of the motion. The date of the report was November 2, 2015. The fact that the report bears a date seven days earlier than the assessment was not addressed during argument.

[5] In March 2016, and at least 30 days prior to the pretrial, the plaintiff served supplementary reports from two orthopedic surgeons, Dr. Steven and Dr. Daniels, the former being the plaintiff's treating orthopedic surgeon, and the latter being a litigation expert as defined in *Westerhof v. Gee*, 2015 ONCA 206, at para 6.

[6] A pretrial was conducted in this matter on April 20, 2016. With leave of the court on this motion, a copy of the witness list that had been included in the defendants' pretrial memorandum was provided to the court. Dr. Rizek was not included in that list of potential witnesses.

[7] The plaintiff's counsel has continued to provide updated medical records and documentation to the defendants' counsel following Dr. Rizek's assessment of the plaintiff. These records included a Progress Report from Sunnybrook Health Sciences Centre and a Medical Imaging Report dated March 1, 2016. These particular documents were generated when the plaintiff attended a consultation appointment with Dr. Stephen on that same date, as a result of increased pain in her right foot. As earlier indicated, supplemental reports were served by both Dr. Steven and Dr. Daniels, both of which referenced, in particular, the CT scan performed on March 1, 2016 and the examination undertaken by Dr. Steven and his resident, the combination of which resulted in the opinion that the plaintiff is "presenting with secondary post-traumatic degenerative changes in the subtalar joint which are in keeping with some of the patient's symptoms".

[8] Despite those new records and information, no additional report was sought from Dr. Rizek.

[9] On May 6, 2016 new counsel, Ms. Teal, assumed carriage of this file. On May 11, 2016, plaintiff's counsel corresponded with Ms. Teal and attempted to alert her to the fact that not all of her expert's reports may have fully complied with rule 53. The fact that Dr. Rizek's report was not signed, nor accompanied by a Form 53, was not specifically stated.

[10] At some point after she assumed carriage of the file, Ms. Teal requested from plaintiff's counsel that the original CT scan from the March 1, 2016 attendance at Sunnybrook be produced to her for examination by Dr. Rizek. On May 13, 2016, Ms. Teal provided a witness list in which she listed Dr. Rizek.

[11] The trial commenced on May 16, 2016. On May 19, 2016, in open court but in the absence of the jury, plaintiff's counsel alerted Ms. Teal to the fact that a Form 53 had not

been delivered with Dr. Rizek's report, and that the report was unsigned. These defects were remedied by Ms. Teal the next day, through service of the signed Form 53 and a signed report. The evidence is that the report provided on May 20, 2016 is identical to the report served last February, and the plaintiff's counsel did not argue otherwise.

[12] Dr. Daniels testified for the plaintiff on May 24, and an expert physiatrist, Dr. Waseem, testified on her behalf on May 26. Both referenced Dr. Rizek's report and findings.

[13] It is the position of the defendants that the failure to serve a signed Form 53 and signed report was inadvertent, that the plaintiff would not be prejudiced in any way by Dr. Rizek providing expert evidence at this trial, and that the plaintiff's lawyers are attempting to use the *Rules of Civil Procedure* to gain an advantage in the proceeding. Ms. Teal argues that it is an issue of trial fairness that the defendants not be prevented from putting their best case forward due to a technical breach of the rules. She points out that there is no requirement in the rules to provide a rebuttal to a reply report. She requests an order permitting Dr. Rizek to comment on any new evidence that he has been provided with since November 2015, including the material from the attendance at Sunnybrook on March 1, 2016, other imaging evidence that had not been provided at the time of Dr. Rizek's assessment and the updated clinical notes and records of the family physician.

[14] It is the position of Mr. Littlejohn that it was only on May 13, 2016, three days before the commencement of trial, that the defendants first indicated an intention to call Dr. Rizek as a witness. Prior to receiving his signed report on May 20, 2016, it was an "unusable" report because it was not in compliance with rule 53.03. He submits there is significant prejudice to the plaintiff in that she committed to trial not knowing that she was going to have to face Dr. Rizek's evidence. Further, to allow Dr. Rizek to comment on the "new" medical evidence that has come to light since November 2015, without knowing in advance what his evidence might be, is not in compliance with rule 53 and amounts to trial by ambush. It is submitted that it was a tactical decision by former counsel to not rely on Dr. Rizek's evidence at trial, as shown by the failure to produce a signed report, to serve it immediately after it was prepared, to not produce it for the mediation, to not have Dr. Rizek update his report in the face of evidence of progression of arthritis in the subtalar joint, and to expressly exclude Dr. Rizek from the witness list provided with the pretrial memorandum. Accordingly, Mr. Littlejohn submits that this is one of those rare cases in which leave should not be granted, as the prejudice to the defendants is entirely of their own making and does not outweigh the prejudice to the plaintiff.

[15] Both parties rely on the comments of Wilson J. in *Grigoroff v. Wawanesa Mutual Insurance Co.*, 2011 ONSC, 2279 at paras. 22 and 23:

> … One would hope that if counsel were going to take the position that an expert ought not to be entitled to testify at trial because of a lack of compliance with Rule 53, that position would be communicated to opposing counsel well in advance of the trial so that whatever breaches exist could be remedied or alternatively, a new expert retained. In my opinion, to wait until the trial commences to advise opposing counsel that a motion will be

> brought to exclude expert testimony is a practice that is to be discouraged; it is conduct that does not accord with the civility the court expects counsel to demonstrate towards one another and as well, it results in a waste of the court's time.
>
> ... In my view, there is no prejudice that results to the Plaintiff by reason of the admission of these expert opinions; they have been in possession of these reports for more than a year and they have known since March of 2010 that the defendants intended to rely on these opinions at trial....

[16] Ms. Teal argues that on the basis of Justice Wilson's comments in *Grigoroff*, plaintiff's counsel should have brought the specific defects to her attention well in advance of May 19. Mr. Littlejohn argues that unlike the plaintiff's counsel in *Grigoroff*, he has only known since May 13 that the defendants intended to rely on the opinion of Dr. Rizek, and accordingly, he would have no reason to draw counsel's attention to the defects in question.

[17] This is an important motion. The ruling made by this court could affect the outcome of trial. It is exactly this type of mid-trial conundrum now facing the trial judge that is sought to be avoided by the rules, and in particular the requirement of a pretrial conference. Unfortunately, former counsel placed her colleague in a difficult situation by omitting Dr. Rizek from her proposed list of witnesses. However, there is nothing in the rules that prohibits eliciting opinion evidence from an expert witness on the basis that his or her name was not included on the pretrial conference form or some other witness list produced in advance of trial. It is a practice to be discouraged, but not a factor that is fatal to this motion.

[18] However, as set out in *Westerhof*, at para. 81, rule 4.1.01, rule 53.03 and Form 53 provide a comprehensive framework to address a specific class of expert witnesses and expert reports, into which class Dr. Rizek falls.

[19] Although Ms. Teal argued to the contrary, in my view Dr. Rizek was required by subrule 53.03 (3) to serve a supplementary report to address any testimony that he wished to give arising from the medical information that he had received after completing his initial report in November 2015. Although she argued that Dr. Rizek could be confined to the four corners of his original report when addressing this new information, I do not see how this could be possible. At the time of argument, even Ms. Teal did not know what Dr. Rizek's evidence may be in relation to the new medical information, as he has been out of the country and unavailable. One of the purposes of rule 53.03 is to ensure that opposing counsel is not placed in the very position that plaintiff's counsel is now in, being faced with the potential to hear testimony from Dr. Rizek which is new or unexpected, and which they were unable to have their own experts comment on during their testimony. The only way to address any potential unfairness to them would be to call reply evidence from either Dr. Daniels or Dr. Waseem, or both. This is both onerous and inefficient, and not how trials should be run. Given the expense, inconvenience, and difficulty scheduling expert witnesses, on balance the potential prejudice to the plaintiff far outweighs the

prejudice to the defendant in being prohibited from testifying from anything not raised in his initial report. This is not a situation, therefore, where leave should be granted under subrule 53.08 (1).

[20] Accordingly, Dr. Rizek, if he is permitted to testify, should be confined strictly to the opinions set out in his initial report. Former defence counsel had ample opportunity to obtain such a report.

[21] That leaves the question of whether this court should grant relief under subrule 53.08 (1) based on the failure to comply with subrule 53.03 (2.1). Subrule 53.08 (1) provides as follows:

> 53.08 (1) If evidence is admissible only with leave of the trial judge under a provision listed in subrule (2), leave shall be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial.
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> (2) Subrule (1) applies with respect to the following provisions:
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> 1. Subrule 30.08 (1) (failure to disclose documents).
>
> 2. Rule 30.09 (failure to abandon claim of privilege).
>
> 3. Rule 31.07 (failure to answer on discovery).
>
> 4. Subrule 31.09 (3) (failure to correct answers on discovery).
>
> 5. Subrule 53.03 (3) (failure to serve expert's report).
>
> 6. Subrule 76.03 (3) (failure to disclose witness).

[22] Subrule 53.03 (2.1) is not among the provisions listed. That being the case, rule 53.08 does provide the jurisdiction to the trial judge to grant relief against non-compliance with subrule 53.03 (2.1). Accordingly, resort must be had to rule 2.01, which addresses the effect of non-compliance with the rules. Under subrule 2.01 (1) (a), the court may grant relief to secure the just determination of the real matters in dispute.

[23] To prohibit the testimony of Dr. Rizek means that the defendants will have tendered no medical evidence. The jury has heard Dr. Waseem and Dr. Daniels refer to and comment on some of Dr. Rizek's findings. Neither of these witnesses was hampered in their testimony by the fact that the report was unsigned or that no Form 53 had been served.

[24] The plaintiff's counsel are not to be faulted for only raising the non-compliance after being informed that Dr. Rizek would be called to give evidence. I agree that everything points to the intention of former counsel to not have Dr. Rizek testify at trial, and that Ms. Teal's correspondence of May 13, 2016 was a "game changer". That, however, does not

change the fact that the plaintiff has been in possession of Dr. Rizek's anticipated testimony since February 2016, and that the unsigned report was given to the plaintiff's own medical experts. No one will be taken by surprise by what Dr. Rizek's testimony, provided that it is confined entirely to the parameters of his report. Further, I have no evidence that the plaintiff's decision to proceed with the trial was based, in whole or even in part, on the fact that she anticipated that Dr. Rizek would not be testifying.

[25] There is no question that the wording of subrule 53.03 (2.1) is mandatory. Compliance is required. The obligation was on former counsel, first and foremost, to ensure that she had complied with rule 53 in full. Opposing counsel, when discovering such non-compliance, has no obligation beyond bringing the defects to opposing counsel on one occasion, and as soon as such defect becomes known to him or her. In rare cases, in order to "secure the just determination of the real matters in dispute" it may be necessary to provide relief against compliance. Ms. Teal now has carriage of this file and has determined as trial counsel, unfortunately entering late in the day, that Dr. Rizek's evidence is necessary. In the absence of demonstrable prejudice to the plaintiff, I find that this is a case where relief should be granted to remedy the failure to comply with subrule 53.03 (2.1), in order to ensure a fair adjudication of the issues upon their merits.

[26] Order to issue:

1. Leave is granted to the defendants to bring this motion.

2. The time for the service and filing of these motion materials shall be abridged.

3. The time provided for service of the report of Dr. Rizek dated November 2, 2015, together with the Acknowledgment of Expert's Duty, shall be extended to May 20, 2016.

4. Leave is granted to the defendants to call Dr. Rizek as an expert witness at trial to provide testimony solely on the basis of his report dated November 2, 2015.

5. Costs of this motion shall be in the cause.

HEALEY J.

Released: May 30, 2016