COURT OF APPEAL FOR ONTARIO

CITATION: Beazley v. Johnston, 2024 ONCA 430
DATE: 20240528
DOCKET: COA-24-OM-0008

Simmons J.A. (Motion Judge)

BETWEEN

Cary Beazley

Plaintiff (Moving Party)

and

Dr. Mary Johnston, Dr. James Gill, Dr. Pravin Shukle, Dr. Kalpesh Raichura, Dr. Robert Gauvreau, ~~Dr. Lawrence Norman~~, Dr. Mariko Hashimoto, Dr. Mark Trecarten, Dr. Baskar Gopalan, Dr. Natalie Keses, ~~Dr. Dean Holden~~, Dr. James Ward, ~~Dr. Ellen Henry~~, Dr. Guy Hebert, Dr. Martin Green, ~~Dr. Pablo Nery~~, Dr. Adam Nicholson, Dr. Adam Cohn, Dr. Donald Harris, ~~Dr. Kuan Chin Chen~~, Dr. Elizabeth Scott, ~~Dr. Gordan Kee~~, Dr. Hyman Rabinovitch, Dr. Daniel Chukwu, ~~Dr. Kadambi Sitaram~~, Dr. Kari Sampsel, Dr. Getnet Asrat, Dr. Richard Moxon, Dr. Stephen Choi, ~~Dr. Pablo Nery, Dr. Samuel Hetz~~, Dr. Jacinda Wong, Dr. Robert Nichols, Dr. Sunil Varghese, Dr. David Davidson, Dr. Nina Ramic, Dr. Jane Doe, Dr. John Doe, ~~The Ontario Ministry of Health and Long Term Care~~, Queensway Carleton Hospital and ~~Public Health Agency of Canada~~

Defendants (Responding Parties)

Cary Beazley, acting in person

Émilie Roy, for the responding party, Queensway Carleton Hospital

Justin McCarthy and Andrew McKenna, for the responding parties, the defendant physicians

Heard: January 19, 2024

ENDORSEMENT

Introduction

[1] The self-represented moving party applies for an extension of time to permit him to file a notice of appeal from a summary judgment dated August 31, 2023. In her August 31, 2023 reasons, the motion judge granted the responding parties' summary judgment motions and dismissed the moving party's medical malpractice action against them. She also dismissed the moving party's request for partial summary judgment in his favour on the issue of liability.

[2] The moving party commenced the underlying action by way of notice of action issued on December 11, 2017. In his amended amended fresh as amended statement of claim[1] ("statement of claim"), the moving party claimed damages for negligence, negligent misrepresentation and breach of fiduciary duty against the 27 responding party doctors (the "doctor defendants"), and for negligence against the responding party, Queensway Carleton Hospital (the "Hospital"). He also claimed that the Hospital was vicariously liable for the negligence of doctor defendants who worked at the Hospital.

[1] The moving party initially amended his statement of claim on November 30, 2019, following an order made by Gomery J. striking the moving party's claims against the Government of Ontario (named as the Ontario Ministry of Health and Long Term Care) and the Government of Canada (named as the Public Health Agency of Canada) as well as various heads of relief asserted against the remaining parties and individual paragraphs of the statement of claim: 2019 ONSC 5756. The moving party subsequently amended his statement of claim, on consent, on December 19, 2019. He later delivered his amended amended fresh as amended statement of claim in August 2020.

[3] The thrust of the moving party's claim was that the doctor defendants were negligent in failing to diagnose him with, and/or treat him for, Lyme disease between December 12, 2015 and May 2018 and that he suffered injuries and losses as a result of the delay in diagnosis and treatment.

[4] Central to his claims were allegations that:

- the standard of care required clinical diagnosis of Lyme disease based on symptoms and tick exposure rather than standard Ontario Lyme disease testing, which he asserts is known to lack sensitivity;
- negative standard Ontario Lyme disease test results received in May 2016 were not sufficiently reliable to rule out Lyme disease; and
- a January 2017 positive PCR test result received from a California laboratory confirmed that he has Lyme disease.

[5] During the summary judgment hearing, which was heard over 15 days spanning approximately eight months, the motion judge made three interim rulings (two in writing, one orally for reasons to follow). In her interim rulings, the motion judge:

- denied the moving party's request to be qualified as an expert to give opinion evidence concerning the diagnosis and treatment of Lyme disease;
- held that many documents relating to Lyme disease on which the moving party sought to rely were inadmissible, and

- refused the moving party's request, made after the responding parties had completed their submissions on their summary judgment motions, to file a second affidavit from his proposed expert witness, Dr. Ben Boucher.

[6] The evidence on the summary judgment motion disclosed that the doctor defendants practised in seven different fields: emergency medicine, family medicine, cardiology, sports medicine, infectious diseases, internal medicine and neurology. While ten of the doctor defendants had privileges at the Hospital and saw the moving party in the emergency department and other Hospital departments, none were employed by the Hospital.

[7] In her August 31, 2023 reasons, the motion judge found that both the doctor defendants and the Hospital had satisfied their evidentiary burden of establishing no genuine issue requiring a trial with respect to any of the moving party's claims, based primarily on:

- a Joint Book of Medical Records;
- affidavits from each of the 27 doctor defendants concerning their care and treatment of the moving party; and
- affidavits from seven expert witnesses (one expert in each of the seven fields of medicine in which the doctor defendants practised) opining that the doctor defendants whose conduct they considered met the standard of care.

[8] In the course of assessing whether the moving party had satisfied the burden of showing that any of his claims had a real chance of success, the motion judge ruled that Dr. Boucher, the moving party's proposed expert, was not qualified to give expert evidence and, in any event, his evidence was insufficient to establish a genuine issue requiring trial. She also noted that the moving party did not file an affidavit that was responsive to the doctor defendants' affidavits.

[9] Having regard to the evidence adduced by the responding parties and in the absence of admissible expert evidence from the moving party, the motion judge found there was no genuine issue requiring a trial with respect to the moving party's claims and dismissed his action.

[10] It is undisputed that the moving party communicated his intention to appeal immediately after receiving the motion judge's August 31, 2023 reasons. However, he failed to file a notice of appeal within the 30-day appeal period. On November 23, 2023, the moving party served a motion to extend the time to file a notice of appeal.

[11] In his proposed notice of appeal and proposed appeal factum, the moving party raises many grounds of appeal, both in relation to the motion judge's interim rulings and her August 31, 2023 reasons. At the heart of his arguments are claims that the motion judge effectively gutted his case through an inflexible and improper application of procedural and evidentiary rules, failed to afford him the leniency to

which a self-represented litigant is entitled and demonstrated a reasonable apprehension of bias.

[12] The moving party submits that he meets all branches of the test for granting an extension of time to file a notice of appeal. He also asserts that this is a case of exceptional public interest, as it raises many serious issues of fact and law of importance to public health.

[13] The doctor defendants submit that an extension of time to file a notice of appeal should be denied. Although they concede that the moving party formed an intention to appeal within the appeal period, they submit that he does not meet any of the other branches of the test for granting an extension. Fundamental to their position is the assertion that the motion judge found that the moving party lacked the necessary expert evidence to support his claims and that he has failed to demonstrate an arguable ground of appeal.

[14] The Hospital takes no position on whether an extension should be granted.

[15] For the reasons that follow, the moving party's request for an extension of time to file his notice of appeal is denied.

Background

A. THE MOVING PARTY'S CLAIM

[16] In his statement of claim, the moving party asserted that he removed two ticks from his body in November 2015, that he subsequently pulled off a larger tick

in May or June 2016, and that he lived in a known high-risk area for Lyme disease. He claimed that he developed flu-like symptoms and two oval rashes consistent with Lyme disease around the end of November 2015 and that, thereafter, his symptoms significantly worsened in a manner consistent with Lyme disease. However, despite initially attending at the Hospital emergency department on December 12, 2015 and subsequently consulting many doctors and undergoing a variety of tests, he was not diagnosed with Lyme disease until January 20, 2017, when he received a positive PCR test confirming a Lyme disease diagnosis from a California laboratory.

[17] Although he acknowledged receiving negative results from standard Ontario laboratory tests in May 2016, the moving party claimed that the sensitivity of the standard Ontario Lyme disease test is known to be poor and that the standard of care required that the responding parties diagnose and provide early treatment for Lyme disease based on his symptoms, his exposure to ticks and residence in a high-risk area. He claimed that he suffered significant injuries and losses, including developing chronic Lyme disease, as a result of the responding parties' failure to diagnose and/or treat him in the period between December 2015 and May 2018, which includes the period after his positive Lyme PCR test.

B. THE SUMMARY JUDGMENT MOTIONS AND THE MOTION JUDGE'S RULINGS

(1) The hearing and the interim rulings

[18] As I have said, the three summary judgment motions[2] were heard over 15 days spanning a period of approximately eight months, from March to October 2022. During the course of the hearing, the motion judge made two formal interim rulings and one oral interim ruling with reasons to follow. She delivered her reasons for the oral interim ruling on August 31, 2023 as part of her summary judgment ruling.

[19] As the moving party relies on alleged errors in these rulings as part of his position that his proposed appeal has merit, I will summarize them briefly.

(2) The motion judge's first formal interim ruling dated March 24, 2022

[20] Following submissions[3] on March 2, 7 and 8, 2022, the motion judge made her first formal interim ruling on March 24, 2022: 2022 ONSC 1739. She denied the moving party's request to be qualified as an expert to give opinion evidence concerning the diagnosis and treatment of Lyme disease and ruled that two reports

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[2] The doctor defendants and the Hospital each brought a summary judgment motion to dismiss the moving party's action against them. The moving party brought a motion for partial summary judgment on the issue of liability.

[3] It appears that the submissions heard on these dates related both to the doctor defendants' summary judgment motion and whether the moving party would be qualified to give opinion evidence: 2022 ONSC 1739, at paras. 11-12. The motion judge indicated it was important for all parties to know whether the moving party would be qualified to give opinion evidence before he began his submissions.

he had prepared (the “Beazley reports”) were not admissible as evidence, either in response to the responding parties’ summary judgment motions or in support of his motion for partial summary judgment.

[21] After referring to *White Burgess Langille Inman v. Abbott and Halliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R 182, in which the Supreme Court stated, at para. 49, that the “threshold requirement [that the expert must be fair, objective and non-partisan] is not particularly onerous”, the motion judge held that this was one of those “quite rare” matters in which the proposed expert evidence was inadmissible.

[22] In accordance with *White Burgess*, the motion judge considered both the moving party’s circumstances and the substance of his evidence to determine the issue.

[23] Concerning the moving party’s circumstances, she noted the moving party was a party to the action with a direct financial interest in its outcome, as well as the comment at para. 49 of *White Burgess* that a direct financial interest in the outcome of the litigation is of “more concern” than a lesser interest in, or connection to, the litigation. She also observed that, in *Marshall v. Jackson*, 2021 ONSC 2361, 154 O.R. (3d) 715, Morgan J. stated, at para. 7, that, regardless of their professional qualifications, it is “trite law to say that a party cannot function as his or her own expert”.

[24] The motion judge then went on to state that, even leaving aside his role as a party, "the substance of the [moving party's] proposed evidence support[ed] a finding that [he was] unable or unwilling to give opinion evidence that is fair, objective and non-partisan." The motion judge provided various examples to support her conclusion, including references in the Beazley reports to the doctor defendants' experts as being "BIASED" and their evidence being "BLATANT PERJURY". She concluded that "[t]he lack of objectivity and partisan nature of the contents of the paragraph quoted above are obvious."

[25] The motion judge also found that the substantive contents of the Beazley reports supported a finding that, in the context of providing expert evidence, the moving party had taken on the role of an advocate.

(3) The motion judge's second formal interim ruling dated April 13, 2022 and corrected on August 30, 2022

[26] In her second formal interim ruling,[4] the motion judge addressed the admissibility as evidence of multiple documents on which the moving party sought to rely: 2022 ONSC 2747.[5] The documents were referred to in materials filed by

[4] The motion judge gave oral reasons on April 13, 2022 and a formal written ruling on May 10, 2022. She subsequently amended her written ruling on August 30, 2022 to clarify that one of the documents she had stated was not admissible was in fact admissible (document 42 on a chart appended to her formal written ruling).

[5] The moving party sought leave to appeal the second interim ruling to the Divisional Court. His request was denied. His subsequent attempts to appeal that denial to this court, and this court's decision to the Supreme Court of Canada, were dismissed: 2022 ONSC 5304 (Div. Ct.), leave to appeal to Ont. C.A. refused, COA-22-OM-0059 (February 21, 2023), leave to appeal refused, [2023] S.C.C.A. No. 182.

the moving party titled “Plaintiff Caselines Documents”, Volumes 1 and 2, comprising 1360 pages of affidavits, facta, and documents. More specifically, the documents at issue were referred to in an 82-page Exhibits Master List identifying 400 separate documents, many of which had website hyperlinks.

[27] On instructions from the motion judge, the moving party and counsel for the responding parties prepared a chart to assist the motion judge with her admissibility ruling. Initially, the chart referred to 124 documents, the admissibility of which was in issue (rather than the original 400 documents). Ultimately, the moving party sought a ruling with respect to 83 documents. Of those, 11 were already in evidence. Of the remaining 72 documents, the motion judge ruled 15 admissible, in whole or in part. She ruled the remaining 57 documents inadmissible, for one of the following reasons:

- the moving party failed to include a hard copy of the document in his record as directed by Roger J. at a January 2022 case conference (20 documents);
- the document could not otherwise be linked to an affidavit, Dr. Boucher’s report or the moving party’s cross-examinations of three of the seven expert witnesses proffered by the doctor defendants, with the result that the relevance and materiality of the document could not be determined (14 documents);

- the moving party had included incomplete copies of the document in his record, relying in many cases on website links as a substitute for inclusion of a document or complete document (16 documents);
- the document included argument or submissions (6 documents, with one additional document flagged for further argument);
- the "document" was a copy of an unauthenticated video recording of testimony of Dr. Stephen Phillips, a person the moving party described as a world-renowned expert in the field of Lyme disease who had presented on the subject at an Infectious Disease Society of America (IDSA) conference and was the former president of the International Lyme and Associated Diseases Society (ILADS). Although the moving party had shown this video to the three doctor defendants' expert witnesses that he cross-examined, it had not otherwise been introduced as evidence and could not be subjected to cross-examination.

[28] In reaching her conclusions about the admissibility of documents, the motion judge considered the moving party's arguments that:

- procedural and evidentiary rules should not be applied in a manner that would hinder his case because of his status as a self-represented litigant;

- s. 32 of the *Evidence Act*, R.S.O. 1990, c. E.23, makes well-known public documents admissible and should be extended, in the electronic age, to a document available on a website; and
- r. 4.06(3)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, permitted him to present documents in the manner in which he did.

[29] She concluded, for several reasons, that the moving party had been treated in a procedurally fair manner in keeping with the *Statement of Principles on Self-represented Litigants and Accused Persons (2006)* (the "*Statement of Principles on Self-represented litigants*"), produced by the Canadian Judicial Council, and endorsed by the Supreme Court of Canada in *Pintea v. Johns*, 2017 SCC 23, [2017] 1 S.C.R. 470, at para. 4.

[30] The requirements for filing documents, including providing hard copies of all documents and prohibiting reliance on hyperlinks to a website, had been established in a detailed January 2022 case conference endorsement by Roger J. The motion judge had also directed that the moving party bring a motion addressing the admissibility of documents – as opposed to the responding parties objecting – so that he had the opportunity to make both primary and reply submissions concerning admissibility. She also ordered the responding parties to deliver to the moving party a point-form summary of their arguments prior to his submissions. The motion judge was also satisfied that, although self-represented,

the moving party was not a neophyte to litigation, as this matter had been proceeding for some time and had involved other motions. Moreover, the moving party had had the opportunity to learn how to properly present documents from the many affidavits filed by the responding parties.

[31] Concerning s. 32 of the *Evidence Act*, the motion judge noted that the requirements of that section concerning providing "examined" copies or extracts "signed and certified as a true copy or extract by the officer to whose custody the original was entrusted" had not been complied with.[6]

[32] As for the moving party's arguments about website links, the motion judge concluded that he had not, in any event, complied with the criteria for the admissibility of internet information set out in cases such as *Sutton v. Sutton*, 2017 ONSC 3181 and *Thorpe v. Honda Canada Inc.*, 2010 SKQB 39, 352 Sask. R. 78. She also noted that there was no opportunity for cross-examination or testing of the internet information the moving party sought to have admitted, and that even he acknowledged that some of the information on the website links he sought to have admitted had changed since his initial visits to the website.

[6] Section 32(1) of the *Evidence Act* reads as follows: "Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, a copy thereof or extract therefrom is admissible in evidence if it is proved that it is an examined copy or extract, or that it purports to be signed and certified as a true copy or extract by the officer to whose custody the original was entrusted."

[33] Finally, the motion judge found that r. 4.06(3) was of no assistance to the moving party because most, if not all, of the documents he sought to have admitted were not referred to as being attached to an affidavit from either him or Dr. Boucher, nor had they been referred to in an affidavit as being produced and shown to the deponent.[7]

(4) The motion judge's oral interim ruling made on August 23, 2022

[34] Following the conclusion of the responding parties' submissions in support of their summary judgment motions on April 13, 2022, the hearing was adjourned to August 23, 2022.

[35] Sometime after the April 13, 2022 adjournment, the moving party obtained a second affidavit from his proposed expert witness, Dr. Boucher (the "Second Boucher affidavit"), and served it on the responding parties.

[36] The Second Boucher affidavit was identical to Dr. Boucher's December 2021 affidavit, save that it substituted a new paragraph 7. Dr. Boucher

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[7] Rule 4.06(3) reads as follows:

> (3) An exhibit that is referred to in an affidavit shall be marked as such by the person taking the affidavit and where the exhibit,
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> > (a) is referred to as being attached to the affidavit, it shall be attached to and filed with the affidavit;
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> > (b) is referred to as being produced and shown to the deponent, it shall not be attached to the affidavit or filed with it, but shall be left with the registrar for the use of the court, and on the disposition of the matter in respect of which the affidavit was filed, the exhibit shall be returned to the lawyer or party who filed the affidavit, unless the court orders otherwise; and
> >
> > (c) is a document, a copy shall be served with the affidavit, unless it is impractical to do so.

explained in paragraph 7 of the Second Boucher affidavit that he was providing "this supplementary affidavit … with attached copies … in support of the expert report footnotes and … references upon which [his] opinions are based and to clarify previous statements."

[37] The "attached copies" consisted of 526 pages of documents that had not previously been provided.

[38] The clarification of previous statements related to "any adjectives such as 'likely' or 'probably' fell below the standard of care" that he had used in his expert report. He said they "were used out of collegiality to [his] fellow physicians and issues with the guidelines and recommendations making up the standards of care". He also stated:

> As specifically noted and generally, all physicians and the [Hospital] involved in [the moving party's] care fell below the expected standard of care of any reasonable physician in failing to address the worst first and precautionary principles as part of their differential diagnosis, and failures to make a Lyme clinical diagnosis and/or treat out of precaution.

[39] When the summary judgment motion hearing resumed on August 23, 2022, the parties made submissions concerning the moving party's request for leave to file the Second Boucher affidavit. The motion judge gave oral reasons for denying leave with written reasons to follow. Her written reasons are included in her August 31, 2023 reasons for judgment.

[40] In essence, the motion judge concluded that the Second Boucher affidavit was an effort to shore up potential deficiencies in the original Boucher affidavit and report, which deficiencies the moving party perceived after hearing the responding parties' submissions on their motions. She concluded that it would cause insurmountable prejudice to the responding parties to grant leave to the moving party to file the Second Boucher affidavit. She also rejected the moving party's claim that he was asking for a simple indulgence to rectify what he described as procedural errors made by a self-represented litigant.

C. THE MOTION JUDGE'S SUMMARY JUDGMENT RULING

[41] The motion judge dealt with the three motions for summary judgment that were before her in turn: 2023 ONSC 4956.

(1) The summary judgment ruling regarding the moving party's negligence claim

[42] Beginning with the doctor defendants' motion, the motion judge noted the following points:

- in support of their motion, the doctor defendants relied on a 1780-page Joint Book of Medical Records[8], affidavits from each of the 27 doctor defendants

[8] At a July 8, 2021 case conference, Master Fortier made an order permitting the parties to file a Joint Book of Medical Records, which totalled 1780 pages in four volumes. The records spanned the period from December 12, 2015 to June 20, 2019 and included a chronology of the moving party's interactions with the doctor defendants, including those that took place at the Hospital and with physicians not named as defendants and at hospitals not named as defendants.

and the evidence of 7 expert witnesses, each of whom had filed an affidavit confirming that their attached reports accurately set out their opinions and anticipated testimony in this matter;

- the evidence of the doctor defendants concerning their involvement with the moving party was uncontradicted: the moving party did not file any affidavits in response to their affidavits and did not cross-examine them;
- the moving party had not challenged the qualifications of any of the seven expert witnesses, all of whom were practising in their stated field between December 2015 and May 2018;
- the moving party cross-examined only three of the doctor defendants' experts: those testifying in the areas of emergency medicine, family medicine and infectious disease; and
- all of the seven expert witnesses who filed affidavits in support of the doctor defendants' motion confirmed that the doctor defendants whose conduct they had considered met the standard of care.

[43] The motion judge found that the opinion evidence of the doctors whom the moving party cross-examined was not "negatively affected through cross-examination." She also rejected, for reasons she explained, the moving party's submissions that the doctor defendants' experts gave only conclusory opinions or

demonstrated bias because they refused to change their opinion under cross-examination or did not examine material cited by Dr. Boucher.

[44] Based on the material filed by the doctor defendants and these findings, the motion judge concluded that the doctor defendants had met their evidentiary burden of establishing no genuine issue requiring a trial of the moving party's claims against them in negligence. The burden therefore shifted to the moving party to demonstrate that his claims in negligence against the doctor defendants had a real chance of success.

[45] As part of her reasons, the motion judge noted that the moving party filed only one affidavit specifically in response to the doctor defendants' motion and that that affidavit was three pages long, contained six paragraphs and was unsworn[9]. She also referred to her previous interim ruling that the Beazley Reports were not admissible as evidence.

[46] With respect to Dr. Boucher's evidence, the motion judge concluded that he was not qualified to give expert opinion evidence concerning any one of the seven fields of medicine relevant to the moving party's claims in negligence against the doctor defendants (emergency medicine, family medicine, cardiology, sports medicine, infectious diseases, internal medicine and neurology).

[9] I acknowledge that, at the outset of the summary judgment hearing, counsel for the responding parties confirmed that they took no issue with whether the moving party's affidavit was sworn.

[47] The motion judge noted that Dr. Boucher had retired from emergency medicine in 2011 and from family medicine in 2013. His *curriculum vitae* did not reveal up-to-date continuing education on the subject of Lyme disease. Although his *curriculum vitae* referred to treating over 200 patients with Lyme disease between 2006 and 2013, there was no annual breakdown of the numbers of patients treated in each year. Even if Dr. Boucher were qualified to give the opinion evidence in the fields in which he had practised (family medicine and emergency medicine), which the motion judge concluded he was not, his claim to particular experience with Lyme disease, which the motion judge did not accept, could not qualify him to give expert opinion evidence concerning the standard of care in fields of medicine in which he did not practice.

[48] The motion judge then went on to consider the substance of Dr. Boucher's report and evidence on cross-examination. She noted that he had expressed an opinion regarding only three of the doctor defendants, Drs. Johnston, Gill and Shukle. Dr. Boucher's areas of practice overlapped only with those of Drs. Johnston and Gill. Concerning them, he had opined merely that they "possibly fell below the standard of care", an opinion that did not satisfy the necessary evidentiary burden on a motion for summary judgment. Concerning Dr. Shukle, an internal medicine specialist (an area falling outside Dr. Boucher's expertise), the motion judge concluded that Dr. Boucher's evidence failed to address the issues

of standard of care and causation on a balance of probabilities[10] and, therefore, even if it were admitted, it could not satisfy the necessary evidentiary burden.

[49] Finally, the motion judge concluded that Dr. Boucher was not fair, objective or non-partisan. He had available to him, but did not review, the entirety of the Joint Book of Medical Records, nor did he have a copy of the doctor defendants' statement of defence. Moreover, although it was unclear whether he had received the seven doctor defendants' expert reports, he conceded on cross-examination that he did not recall reviewing them. The motion judge was also satisfied, based on evidence that she cited, that Dr. Boucher chose to rely on information and documentation from the moving party without question or due diligence.

[50] Based on these findings, the motion judge concluded that she should give Dr. Boucher's evidence no weight. Given that the moving party had not produced admissible expert opinion evidence in support of his theory on the issues of standard of care and causation, the motion judge concluded that there was no genuine issue requiring a trial of his claim in negligence against the doctor defendants and dismissed those claims.

[10] Dr. Boucher's evidence concerning Dr. Shukle was that he "likely" fell below the standard of care.

(2) The summary judgment ruling regarding the moving party's negligent misrepresentation and breach of fiduciary duty claims

[51] As for the moving party's claim that four of the doctor defendants had made negligent misrepresentations concerning the accuracy of Lyme tests, PCR Lyme tests, or the existence of chronic Lyme disease, the motion judge again concluded that there was no evidence that the statements made were untrue, inaccurate or misleading. Although there was evidence that one of the doctor defendants had asked the moving party whether he was suffering from a mental health issue, the moving party declined the offer of a mental health assessment.

[52] The motion judge also noted that the moving party had not delivered an affidavit in response to the evidence of the four doctors and that Dr. Boucher had not addressed, in his April 2020 report, the care and treatment of the moving party by any one of the four doctors.

[53] The motion judge therefore dismissed the moving party's claims for misrepresentation.

[54] Based on her review of the pleadings, the motion judge found that the moving party's breach of fiduciary duty claims were not standalone claims, but rather were inextricably linked to his claims in negligence against the doctor defendants. She therefore found that they did not require a different analysis from the claims in negligence and dismissed the claims for breach of fiduciary duty.

(3) The summary judgment ruling regarding the moving party's claims against the Hospital

[55] Turning to the moving party's claim in vicarious liability against the Hospital, the motion judge found, for the reasons set out in relation to the doctor defendants' summary judgment motion, that there was no admissible evidence supporting a genuine issue requiring a trial with respect to the claim in vicarious liability against the Hospital. Relying on *Yepremian et al. v. Scarborough General Hospital et al.* (1980), 28 O.R. (2d) 494 (C.A.), the motion judge was also satisfied that, in any event, the Hospital was not liable for the actions of physicians not employed by it, even if they were negligent. She therefore dismissed the moving party's claim in vicarious liability against the Hospital.

[56] Concerning the moving party's claim in negligence against the Hospital, the motion judge noted that the moving party had no affidavit addressing his claim against the Hospital, nor had he produced any admissible expert evidence addressing the issues of standard of care and causation in relation to the Hospital. The motion judge found, based on the uncontradicted and unchallenged evidence of a representative of the Hospital, that there was no genuine issue requiring a trial with respect to the moving party's claim in negligence against the Hospital.

(4) The summary judgment ruling regarding the moving party's partial summary judgment motion

[57] Lastly, the motion judge considered the moving party's motion for partial summary judgment on the issue of liability. She again noted that he had no admissible evidence before the court concerning his version of his interactions with the doctor defendants and rejected his arguments that expert evidence was not required to support his claims and that she should take judicial notice of various matters related to the standard of care. She found that the analyses applicable to the doctor defendants' and Hospitals' respective motions were equally applicable to his motion, and that the moving party had failed to discharge his evidentiary burden to establish that there is no genuine issue requiring a trial on the issue of liability.

Discussion

A. THE TEST ON A MOTION FOR AN EXTENSION OF TIME TO FILE A NOTICE OF APPEAL

[58] The test on a motion of this kind is well-established. The overarching principle is whether the justice of the case requires that an extension be given. Each case depends on its own circumstances, and the court must take into account all relevant considerations, which generally include the following:

- whether the moving party formed a *bona fide* intention to appeal within the relevant time period;
- the length of, and any explanation for, the delay;
- any prejudice to the responding's parties caused by the delay; and
- the merits of the proposed appeal.

See e.g., *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636, at para. 15.

B. APPLICATION OF THE TEST FOR AN EXTENSION OF TIME

(1) The moving party's *bona fide* intention to appeal within the appeal period

[59] The moving party communicated his intention to appeal in an email dated September 1, 2023. He also reiterated that intention in an email dated September 18, 2023, responding to an inquiry about resolving costs from counsel for the doctor defendants.

[60] As I have said, it is uncontested that the moving party formed an intention to appeal immediately following release of the motion judge's decision and communicated his intention to the responding parties well within the appeal period.

[61] This factor favours granting an extension.

(2) The length of the delay and the explanation for the delay

[62] Approximately 54 days elapsed between the last day for serving a notice of appeal (September 30, 2023) and the date on which the moving party served his motion for an extension of time to file his notice of appeal (November 23, 2023).

[63] The moving party submits that the delay in filing a notice of appeal was due to confusion created by the motion judge and a procedural misunderstanding on his part as a self-represented litigant.

[64] The confusion was caused by the fact that the backing page of the motion judge's August 31, 2023 reasons was titled "Interim Ruling". Moreover, the reasons contemplated a further decision on costs. Given that the motion judge had delivered two previous formal interim rulings in this matter and that the issue of costs was outstanding, the moving party reasonably understood that the appeal period would not commence until the costs issue was determined. This was also in line with what had happened in relation to his request for leave to appeal the motion judge's second formal interim ruling. The Divisional Court and the Court of Appeal had dealt with the issue of costs in their reasons, leading him to believe that the costs issue must be dealt with before he could appeal.[11]

[11] The Supreme Court's leave decision was delivered on October 12, 2023, after the motion judge's summary judgment motion.

[65] The doctor defendants submit that the moving party's explanation for his delay in serving a notice of appeal is inadequate. In particular, they dispute his claims that there was any confusion over whether the August 31, 2023 decision was an interim or final order or that there was any reasonable basis for misunderstanding when the time for appealing began to run.

[66] They point out that a plain reading of the August 31, 2023 decision makes it clear that the motion judge fully and finally disposed of the moving party's action. In any event, if the moving party believed it was an interim ruling, he was required to seek leave to appeal within 15 days of the release of the ruling and knew that because of his previous experience in seeking leave to appeal the motion judge's second formal interim ruling.

[67] Further, s. 6.1 of the *Practice Direction Concerning Civil Appeals at the Court of Appeal* makes it clear that the time limit for serving a notice of appeal begins to run from the making of the order to be appealed and not from the making of a subsequent related order, such as an order dealing with costs.

[68] Although self-represented, the moving party is an experienced litigant. He has had experience with multiple motions during the currency of this litigation and two sets of appeals: his appeal of the order of Gomery J., who dealt with the motions to strike brought by Ontario and Canada, and his appeals of the motion judge's second formal interim ruling. He should have been well familiar with the

procedural rules relating to appeals. In any event, although self-represented, the moving party had an obligation to familiarize himself with the applicable practice direction.

[69] As I see it, viewed in the context of this entire litigation, the delay involved in the moving party serving his motion for an extension is not unduly lengthy. The total delay was less than two months. The litigation had been going on for years. Although, quite understandably given the volume of materials, the motion judge took almost ten months to deliver her decision.

[70] Similarly, I do not find the moving party's explanation for failing to file a notice of appeal within the appeal period unreasonable. No doubt he should have familiarized himself with the relevant practice direction. But it is not uncommon for self-represented litigants to make the mistake of thinking that the appeal period commences only once a decision on costs has been made. I do not accept that confusion over whether the ruling was interim should have led him to seek leave to appeal within the time frame for appealing an interlocutory order. He had gone down that route all the way to this court, and, by October 2023, to the Supreme Court of Canada without success in relation to the motion judge's second formal interim ruling. I do not find it surprising that he would not seek leave to appeal something he thought was merely an interim ruling once again.

[71] This factor is either neutral or slightly favours granting an extension.

(3) Any prejudice to the responding parties caused by the delay

[72] The doctor defendants do not assert any prejudice arising from the delay between September 30, 2023 and November 23, 2023 and I see none. This factor is neutral.

(4) The merits of the proposed appeal

[73] The issue of the merits of the appeal must be assessed not with a view to determining whether the appeal will succeed, but only with a view to determining whether the appeal has so little merit that the court could reasonably deny the important right of appeal: *Issasi v. Rosenzweig*, 2011 ONCA 112, 277 O.A.C. 391, at para. 10; *Duca Community Credit Union Ltd. v. Giovanni et al.* (2001), 142 O.A.C. 146 (C.A.), at paras. 14-15.

[74] In this case, the question whether an extension should be granted turns to a large extent on this issue.

[75] The doctor defendants submit there is no merit in the moving party's appeal for two main reasons. First, they say that the motion judge ruled the moving party's proposed expert evidence inadmissible for reasons that reveal no error. They submit that there can be no genuine issue requiring a trial where the plaintiff in a medical negligence action fails to file expert evidence to support their allegations: *Liu v. Wong*, 2016 ONCA 366, at para. 14. Second, they assert that the moving party has failed to identify an arguable ground of appeal.

[76] The moving party asserts multiple grounds of appeal/arguments in many documents, including his amended notice of motion, his letter of support (unsworn affidavit), his amended moving party factum; his supplementary oral hearing compendium filed for this motion; his proposed notice of appeal; his proposed appeal factum (which was filed as part of a 2175 page supplemental motion record referred to at the motion hearing as volume 4[12]); and his unsworn affidavit apparently filed as part of his costs submissions to the motion judge.

[77] I have organized my discussion of the moving party's many grounds of appeal/arguments around the ruling to which they relate, but also taking account of the fact that the moving party raises certain overarching issues relevant to many, if not all of the motion judge's rulings. These overarching issues include:

- failure to grant the leniency concerning procedural and evidentiary matters that is necessary to enable a self-represented litigant to present their case: *Pintea*; *Jonsson v. Lymer*, 2020 ABCA 167, 448 D.L.R. (4th) 275; *Statement of Principles on Self-represented Litigants*; *Moore v. Apollo Health & Beauty Care*, 2017 ONCA 383; *R. v. Tossounian*, 2017 ONCA 618, 354 C.C.C. (3d) 365; *Girao v. Cunningham*, 2020 ONCA 260, 2 C.C.L.I. (6th) 15; *R. v.*

[12] This volume was apparently served on the responding parties during the afternoon of January 15, 2024, after the doctor defendants had filed their responding material. It is stamped as having been filed with the court on January 16, 2024. However, because of the manner in which it was labelled in the electronic file provided to me, I was not aware during the motion hearing that it was part of the electronic file.

Morillo, 2018 ONCA 582, 362 C.C.C. (3d) 23; *Gadsby v. British Columbia (Attorney General)*, 2019 BCSC 1596; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Carbone v. McMahon*, 2017 ABCA 384; *Wouters v. Wouters*, 2018 ONCA 26; *Bernard v. Canada (Attorney General)*, 2014 SCC 13, [2014] 1 S.C.R. 227; and *Sanzone v. Schechter*, 2016 ONCA 566, 402 D.L.R. (4th) 135; and

- reasonable apprehension of bias.

(a) Grounds of appeal relating to the motion judge's first formal interim ruling

[78] As noted above, in her first formal interim ruling, the motion judge denied the moving party's request to be qualified as an expert to give opinion evidence concerning the diagnosis and treatment of Lyme disease and ruled that the Beazley reports were not admissible as evidence either in response to the responding parties' summary judgment motions or in support of his motion for partial summary judgment.

[79] The moving party submits that the motion judge erred in failing to admit the Beazley reports for many reasons:

- she ignored the law that lay persons are entitled to testify to matters within their knowledge, observation and experience: Alan W. Bryant, Sidney N.

Lederman and Michelle Fuerst, *The Law of Evidence in Canada*, 3rd ed. (Markham, Ontario: LexisNexis, 2009), at §§ 12.2, 12.4-12.32.

- she failed to distinguish between facts and opinions;
- she ruled he was unable to testify as an expert despite his deep knowledge and extensive study of Lyme disease;
- she failed to recognize that expert evidence concerning the standard of care is not required where it is obvious that the standard of care has been breached: *Ter Neuzen v. Korn*, [1995] S.C.R. 674;
- she breached the rule in *Browne v. Dunn*, [1894] H.L. 67 by excluding his evidence when it had not been challenged through cross-examination; and
- she pre-judged the moving party's credibility without reviewing and weighing the full evidentiary record.

[80] I am not persuaded that the moving party has raised an arguable ground of appeal concerning the motion judge's first formal interim ruling.

[81] As a starting point, I observe that the moving party's affidavit did not append, let alone specifically attest to the truth of, the Beazley reports.[13] I acknowledge that counsel for the responding parties agreed, during preliminary discussions at the

[13] The moving party's affidavit can be found at tab 7 of volume 4 of the Moving Party's Motion Record. The Beazley reports can be found at tab 17 of volume 1. The moving party referred obliquely to the Beazley reports at para. 4 of his affidavit.

outset of the summary judgment hearing, that they were content that there was no issue about affidavits[14] being sworn and that, to the extent that there were exhibits that may not have been properly commissioned, they were prepared to treat them as having been properly commissioned. Nonetheless, as I have said, the moving party did not attest to the truth of the Beazley reports in his affidavit.

[82] However, even leaving aside that deficiency, the moving party's many arguments do not squarely address the primary basis on which the motion judge excluded the Beazley reports. Namely, the motion judge held that, as a matter of trite law, the moving party was not entitled to act as his own expert witness. But she also found, based on an examination of the substance of the moving party's proposed evidence, that he was "unable or unwilling to give opinion evidence that is fair, objective and non-partisan" and that he had taken on the role of an advocate, thus disqualifying himself from giving expert evidence.

[83] In support of her conclusions, among other things, the motion judge referred to the moving party's description of the evidence of the doctor defendants' experts in the second Beazley Report as "BLATANT PERJURY***" and his statements that

[14] Counsel for the responding parties acknowledged that, for some reason, the electronic signatures on the affidavits they had filed did not print, but noted that the Caselines versions had a signature affixed. Concerning the moving party's affidavit, although he indicated it had been sworn, counsel said they were content that some leeway be granted and for it to be considered sworn testimony.

he would be seeking perjury charges against them and to have them barred from future independent medical examination activities.

[84] As I have said, the moving party has not directly raised in his arguments any basis for challenging the motion judge conclusions in this regard and I see none.

[85] As for the moving party's argument that the contents of his reports related to matters of fact within his knowledge rather than opinion, he provided no examples of particular statement he claims should have been admitted as matters of facts within his knowledge. Based on my review of the Beazley reports, I conclude that they are a confusing mix of opinion, unsworn factual assertions and affidavit critiques, based in significant part on references to material that is not attached. I see no error in the motion judge's decision not to admit the Beazley reports on this ground.

[86] Moreover, and in any event, I have no doubt that the moving party sought to have the Beazley reports admitted as expert opinion evidence on the issue of standard of care and as a rebuttal to the doctor defendants' expert evidence. At paragraph 2 of his affidavit, he provided an acknowledgment of his duty as an expert witness. At paragraph 6, he set out his "expert opinion" that the doctor defendants and the hospital "fell well below the standard of care". The motion judge was entitled to deal with the admissibility of the moving party's affidavit and the Beazley reports on the basis on which they were presented, *i.e.* as expert opinion

evidence relating to the standard of care. I see no arguable basis for challenging on appeal the motion judge's conclusion that the Beazley reports were inadmissible for the reasons she gave.

[87] For the sake of completeness, I add two additional points.

[88] First, even assuming that the moving party has a deep knowledge of Lyme disease based on extensive study, he is not a physician. Accordingly, he was not qualified to give expert opinion evidence on the standard of care, which requires an assessment of whether the physician conducted himself/herself in accordance with the conduct of a prudent and diligent doctor in the same circumstances. The physician's behaviour must be assessed in light of the conduct of other ordinary physicians in the same field or specialty, who possess a reasonable level of knowledge, competence and skill expected of professionals in Canada, in that field or specialty: *Ter Neuzen*, at paras. 35, 38–41. The moving party does not possess any special training, knowledge or experience that would permit him to opine on the required skill level of a doctor practising in a particular specialty.

[89] Second, the motion judge's admissibility ruling was not premised on credibility findings. Accordingly, I see no merit in the moving party's claims that she prejudged his credibility or that her ruling contravenes the rule in *Browne v. Dunn*. The latter rule addresses whether the credibility of a witness can subsequently be called into question if not challenged in cross-examination.

[90] I will address the issue of whether expert opinion evidence was required when dealing with the motion judge's summary judgment reasons.

(b) Grounds of appeal relating to the motion judge's second formal interim ruling

[91] In her second formal interim ruling on April 13, 2022, the motion judge ruled 57 documents on which the appellant sought to rely inadmissible.

[92] The moving party submits that the motion judge made several errors in ruling these documents inadmissible. I would categorize his arguments generally as follows:

- she disregarded an agreement between the parties that his documents would be considered properly before the court so that the case could be decided on the merits, despite any procedural issues;
- she prejudged the issue of admissibility, thus demonstrating a reasonable apprehension of bias;
- she failed to afford him the leniency to which he was entitled as self-represented litigant with respect to minor procedural errors that could have been easily corrected;
- she applied a mechanical and inflexible approach to procedural and evidentiary rules with the result that critical documents were improperly excluded.

[93] I will deal with these arguments in turn. For reasons that I will explain, I am satisfied that there is little, if any, merit in these arguments. To the extent that there may be some merit in them, I conclude that the moving party has not demonstrated that the decision not to admit any of the excluded documents had an adverse impact on his case. Although he argues that the documents contradict the doctor defendants' expert evidence concerning the standard of care, I am skeptical that they do. But in any event, as the documents at issue were not put to the doctor defendants' experts, they would have been entitled to little, if any, weight had they been admitted.

(i) There was no agreement that the motion judge would abandon her gatekeeper role in relation to the admissibility of documents

[94] I acknowledge that there was discussion on the first hearing day of the summary judgment motion to the effect that the moving party's documents could be considered "properly before the court" despite any procedural issues. Nonetheless, counsel for the doctor defendants made it clear that it would ultimately be for the court to determine the admissibility of all documents:

> In, just talk about the approach we took to this, Your Honour, because understanding that Mr. Beazley is [a] self-represented litigant, we are, we are trying to be as flexible as we can, while still trying to operate within the bounds of, of the Rules of Evidence and the Rules of Procedure. There's no question in which the manner in which Mr. [Beazley] has presented his materials to the court is not in the ordinary course and, and <u>therefore</u>

> when we've taken the position that we're not opposed to a document, its on the understanding you ultimately will have to make the determination on admissibility, but we've, to be fair to Mr. Beazley, I think we're, we're pushing the limits of some of the law, in order to take the position that we're not opposed. [Emphasis added.]

(ii) The moving party has not demonstrated that the motion judge prejudged admissibility issues

[95] In a letter dated April 14, 2022[15], the moving party alleged bias on the part of the motion judge, highlighting in particular a claim that she had made comments suggesting she had prejudged evidentiary issues on the morning of April 11, 2022:

> Most concerning were late April 11th statements that your Honour had already pre-decided the eviden[t]iary matter that morning prior to hearing arguments which frankly appear not to have been read. Despite parties indicating they would prefer the matter was decided on its merits (March 2 and again April 4), your Honour appears to have already decided procedural eviden[t]iary issues in early March 2nd statements. The court then indicated minutes later it would one-sidedly penalize and exclude most evidence, perhaps fatally, the motion for summary judgment.

[96] The moving party repeated these concerns on October 28, 2022, saying that his greatest concern was that the motion judge had "pre-judged an issue prior to the hearing of the argument, which gave him "great concern." The motion judge

[15] In oral submissions on this motion, the moving party indicated he was not sure when this letter was sent. He also indicated he raised the issue of bias, withdrew it, and later raised it again. However, no ruling was ever made. The moving party did not identify anything in his material to demonstrate these facts.

responded that she did not know what the moving party was referring to. The moving party did not elaborate.

[97] As I understand the moving party's submissions, he is speaking about the following transcript references, at pp. 86 and 89 on April 11:

> THE COURT: Well, just so that you're aware, Mr. Beazley, in thinking about this morning, I came to the conclusion that in, in fact, there has already been flexibility demonstrated in the manner in which we have approached the issue of admissibility of the documents, because another approach could have been to require the Defendants to move for an order excluding materials, which would have given them the right to make the primary submissions and the right to make reply. By proceeding in the manner in which I did, you were given the right to make primary submissions and to reply. By proceeding in the manner in which I did, it, it would normally have been incumbent on you to deliver your two-page point form outline ahead of the Defendants but as a courtesy to you, and appreciating that you are a self-represented litigant, I asked them to give their, their outlines to you ahead of time. So I am aware that you are self-represented and I am in managing this summary judgment motion doing what, in my view to date, has been fair and a reasonable application of both the Rules of Civil Procedure and evidentiary principles. So I appreciate you pointing out those particular cases and I certainly will take them into account as I go through the documents, but so that you have some level of confidence in my approach has been to date, in any event, in my own view, has been in keeping with those kinds of principles. So I'll certainly keep them in mind when I deal with the documents.
>
> …
>
> … I really don't like operating with a gun to my head, I don't mind operating with a gun to my head, but I don't

> want the end result being people short changed, in my consideration of the issue. So I'm just going to take the time that I need. So be it. But, for sure, Ms. Roy, your, you will, we'll hear from you on Wednesday, no matter what. It's whether Mr. Beazley's in a position to start ahead of time. And so rather than dispute your day tomorrow, and leave you sort of on ten[t]er hooks, does it make sense to simply start at 9:30 on Wednesday, or would you rather, if I, would you rather have a check, say at two o'clock tomorrow, to find out if maybe, maybe, by some miracle I can get something to you by 3:30?

[98] In my view, these references demonstrate only that the motion judge was thinking carefully about the process in which she was engaged and how she should conduct it. They do not demonstrate that she prejudged admissibility issues. I am fortified in my conclusion by the fact that the motion judge gave detailed reasons for her second formal interim ruling, indicating that she reviewed the issues carefully and took account of the moving party's arguments.

(iii) There was no error in the motion judge's approach to the evidentiary issues

[99] I will address the moving party's submissions concerning leniency for self-represented litigants and his claim that the motion judge took a mechanical and inflexible approach to procedural and evidentiary issues that resulted in critical documents being improperly excluded together, because I consider them interrelated.

[100] The motion judge ruled many of the moving party's documents inadmissible because he had not complied with the January 2022 case conference endorsement concerning filing hard copies and complete copies of documents.

[101] In her reasons relating to these documents, the motion judge considered the moving party's reliance on r. 4.06(3) and s. 32 of the *Evidence Act* to support his method of presenting documents. She concluded, correctly in my view, that he had not complied with all requirements of these provisions. She also considered case law addressing the criteria for admissibility of internet information and, again, concluded correctly in my view, that the website links and internet information on which the moving party sought to rely did not meet those criteria. She also found that a video the moving party sought to introduce had not been properly authenticated.

[102] On this motion, the moving party relies on, among other things, the *Statement of Principles on Self-represented Litigants* adopted in *Pintea*, *Gibb v. Pereira*, 2017 ONSC 4762 and *J.N. v. C.G.* 2023 ONCA 77, 477 D.L.R. (4th) 699, to argue that the motion judge's approach was inappropriately inflexible and a violation of the *audi alteram partem* rule, resulting in the improper exclusion of critical evidence that would have contradicted the doctor defendants' experts' evidence.

[103] I am not persuaded that the approach adopted in either *Gibb* or *J.N.* would apply in the circumstances of this case.

[104] *Gibb* involved what was, in effect, technical non-compliance with r. 4.06(3), where it was apparent from a party's affidavit that the party had reviewed exhibits that were not properly referenced in the affidavit. Those exhibits were, however, discussed in the affidavit and referred to explicitly by the affiant. The same cannot be said here. The moving party did not refer to or identify any of the documents he sought to have admitted in his affidavit.

[105] The court in *J.N.* permitted the admission of Health Canada and Canadian Paediatric Society documents concerning the safety of vaccines. However, the documents were appended to a party's affidavit, there is no indication the documents were incomplete, and neither party had filed expert evidence. Here, the moving party was seeking to file what were sometimes incomplete documents supposedly to contradict the doctor defendants' expert witnesses, without properly identifying the documents through affidavit evidence and without having put the documents to the expert witnesses. That is a far different situation.

[106] Like the motion judge, I am not persuaded that the moving party's failure to file complete, hard copies of the documents at issue and append them to, or refer to them in an affidavit, amounted to technical deficiencies that could be easily cured or overlooked because of his status as a self-represented litigant.

Evidentiary and procedural rules exist to ensure that cases are decided fairly and efficiently on the basis of properly admissible evidence. Although the moving party had been provided with guidance (in the form of the January 2022 case conference endorsement) and examples (in the form of the responding parties' materials) concerning how to present documentary evidence, he chose to proceed by way of a data dump of electronic information, the authenticity and significance of which could not be easily determined. Although self-represented litigants are entitled to procedural fairness, that does not mean the rules of evidence do not apply to them or that they can ignore directions from the court.

[107] The video of Dr. Phillips was correctly ruled inadmissible for the same reasons. Regardless of Dr. Phillips' qualifications, the video evidence had to be authenticated. The doctor defendants' experts were not in a position to say whether it was an authentic video in cross-examination.

[108] In any event, even if it were arguable that the motion judge erred by failing to admit some of the excluded documents, I am not persuaded that their admission would have had any impact on the motion judge's summary judgment ruling. As I have said, I am skeptical of the moving party's claim that the documents contradicted the doctor defendants' experts' evidence on the issue of the standard of care. Even if they did, they would be entitled to minimal, if any, weight, as they were not put to the doctor defendants' experts in cross-examination (which pre-dated the admissibility ruling).

[109] I would also note that the motion judge ordered the responding parties to deliver to the moving party a point-form summary of their arguments prior to his submissions on the admissibility of the documents. This, coupled with the fact that the motion judge accepted some technical deficiencies in the moving party's affidavits and exhibits, demonstrates her desire to afford some flexibility and assistance to the moving party as a self-represented litigant.

[110] I am not persuaded that the moving party has identified an arguable ground of appeal concerning the motion judge's second formal interim ruling.

(c) The motion judge made no error regarding Dr. Boucher's evidence

[111] I will deal with the motion judge's two rulings concerning Dr. Boucher's evidence together, as they are interrelated.

[112] As I have said, in an oral interim ruling made on August 23, 2022, the motion judge denied the moving party's request for leave to file the Second Boucher affidavit. In her August 31, 2023 summary judgment decision, she explained her reasons for doing so. She also ruled that Dr. Boucher was not qualified to give expert evidence, and that, in any event, his evidence was entitled to no weight.

[113] The focus of the moving party's submissions in relation to these rulings is on the oral interim ruling denying the moving party's request for leave to file the Second Boucher affidavit. Once again, he submits that the motion judge failed to afford him appropriate leeway, as a self-represented party, on evidentiary and

procedural matters and effectively gutted his case through an inflexible and improper application of procedural and evidentiary rules. In addition, he argues that the motion judge erred in holding that the responding parties would suffer insurmountable prejudice if the Second Boucher affidavit were admitted. With respect to the admissibility at large of Dr. Boucher's evidence, the moving party argues that the motion judge erred by failing to recognize his expertise as a Lyme disease expert and in holding that his evidence did not address the necessary evidentiary burden.

[114] I am not persuaded that the moving party has raised an arguable ground of appeal concerning the motion judge's rulings on the admissibility of Dr. Boucher's evidence.

[115] Once again, the moving party's arguments fail to address the primary basis on which the motion judge excluded evidence, in this case, Dr. Boucher's evidence. The motion judge held not only that Dr. Boucher lacked up-to-date experience that would qualify him to give expert evidence in relation to either of the fields in which he had practised and that he had not properly addressed the burden of proof, but also that he did not approach his role as an expert witness in a manner that was fair, objective, and non-partisan. The motion judge therefore gave his evidence no weight. The motion judge's reasons fully support these conclusions, as does the record. Dr. Boucher admitted that he relied on what the moving party said to him about his reported symptoms and interactions with the

doctor defendants in his cross-examination. He went on to agree that the information he relied on conflicted with what appeared in the medical reports on at least one occasion. In the circumstances, I see no arguable basis for challenging the motion judge's rulings concerning Dr. Boucher's evidence.

[116] For the sake of completeness, I add that I see no merit in the moving party's arguments concerning the motion judge's decision not to admit the Second Boucher affidavit. Contrary to the moving party's arguments, I conclude that the motion judge's finding that the responding parties would suffer insurmountable prejudice if that affidavit were admitted is unassailable. The moving party sought to admit the affidavit not only after all affidavits were delivered and all cross-examinations had been completed, but also after the responding parties had completed their arguments on their summary judgment motions. A responding party to a summary judgment motion is required to put their best foot forward when filing their evidence. They are not entitled to file new evidence to endeavour to plug perceived holes in their case after hearing the moving party's arguments. To hold otherwise would undermine the important principle of finality in litigation.

(d) Grounds of appeal relating to the motion judge's summary judgment ruling

[117] The moving party submits that the motion judge made several errors in relation to her summary judgment ruling:

- she erred in concluding that expert evidence was required;
- she relied on biased hearsay evidence from the doctor defendants' experts;
- she ignored the contradictory evidence in the moving party's documentary evidence that was admitted and filed in the Book of Admitted Documents (the "BOAD");
- she violated the principle of *stare decisis* by ignoring persuasive authority holding that two-tier Lyme disease testing, such as the test the moving party's family doctor ordered in May 2016, is unreliable;
- she failed to address the moving party's *Charter* arguments; and
- she failed to make critical factual findings, including whether the moving party has Lyme disease.

[118] The moving party also contends that the motion judge's many errors demonstrate a reasonable apprehension of bias.

[119] I conclude that none of these arguments raises an arguable ground of appeal.

[120] I will address the moving party's first two arguments together because they are interrelated.

(i) The motion judge did not err in concluding expert evidence was required or in relying on the doctor defendants' experts' evidence

[121] The moving party claims that the motion judge erred in concluding that expert evidence was required in this case because a diagnosis that he had Lyme disease would be obvious to an ordinary layperson. He claims his presenting circumstances included a tick bite, or, at a minimum, tick exposure, quickly followed by flu-like symptoms, classic Lyme disease rashes (or at least rashes consistent with Lyme disease), and subsequent worsening symptoms consistent with Lyme disease.

[122] One of the problems with this argument is that, as noted by the motion judge, the moving party filed only one affidavit in response to the doctor defendants' evidence. The doctor defendants' evidence included affidavits from all of the doctor defendants setting out their interactions with the moving party. The moving party's affidavit did not include details of his version of his interactions with the doctor defendants. In the result, the evidence before the court did not include evidence of what the moving party claimed in the proceedings were his presenting circumstances, namely, reports to a doctor about tick exposure quickly followed by flu-like symptoms and presentation with classic Lyme disease rashes (or at least rashes consistent with Lyme disease). Thus, the admissible evidence before the

court did not include evidence of a chronology of events the moving party claims would lead to a diagnosis obvious to a layperson.

[123] A second problem with this argument is that it is generally accepted that, when a doctor acts in accordance with a recognized and respectable practice of the profession, he or she will not be found to be negligent. This is because courts do not ordinarily have the expertise to tell professionals that they are not behaving appropriately in their field: *Ter Neuzen*, at para. 38. While exposure to ticks and flu-like symptoms might be matters a lay person could recognize, a rash consistent with Lyme disease is not.

[124] In this case, the emergency room doctor who first met the moving party diagnosed a rash that is not consistent with Lyme disease. Moreover, her medical records did not disclose advice about tick exposure or flu-like symptoms. While I recognize that the moving party debated the adequacy of her assessment of his presenting rash while cross-examining three of the doctor defendants' expert witnesses,[16] he had no admissible evidence before the court to contradict her description of it. In any event, contrary to the moving party's main point, the issue

[16] Among other things, the moving party suggested that the fact that the emergency room doctor noted only that the moving party did not have a "bulls-eye rash" and that her notes did not disclose an inquiry about tick exposure demonstrated negligence. The doctor defendants' experts did not accept this proposition for reasons they explained.

of assessing the nature of the rash is an issue requiring expert evidence about the standard of care.

[125] The moving party also claims that the motion judge erred by relying on biased hearsay evidence from the doctor defendants' experts. As I understand it, his concern is that that their evidence was unsubstantiated.

[126] However, the doctor defendants' experts were giving evidence based on their knowledge and experience practising in the particular field of medicine at issue. As I have said, the crux of standard of care evidence is assessing a physician's behaviour in light of the conduct of other ordinary physicians in the same field or specialty, who possess a reasonable level of knowledge, competence and skill expected of professionals in Canada, in that field or specialty. The fact that they did not refer to sources or accept that material the moving party presented reflected the standard of care at the relevant time did not make their evidence either biased or unsubstantiated. Their evidence was premised on their own knowledge and experience.

[127] I am not satisfied that the first two issues raised by the moving party raise an arguable ground of appeal.

(ii) The motion judge did not err regarding the BOAD

[128] Turning to the moving party's claim that the motion judge ignored contradictory evidence that was admitted and filed in the moving party's BOAD, I am not satisfied that this issue raises an arguable ground of appeal.

[129] In her summary judgment ruling, the motion judge noted that the moving party had cross-examined only three of the doctor defendants' expert witnesses, Drs. Newbigging (emergency medicine), Wiginton (family medicine) and Zoutman (infectious disease). She concluded that their opinion evidence was not negatively affected through cross-examination. I have read the cross-examinations and I agree with that assessment.

[130] The moving party put some of the documents on which he relies to the doctor defendants' experts that he cross-examined. For various reasons, they did not accept that any portions of the documents he put to them reflected the standard of care for their specialty at the relevant time. Absent countervailing expert evidence, it was open to the motion judge to accept the doctor defendants' experts' evidence and conclude that the moving party had not raised a genuine issue requiring a trial. In relation to documents in the BOAD that were not put to the doctor defendants' experts, it was open to the motion judge to conclude that they were entitled to no weight and did not raise a genuine issue requiring a trial.

(iii) The motion judge did not violate the principle of *stare decisis*

[131] The moving party's argument that the motion judge erred by violating the principles of *stare decisis* is premised on a decision of the Workplace Safety and Insurance Appeals Tribunal: 2017 ONWSIAT 3276 (the "Tribunal Decision").

[132] I see no merit in this submission. A tribunal decision is not binding on a Superior Court judge. In any event, the Tribunal Decision is distinguishable on the facts. It involved a worker whose family doctor diagnosed him with Lyme disease based on clinical presentation soon after a reported tick bite even though standard Ontario Lyme disease testing conducted within two weeks of the tick bite was equivocal (reactive at stage one, non-reactive at stage two). Two experts disputed the diagnosis and benefits were denied. On appeal, two other experts supported the diagnosis. Medical literature submitted by the union representative for the worker on appeal also supported the diagnosis. Among other things, the Tribunal Vice-Chair accepted the opinions of the two experts who supported the worker that "a Lyme disease diagnosis is based on clinical presentation following potential exposure, and that the serology testing is not reliable": at para. 30.

[133] The Tribunal decision is distinguishable on its facts for two reasons. First, it involves an individual who was diagnosed with Lyme disease based on clinical presentation soon after a tick bite. That is not this case. Although the moving party claims his early clinical presentation was consistent with Lyme disease, no

admissible evidence supports that conclusion. Second, the Tribunal Decision relates to the reliability of standard Ontario Lyme disease testing for early-stage disease. I do not discern any disagreement in the expert evidence in this case with the proposition that false negatives may occur in early-stage disease.

(iv) The motion judge was not required to address *Charter* issues, nor did she err by failing to make critical factual findings

[134] I see no merit in the moving party's claims that the motion judge erred by failing to address his *Charter* arguments. The moving party's claims against the Government of Ontario (named as the Ontario Ministry of Health and Long Term Care) and the Government of Canada (named as the Public Health Agency of Canada) were struck in a ruling by Gomery J.: 2019 ONSC 5756. Following that decision, the moving party did not plead any allegations under the *Charter* in his statement of claim.[17]

[135] Similarly, I see no merit in the moving party's claims that the motion judge failed to make critical factual findings, including about whether the moving party has Lyme disease. The issue in this case was whether there was a genuine issue requiring a trial concerning whether the doctor defendants had breached the

[17] The moving party did, however, file a Notice of Constitutional Question on September 14, 2022, after the responding parties had completed their submissions on the summary judgment motion.

standard of care. The motion judge made the findings necessary to determine that issue.

[136] For the sake of completeness, I observe that there is limited admissible evidence in the record concerning whether the moving party has Lyme disease. Although his PCR test results from the California laboratory are included in the record, there is no admissible evidence interpreting those results from Dr. Jacobson, the Ontario doctor who obtained, or recommended obtaining, that test. The motion material includes a letter from Dr. Jacobson, but he did not deliver an affidavit. As such, there is no admissible evidence from him in the record.

[137] Moreover, the doctor defendants' experts disputed the validity of the testing conducted by the California laboratory. For example, Dr. Wiginton testified on cross-examination that family physicians in Ontario are educated to not seek testing in non-approved laboratories such as the one the moving party used. Further, Dr. Zoutman stated on cross-examination that, in his opinion, the moving party's test results from the California laboratory were not consistent with Lyme disease.

[138] I have already dealt with the main focus of the moving party's submissions concerning reasonable apprehension of bias when addressing his grounds of appeal concerning the motion judge's second formal interim ruling. As I understand it, the moving party also asserts more generally that the motion judge's many

errors altogether reveal a reasonable apprehension of bias. I am not satisfied that this raises an arguable ground of appeal. Although the motion judge's reasons might contain certain minor factual errors or omissions, I have discerned no arguable ground of appeal.

(e) The justice of the case

[139] I have concluded that the moving party formed an intention to appeal within the applicable appeal period and that the length and explanation for his delay in moving for an extension of time to appeal are not unreasonable. Further, the responding parties were well aware of the moving party's intention to appeal, and I can see no prejudice to them arising from the moving party's 54-day delay in seeking an extension of time to appeal. Counsel for the doctor defendants acknowledged in oral argument that he did not warn the moving party that the appeal period was about to expire.

[140] In some cases, these factors could provide significant support for a moving party's request for an extension of time to file a notice of appeal. Parties have a right to appeal a decision such as this one to a court composed of three judges. That right should not be removed lightly.

[141] However, in this case, I agree with the submissions of the doctor defendants that the justice of the case does not support granting an extension. I have reviewed as best I can the moving party's many arguments and submissions concerning the

merits of his proposed appeal. I have concluded that they do not raise an arguable ground of appeal. The moving party did not file an affidavit setting out his version of his interactions with the doctor defendants and did not cross-examine any of them. The moving party was never eligible to act as his own expert. Even leaving aside the issue that his proposed expert witness did not provide evidence in a fair, objective and impartial manner, the evidence that the moving party obtained from his proposed expert did not address, in a substantive or specific way, the conduct of most of the doctor defendants and did not address the conduct of those he did address on the appropriate standard. The moving party was not entitled to proceed by ambush and file a supplementary affidavit from his expert after the responding parties had led their case. The moving party did not put many of the documents he proposed to rely on to the doctor defendants' experts, who all provided an opinion that the doctor defendants' conduct they reviewed met the standard of care. The moving party did not follow the directions of a case management judge concerning presenting his voluminous materials in a manner that would allow the court to digest it efficiently.

[142] The moving party's status as a self-represented litigant does not permit the court to overlook the deficiencies in his case.

[143] The doctor defendants have already incurred substantial time and expense in defending a case involving voluminous material, much of which was not properly presented.

[144] I conclude that the moving party's case has so little merit that the justice of the case does not warrant granting an extension.

Disposition

[145] Based on the foregoing reasons, the moving party's request for an extension of time to file a notice of appeal is denied. The responding parties may file submissions on costs, not to exceed five pages, within seven days from delivery of these reasons. The moving party may respond, with written submissions not to exceed five pages, within seven days thereafter.

"Janet Simmons J.A."