CITATION: Nykilchuk v. 2244301 Ontario Inc. et al
ONSC 5025
COURT FILE NO.: **CV-16-00068516-0000**
DATE: September 11, 2024

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JESSICA NYKILCHUK

AND:

2244301 ONTARIO INC., 1067277 ONTARIO INC., and DANIEL MOORE

BEFORE: Associate Justice M. Fortier

COUNSEL: *Warren WhiteKnight, for the Plaintiff*
Marcus Rozsa and Andrew Lee for the Defendants

HEARD: August 27, 2024

ENDORSEMENT

Introduction

[1] This is a motion by the defendants, 1067277 Ontario Inc., c.o.b. as T.G. Carroll Cartage Ltd., and Daniel L. Moore ("the defendants"), for an order compelling the plaintiff to attend defence medical examinations with Dr. Shariff Dessouki, Physiatrist, on September 26, 2024, and Dr. Paul Duhamel, Neuropsychologist, on October 1, 2024, as well as an order extending the time for service of the reports of Dr. Dessouki and Dr. Duhamel.

[2] The plaintiff opposes the motion.

Background

[3] On December 3, 2014, the plaintiff was injured in a motor vehicle accident involving the defendants.

[4] The plaintiff alleges that she suffered serious and permanent physical and psychological injuries as a result of the collision.

[5] The following is a brief chronology of the action:

- The Statement of Claim was issued May 9, 2016, and the Statement of Defence was served in October 2016.
- The plaintiff's examinations for discovery were held over three days on October 3 and 4, 2017, and July 18, 2018.
- The defendants' examinations for discovery were held on October 4, 2017.
- A consent timetable order was signed by Master Kaufman (as he then was) on May 3, 2021 whereby the parties agreed to serve all expert reports in accordance with the *Rules of Civil Procedure*, R.S.O. 1990, Reg. 194 (or "the *Rules*").
- Mediation was held on December 22, 2021.
- The plaintiff served the trial record on April 27, 2022.
- Both the pre-trial and trial dates were scheduled by Justice Gomery at a trial management conference on May 13, 2022.
- The pre-trial was held before Justice Robert Smith on January 13, 2023.
- The five-week jury trial is scheduled for January 15, 2025.

[6] The defendants were initially represented by counsel at at Gowling WLG until early 2024. The file was transferred to counsel at Cavanagh LLP in early 2024 and then transferred to counsel at Bell Temple LLP in May 2024.

[7] The plaintiff was represented by David Bertschi of Bertschi Orth from 2015 to February 2024. When Mr. Bertschi retired, the plaintiff retained counsel at Bergeron Clifford LLP in February 2024.

[8] The plaintiff obtained and served seven expert reports between 2018 and the pre-trial in 2023.

[9] No expert reports have been served by the defendants in this proceeding. In addition, no request was made for the plaintiff to attend a defence medical examination until April 2024, when counsel at Cavanagh LLP indicated her plan to schedule medical assessments. At the time, the plaintiff sought a reasonable explanation for the defendants' failure to serve expert reports according to the *Rules*. When no explanation was received, the plaintiff indicated that she would not consent to the medical assessments and the submission of the resulting expert reports.

[10] No steps were taken by the defendants to schedule defence medical examinations until June 2024 when current defendants' counsel scheduled independent medical assessments to occur in late September and early October 2024.

[11] According to the defendants, Dr. Dessouki will complete his report by October 24, 2024, and Dr. Duhamel will complete his report by October 22, 2024.

[12] The plaintiff refuses to attend the medical examinations and does not consent to the late service of the medical reports.

Position of the Parties

[13] The defendants argue that they have a reasonable explanation for their non-compliance with the service deadline of the expert reports and that the late service of the reports will not cause prejudice to the plaintiff. Moreover, the defendants contend that they will be significantly prejudiced if they are not permitted to serve their expert reports.

[14] The plaintiff does not take issue with the defendants' proposed specialists chosen for the proposed medical examinations. Rather, the plaintiff opposes the motion due to the defendants' non-compliance with the timelines set out in the *Rules* and the consent timetable order signed by the parties setting out the timing for the delivery of expert reports. It is the plaintiff's position that the defendants have no reasonable explanation for their failure to tender expert reports in a timely fashion. Moreover, permitting the service of late expert reports at this stage of the proceeding will cause prejudice to the plaintiff which cannot be compensated for by an adjournment or costs.

The Law

[15] Pursuant to section 105(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the court has the discretion to order a plaintiff to attend a defence medical examination "where the physical or mental condition of a party to a proceeding is in question". Such an examination is a way to "put the parties on equal footing by allowing the defendant to meet the case advanced by the plaintiff and to respond to the allegations made by the plaintiff in the statement of claim": *Chapell v. Marshall Estate*, [2001] O.J. No. 3009, at para. 9.

[16] The timing of a defendant's request for a medical examination must be considered on motions for leave to file late expert reports: *Lamothe v. Sudbury Trail Plan Association*, 2023 ONSC 3176, at para. 25. As stated by Justice Muszynski in *Tyner v. Phillips*, 2023 ONSC 5207, at para. 33: "An order compelling the plaintiff to attend a medical examination cannot be divorced from the service of the expert report that the examination will generate and that the rules dictate must be served forthwith."

[17] The *Rules of Civil Procedure* contain very specific requirements regarding the timeframe in which the expert reports are to be served. Rule 53.03 provides that parties must deliver expert reports not less than 90 days prior to the judicial pre-trial; responding reports, not less than 60 days prior to the judicial pre-trial. Rule 53.03(4) permits the parties, on consent, or the court, on motion, to extend the time to deliver expert reports. Pursuant to r. 53.03(3), experts cannot testify at trial without leave if their report is not filed in accordance with the *Rules*.

[18] In determining whether leave should be granted, r. 53.08 provides that the party seeking leave must satisfy the trial judge that:

a. There is a reasonable explanation for the failure; and
b. Granting leave would not,
    (i) Cause prejudice to the opposing party that could not be compensated for by costs or an adjournment, or
    (ii) Cause undue delay in the conduct of the trial.

[19] The court can grant an indulgence for the late service of an expert report, but only where the moving party can establish a "reasonable explanation for the failure" to comply with the timelines set forth in r. 53.03. It should be emphasized that the test in r. 53.08 is a compound test in that the moving party must show both a reasonable explanation and that there will be no prejudice or delay in the conduct of the trial.

[20] A motion requesting the extension of the time to serve an expert report must be supported by evidence explaining the reason that the extension is required: *Lafontaine v. McDaniel*, 2022 ONSC 5153, at para. 46.

Analysis

[21] There is no question that there has been a serious delay on the part of the defendants to schedule defence medical examinations and hence, to serve the expert reports emanating from the examinations.

[22] As the ordering of a defence medical examination and the subsequent delivery of the expert report are inextricably linked, the admissibility of the late report is key when considering whether a defence medical examination ought to be ordered in the first place.

[23] The first hurdle that the defendants must overcome is to satisfy the court that there is a reasonable explanation for their failure to serve expert reports.

[24] The defendants argue that their non-compliance is multi-layered and can be explained by the following:

- The defendants' former counsel had a long-standing intention to obtain defence medical examinations, however, never formally arranged any.
- The defendants' former counsel was not operating on the understanding that the r.53.03 deadlines applied in the circumstances.
- The defendants' former counsel's inadvertence.

[25] In my view, an "intention" to schedule defence medical examinations over an eight-year period since the commencement of the proceedings falls far short of being a reasonable explanation

for not actually arranging the medical examinations and obtaining the reports. The law does not account for the intention of a party to do so; the assessments must be scheduled, and the reports must be completed for the reports to be considered in a civil trial.

[26] It is noteworthy that there is no evidence before the court of any request by the defendants for the plaintiff to attend a medical examination before April 2024. Moreover, the evidence is clear that no defence medical assessments were scheduled before June 2024.

[27] When the defence medical examinations were scheduled in June 2024, defendants' counsel wrote to plaintiff's counsel on June 21, 2024, stating that "if the plaintiff does not agree, she runs the risk of having the trial adjourned". It appears that at the time, the defendants were of the mistaken view that the best defence is a good offence. In any event, the defendants indicated in their submissions on the motion that they were no longer seeking an adjournment of the trial.

[28] The explanation that the defendants' former counsel was not operating on the understanding that the r. 53.03 deadlines applied in the circumstances is improbable and not supported by the evidence. Furthermore, the defendants consented to the timetable order of Master Kaufman (as he then was) in 2021 whereby all parties agreed to serve expert reports in accordance with the *Rules of Civil Procedure*.

[29] The timelines for delivery of expert reports set out in the *Rules* are clear and unambiguous. The defendants took no steps to obtain responding expert reports before the pre-trial, or after the pre-trial until June 2024.

[30] Further, there is no evidence before me that the defendants' non-compliance was due to inadvertence on the part of the defendants' former counsel. In my view, the defendants cannot claim inadvertence in nearly eight years of taking no steps to obtain expert reports since the filing of their statement of defence.

[31] The record is clear that the defendants were aware that they had not scheduled defence medical examinations or produced expert reports. For example, the defendants indicated on the cover page their January 2023 Pre-Trial Brief that: "These Defendants intend to obtain and produce responding reports". In addition, defendants' former counsel wrote in a May 23, 2023, email to

plaintiff's counsel that: "Upon review of this matter, we are trying to determine which independent assessments of the Plaintiff are required". Despite these assertions, nothing was done.

[32] It is noteworthy that the plaintiff would have attended defence medical examinations in the past had the request been made on a timely basis. As stated by plaintiff's counsel in an email to defendants' counsel dated June 27, 2024: "I have every understanding that in the past the plaintiff would have attended consent DME's if they had been requested in accordance with the Rules and Court timelines etc. However, that time has long passed".

[33] In *Longo v. Westin Hotel Management, L.P.*, 2024 ONSC 3676, R.S.J. Edwards found that the defence had failed to offer a reasonable explanation for the late delivery of expert reports and reiterated the need for the Bar to comply with the deadlines for service of the reports:

> [10] The change to r. 53.08 occurred in 2022. Since that change, a number of cases have come before the Court where parties have sought an indulgence under r. 53.08. In that regard, in a case that I decided, *Agha v. Monroe*, 2022 ONSC 2508, I explained how the new rule has fundamentally changed how the Bar must adapt to the deadlines for service of expert reports. I finished my Reasons with the following admonition:
>
> > Lawyers and litigants need to adapt to the new rule immediately. The late delivery of expert reports simply will not be rubber-stamped by the court. By shifting the onus to the party seeking the indulgence and changing the word "shall" to "may", the exercise of the court's discretion will, in my view, result in far fewer adjournments and more productive pre-trials. There will always be circumstances that are beyond the control of counsel and the parties which will fall within the definition of a "reasonable explanation" for failing to comply with the timelines for the service of expert reports. In this case, no such reasonable explanation was provided to the court.
>
> [11] The so-called reasonable explanation that was argued by Ms. Gaw on behalf of her client, was to suggest that junior counsel had failed in his responsibilities. Junior counsel has a responsibility to ensure that a file is being properly handled on a day-to-day basis. This includes timely responses to emails and phone calls from opposing counsel. However, to lay the blame at the feet of Junior counsel or a law clerk does not meet the definition of a "reasonable explanation".

[34] It may be that the defendants intended to get expert reports and did not do so, or they had chosen another litigation strategy. Either way, in my view, this is not a "reasonable explanation"

for the excessive delay, and I conclude that the defendants have failed to provide a reasonable explanation for their failure to comply with r. 53.03.

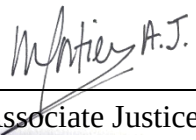
[35] Since the test set out in r. 53.08(1) is conjunctive, both subrules (a) and (b) must be met. Therefore, the failure to provide a reasonable explanation is determinative of the motion, and it is not necessary to consider whether granting the extension would not result in non-compensable prejudice or undue delay. In the circumstances, the defendants' request for an extension of time to serve expert reports is denied. Accordingly, I decline to order the plaintiff to attend the medical appointments arranged by the defence.

[36] In my view, when considered in the context of the procedural background I have outlined, if the defendants are now disadvantaged in any way, it was self-inflicted.

Conclusion

[37] The defendants' motion for an order to compel the plaintiff to attend defence medical examinations and for an order to extend the time to serve expert reports is dismissed.

[38] The plaintiff is entitled to her costs which I fix in the sum of $8,500 inclusive of disbursements and HST, payable by the defendants to the plaintiff within 30 days.



Associate Justice M. Fortier

Date: September 11, 2024