CITATION: McLeish v. Daines, 2017 ONSC 902
COURT FILE NO.: 14-61793
DATE: 2017/02/07

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Krystal McLeish	)	Alan J. Clausi and Ian Mair, for the Plaintiff
Plaintiff	)	
– and –	)	
Erin Daines and Paul Penney	)	Kevin P. Nearing and Michelle Doody, for the Defendant
Defendants	)	
	)	**HEARD:** January 23, 2017

REASONS ON MOTION FOR LEAVE TO CALL A SECOND PHYSIATRIST

R. SMITH J.

[1] The defendants seek leave to call more than three experts under s. 12 of the *Ontario Evidence Act*, R.S.O. 1990, c. E.23. The defendants have already called Dr. Shanks who is a physiatrist, who examined the plaintiff and will also be calling a psychiatrist and filing a report from an orthopedic surgeon. The defendants seek leave to file a report from a second physiatrist, who conducted an assessment and prepared a report for the plaintiff's own insurance company.

[2] The defendant acknowledges that the report sought to be introduced from the physiatrist, Dr. Waseem, repeats the same evidence that has already been given by Dr. Shanks, with the addition of recording that the plaintiff returned to normal duties shortly after the accident. In addition, Dr. Waseem did not address any psychological or psychiatric issues that were related to the pain symptoms being reported by the plaintiff.

[3] The plaintiff submits that the defendants should not be permitted to call more than three expert witnesses where the result will be to allow two identically qualified experts to give the same evidence.

[4] The fact that Dr. Waseem's report does not deal with the psychological makeup of the plaintiff as a factor which contributes to her experiencing chronic pain, is not an additional subject which needs to be addressed by a further expert report. Dr. Waseem as a physiatrist is not qualified to give evidence on the psychological and psychiatric aspects of the plaintiff in any event. The defendant is calling a psychiatrist who is qualified to give evidence on this subject and so the fact that Dr. Waseem did not address the psychological aspects of the plaintiff's chronic pain is not a subject that the defendant needs him to address, and he is not qualified to do so in any event.

[5] The second additional evidence in Dr. Waseem's report is that in his history, he states that the plaintiff told him she had returned to regular duties at the Algonquin Cafeteria after a few days after the accident.

[6] The evidence is uncontradicted that he plaintiff gave up her job with UPS, which required heavy lifting, immediately after the accident. The plaintiff also agreed that she returned to her work at Algonquin College shortly after the accident, but she was accommodated by not being required to lift the heavy trays of food from the kitchen. The failure of Dr. Waseem to record the slight accommodation to the plaintiff is a minor aspect to his evidence. The defendants agree that it is not worth it to call him to testify on this aspect of his report. I agree

Barn Door Opened

[7] The Plaintiff's reason for seeking leave is the barn door analogy. The defendant stated in his opening statement to the jury that they would be hearing evidence from Dr. Waseem and therefore the defendants would be prejudiced if they were not allowed to file a report form. him and have him cross-examined by the plaintiff.

[8] In the *Wise v. Abbott Laboratories Ltd*, 2016 ONSC 7275, Perrell J. stated in para. 88 of his decision that although there was a great deal of redundant expert evidence called by Abbott, he granted leave to allow them to call more than three expert witnesses because "the Wises"

would not be disadvantaged by granting leave, and … after a six day hearing, it is too late and not fair to shut the evidentiary barn door and stable some of Abbott's experts.

[9] The *Abbott* decision involved a summary judgment motion in a complex class action involving an alleged failure to warn of the potential side effects of a medication, manufactured by Abbott, which included that it could cause a heart attack. I find the *Abbott* situation was quite different as it involved a judge alone hearing on a summary motion rather that a trial before a jury.

[10] Any potential prejudice to the defendants can be remedied by an instruction to the jury that Dr. Waseem will not be testifying because his evidence was covered by Dr. Shanks's expert testimony, if the defendants wish this instruction to be given.

[11] In this case, Dr. Waseem would be categorized as a non-party expert according to the *Westerhof v. Gee Estate*, 2015 ONCA 206 decision of the Court of Appeal. A non-party or participating expert witness such as Dr. Waseem may give evidence without complying with Rule 53. However, this is not the issue before me, which is whether leave should be granted to call more than three expert witnesses pursuant to s. 12 of the *Evidence Act*, where the additional witness is also a physiatrist and will give the same evidence that the first physiatrist, Dr. Shanks, has already given.

[12] In the decision of *Davies v. The Corporation of the Municipality of Clarington*, 2016 ONSC 1079, Edwards J. ruled that where expert opinion evidence was sought to be adduced from a participating or, in this case a non-participating expert, and the defendant wishes to call another expert with the same speciality, then the defendants will be limited to one expert per specialty. I agree with this approach.

[13] I also agree with the *Gorman v. Powell*, [2006] O.J. No. 4233 decision that the policy of s. 12 of the *Evidence Act* was intended to prevent calling multiple experts with the same specialty, as it incurs unnecessary expense, uses up scarce resources, and ultimately is not necessary to assist the triers of fact, a requirement of the *Mohan* test, where an expert with the same specialty has already testified on the same subject matter.

Disposition

[14] Leave to call a second physiatrist, Dr. Waseem, to give the same evidence as the first physiatrist is denied.

Justice Robert Smith

Released: February 7, 2017

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SUPERIOR COURT OF JUSTICE

BETWEEN:

Krystal McLeish

Plaintiff

– and –

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Released: February 7, 2017