IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Wilson v. McCoy,***
2006 BCSC 1011

Date: 20060614
Docket: M040931
Registry: Vancouver

Between:

Pamela Wilson

Plaintiff

And:

Shirley Lagalle McCoy

Defendant

Before: The Honourable Mr. Justice Ehrcke

Oral Reasons for Judgment

In Chambers
June 26, 2006

Counsel for Plaintiff	L. E. Kancs
Counsel for Defendant	T. H. Pettit
Place of Trial/Hearing:	Vancouver, B.C.

[1] I have before me two applications by the defendant. The present action arises out of a May 21, 2003 motor vehicle accident in which the plaintiff claims damages for, amongst other things, pain and suffering and income loss.

[2] The plaintiff was involved in a previous action in which she claimed damages against the Comox-Strathcona Regional District and the Denman Island Residents Association arising out of a slip and fall accident on a dock on Denman Island on February 16, 2000.

[3] In that Comox action, both parties produced various documents as part of the discovery process. As well, the plaintiff attended examinations for discovery in that matter on July 13, 2003, and on April 27, 2004. It is common ground that the plaintiff made reference to the May 21, 2003 motor vehicle accident in one or both of those examinations for discovery.

[4] The plaintiff in the present action has produced a list of documents, and at the defendant's request, a further particularized amended first supplementary list of documents. Nevertheless, the defendant takes the position that even the amended list is not adequate, and in her amended notice of motion dated May 1, 2006, she seeks further production.

[5] As well, in her notice of motion dated May 29, 2006, she seeks an order under Rule 30 for the plaintiff to be

examined by Dr. J. F. Schweigel.

[6] With respect to the first notice of motion, the defendant seeks disclosure of the items listed under part 3 of the amended first supplementary list of documents at paragraphs 4, 5, 7(e) and 7(f). Those are the two examinations for discovery of the plaintiff in the Comox action, documents relating to wage loss in the Comox action and medical reports from the Comox action.

[7] The plaintiff resists production of those items on the basis that they are covered by an implied undertaking to use them only for the purposes of the action in which they were produced, that is the Comox action. Counsel for the plaintiff submits that this implied undertaking is an undertaking to the court, and therefore he cannot comply with the present defendant's request for production of those materials without a court order.

[8] This raises the issue of the scope of the implied undertaking. Counsel for the defendant submits that the implied undertaking only applies to those documents which a party obtained from an opposing party through the compulsion of the discovery process. He submits that the implied undertaking does not prevent or shield a party from producing in new litigation items that came from that party herself in the previous litigation.

[9] Counsel for the defendant submits that the law in this province has been authoritatively stated by our Court of Appeal in the recent case of ***Doucette (litigation guardian of) v. Wee Watch Day Care Systems Inc.***, 2006, BCCA 262.

[10] There, Kirkpatrick J.A. speaking for the court, said at paragraph 56:

> I conclude that the implied undertaking of confidentiality rule is as stated in ***Hunt***: a party obtaining production of documents or transcriptions of oral examination of discovery is under a general obligation, in most cases, to keep such document confidential. A party seeking to use the discovery evidence other than in the proceedings in which it is produced must obtain the permission of the disclosing party or leave of the court.

[11] The reference there to ***Hunt*** was to the case of ***Hunt v. T & N plc*** (1995), 4 B.C.L.R. (3d) 110, where a British Columbia Court of Appeal sat in a five-justice division and held, at para. 64:

> Accordingly, we would uphold the obligation which the law has generally imposed upon a party obtaining discovery of documents, and we would require such party, in appropriate cases, to obtain the owner's permission or the court's leave to use the documents other than in the proceedings in which they are produced.
>
> [Emphasis in original]

[12] In ***Doucette***, the British Columbia Court of Appeal also referred to the decision of the House of Lords in ***Home Office v. Harman***, [1982] 1 All E.R. 532. At paragraph 24 of ***Doucette***, the British Columbia Court of Appeal summarized the judgment in ***Harman*** in this way:

> The House of Lords in ***Harman*** held that a solicitor who obtained copies of documents of an adversary in the course of litigation discovery gives an implied undertaking not to use the copies, nor allow them to be used, for any purpose other than the proper conduct of the action. The Court further held that the undertaking subsisted whether the evidence was admitted in court or not.

[13] In each of those passages, the undertaking was expressed as being one that binds an adversary in litigation who obtains documents from the opposing party through the compulsion of the discovery process. I agree with counsel for the defendant in the present case that the passages referred to above correctly state the scope of the implied undertaking.

[14] Accordingly, I agree with counsel for the defendant that the plaintiff in the present case is not bound by an undertaking to withhold from the present defendant materials that she herself produced to the previous defendants

in the previous action. Rather, the implied undertaking that binds her from the previous action is that she will not produce materials which she obtained from the defendants in the previous action.

[15] Accordingly, there is no basis for the plaintiff to resist production to the present defendant of the materials he seeks as set out in paragraphs 4, 5, 7(e) and 7(f) of the plaintiff's amended first supplementary list of documents. The plaintiff is ordered to disclose those items to the defendant.

[16] The plaintiff is also ordered to prepare a new list of documents which complies with Rule 26 in light of my ruling about the scope of the implied undertaking from the Comox action. This may result in some items that were in part 3, being moved to part 1. Alternatively, if there are items not covered by the implied undertaking that the plaintiff still says should not be produced, the plaintiff shall particularize the basis of the refusal.

[17] All of the other items of relief sought in the May 1, 2006 amended notice of motion that I have not specifically dealt with above are adjourned generally.

[18] As to the May 29, 2006 notice of motion, I grant the application for an order that the plaintiff attend a medical examination with Dr. Joseph Frank Schweigel at a time and place to be agreed upon between the parties. If agreement cannot be reached, the defendant may apply to fix the date on short leave.

[19] It will be a condition of this order under Rule 30 that if the defendant orders a report from Dr. Schweigel, the defendant will deliver a copy to the plaintiff within a reasonable time and the plaintiff will likewise provide to the defendant any medical/legal reports that are then in the plaintiff's possession.

[20] If the defendant does not order a report from Dr. Schweigel, then the defendant will provide to the plaintiff the doctor's notes recording any history given to him by the plaintiff and any notes of the doctor's observations or findings on the physical examination in accordance with ***Stainer v. ICBC***, 2001 BCCA 133.

(SUBMISSIONS ON COSTS)

[21] THE COURT: Thank you. I do not agree that this motion was avoidable or unnecessary. Counsel for the plaintiff was being appropriately cautious with respect to a matter about which counsel should be cautious, namely undertakings. It was necessary for both parties to obtain clarification.

[22] Accordingly, the costs of this motion will be in the cause.

"W.F. Ehrcke, J."
The Honourable Mr. Justice W. F. Ehrcke