

1995 CarswellAlta 73, 27 Alta. L.R. (3d) 15, 34 C.P.C. (3d) 163



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Souther (Next Friend of) v. Pitre

RICK SOUTHER, JR. by his next friend GEORGINA SOUTHER v. JOSEPH PHILIP PITRE

Alberta Court of Queen's Bench

Hembroff J.

Judgment: January 23, 1995

Docket: Doc. Lethbridge/MacLeod 9006-00979

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Counsel: *R.A. Low*, for plaintiff (appellant).

D.H. McCallum, for defendant (respondent).

Subject: Civil Practice and Procedure; Evidence

Evidence --- Opinion evidence — Expert evidence — Expert reports

Judges and Courts --- Jurisdiction — Jurisdiction of superior Courts — Jurisdiction of Master

Civil procedure — Discovery — Medical or physical examination of persons — Multidisciplinary assessments — Plaintiff bringing personal injury action claiming large future income loss — Defendant requesting plaintiff attend examination by "functional capacity assessment expert" — Examination sought not being purely medical one — Plaintiff not being ordered to attend — However, in view of magnitude of plaintiff's claim, defendant needing fair opportunity to meet plaintiff's case — Plaintiff's action being stayed pending examination by defendant's expert.

The plaintiff's personal injury action against the defendant involved, among other things, a claim for future income loss of between \$743,000 and \$917,000. The plaintiff appealed an order requiring him to be examined by a "functional capacity assessment expert" on behalf of the defendant.

Held:

Appeal dismissed; original order varied.

The examination sought was not a purely medical examination, but was an examination concerning the plaintiff's ability to engage in various kinds of occupations. The plaintiff could not, therefore, be ordered to at-

tend for examination. Notwithstanding this, given the magnitude of the plaintiff's claim, the defendant should be given a fair opportunity to meet the plaintiff's case. He should, therefore, have the right of further examination. Accordingly, the order should be varied to the extent that the plaintiff would not be required to submit to the examination, but that his action would be stayed pending examination by the defendant's expert.

Cases considered:

Bilinski v. Wangerin (1993), 15 Alta. L.R. (3d) 100, [1994] 3 W.W.R. 379, 147 A.R. 211, 27 C.P.C. (3d) 346 (Q.B.) — referred to

Blackburn v. Kochs Trucking Inc., 58 Alta. L.R. (2d) 358, [1988] 4 W.W.R. 272, 25 C.P.C. (2d) 113, 86 A.R. 321 (Q.B.) — considered

Parenteau v. Courtesy Corner Tourist Service Ltd. (1993), 13 Alta. L.R. (3d) 269, [1994] 1 W.W.R. 165, 20 C.P.C. (3d) 121, 146 A.R. 241 (Q.B.) — referred to

Rules considered:

Alberta Rules of Court

R. 217 referred to

R. 218 referred to

Appeal from order requiring plaintiff to be examined by "functional capacity assessment expert" on behalf of defendant.

Hembroff J.:

1 This was an appeal from an Order granted by Master Waller on November 9th, 1994. The defendant applied for and obtained a further expert examination of the plaintiff by a "functional capacity assessment expert." The plaintiff was directed to attend upon such examination. It is from that Order the plaintiff appeals. The appeal was heard on November 29th, 1994 and counsel were invited to provide written submissions and they have done so.

2 Simply stated, the position of the appellant herein is the Master had no grounds upon which to grant the Order requiring the plaintiff to attend for a further examination. The Master apparently relied upon the *Rules of Court* and the appellant herein argues there is no basis in the Rules to make such an Order as was made.

3 The appellant also says any issues already raised by the plaintiff's expert can be dealt with on cross examination by the defendant. The appellant argues the respondent is simply wanting to go on a "fishing trip" and the plaintiff has already been substantially delayed and wants to get on with the action.

4 The respondent in his argument indicates as a result of the formal report of the plaintiff's vocational expert, it is clear the plaintiff will adduce evidence at trial respecting the plaintiff's physical abilities or lack thereof. The appellant herein also says the plaintiff's economic expert also relies, in part, on the plaintiff's residual employability potential in coming to the conclusion he does concerning the plaintiff's future income loss.

5 The defendant in his argument does acknowledge R. 217 and/or R. 218 are not the appropriate Rules by

which to grant the order given, but nevertheless as a result of the inherent jurisdiction of the Court to ensure fairness, an appropriate order can be given. The appellant relies upon *Blackburn v. Kochs Trucking Inc.* [58 Alta. L.R. (2d) 358, [1988] 4 W.W.R. 272] where McDonald J. stated at pp. 368-69:

If the defendants' material were such as to satisfy the court that the proposed examination on behalf of the defendants by an expert ... would be essential to ensure that at trial there was a fair opportunity to meet the case put forward by the plaintiff, and if the plaintiff had refused to consent to the examination, the court, *in the exercise of its inherent power to ensure fairness*, could order that the action be stayed until the plaintiff submitted to the proposed examination. (emphasis added)

6 The defendant also suggests the principle in *Blackburn* has been accepted by Veit J. in *Bilinski v. Wangerin* [(1993), 15 Alta. L.R. (3d) 100, [1994] 3 W.W.R. 379] and by Mason J. in *Parenteau v. Courtesy Corner Tourist Service Ltd.* [(1993), 13 Alta. L.R. (3d) 269, [1994] 1 W.W.R. 165].

7 Having reviewed both of the briefs, the cases quoted and the Rules, I am of the view this is not the sort of case in which the defendant can rely upon the Rules indicated. This is not a purely medical examination that is being requested but rather is an examination concerning the plaintiff's ability to engage in varying kinds of occupations. From the appearance of the pleadings and from the facts as given by the parties, this is a very important matter to be determined. When the plaintiff's economic expert is suggesting a future income loss between \$743,000 and \$917,000, one is driven to understand the need to give the defendant a fair opportunity to meet the plaintiff's case.

8 As I have indicated, I do not believe I can order the plaintiff to attend for a further examination. However, in keeping with the right of the Court to ensure fairness, I am prepared and do acknowledge the defendant's right to conduct a further examination.

9 In the result, the appeal of the plaintiff appellant herein will be dismissed although the Order of Master Waller will be varied to the extent no Order will be made requiring the plaintiff to submit to a further examination. However, the plaintiff's action will be stayed until such time as the plaintiff agrees to be examined by the defendant's expert. It is further ordered when and if such agreement is delivered to the defendant in writing, then the defendant shall have 45 days from that date to arrange for and conclude the necessary examination. Further, upon the plaintiff presenting himself for such examination, the plaintiff may immediately enter the matter for trial and apply for the earliest available trial date.

10 The defendant will be required to provide the plaintiff's counsel with a copy of the report provided by the Columbia Rehabilitation Centre within 10 days of the receipt of the same by the defendant. It is further ordered the stay of the plaintiff's action will be removed on the 45th day after written agreement is delivered to the plaintiff's counsel if the required examination has not been concluded.

11 Costs of this appeal will be in the cause.

Appeal dismissed; original order varied.

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