

File No: 04-05085
Registry: Vancouver

In the Provincial Court of British Columbia

Civil Division

BETWEEN:

FELICIA ALLEN

CLAIMANT

AND:

DENNIS P.A. NIMCHUK INC.

DEFENDANT

**REASONS FOR JUDGMENT
OF
THE HONOURABLE JUDGE GALLAGHER**

COPY

Appearing on her own behalf:

Felicia Allen

Counsel for the Defendant:

J. Brun

Place of Hearing:

Vancouver, B.C.

Date of Judgment:

June 22, 2012

[1] THE COURT: I am able to give oral reasons on this application. The claimant is applying to have her claim transferred to Supreme Court per Rule 7.1 of the *Small Claims Rules*. The defendant is opposing the claimant's application. This is a claim for damages arising out of dental treatment provided by the defendant to the claimant 10 years ago.

Court History

[2] On November 9th, 2004, the notice of claim was filed. On November 7th, 2005, the claimant filed a certificate of readiness. First settlement conference was scheduled to be heard March 29th, 2006. In February 2006, there was a consent to adjourn the settlement conference filed.

[3] The matter adjourned for approximately four years. Initially and in part, the adjournment was in order to allow the claimant to deal with her claim against the College of Dental Surgeons.

[4] On November 7th, 2005, an amended notice of claim was filed. On May 22nd, 2009, a further amended notice of claim was filed.

[5] On January 28th, 2010, the defendant filed a requisition requesting the registry schedule a settlement conference. On February 15th, 2010, a notice of settlement conference was sent to the parties scheduling a settlement conference for May

27th, 2010. On March 8th, 2010, the claimant filed an application to the judge requesting the settlement conference for May 27th, 2010, be adjourned until after the outcome of the appeal of the decision involving the College of Dental Surgeons.

[6] On April 13, 2010, Judge Senniw ordered the settlement conference set for May 27th, 2010, be adjourned and that a mediation with a senior mediator be scheduled. The mediation occurred September 17th, 2010. No resolution was achieved.

[7] On November 16th, 2010, after hearing the defendant's application to dismiss the claimant's claim, Judge Ehrcke ordered that the claimant file and serve an expert report to support her claim by March 15th, 2011, or her claim would be summarily dismissed. On March 14th, 2011, the claimant filed the expert report.

[8] On June 14th, 2011, Judge MacLean granted the defendant leave to serve a formal offer to settle on the claimant. On June 20th, 2011, at the trial conference, the amended notice of claim filed May 22nd, 2009, came to the attention of the defendant and Judge Yee ordered the claimant had leave to bring an application to transfer the file to Supreme Court and the defendant had leave to bring a counter-application.

[9] Those are the matters that came before me yesterday

afternoon.

Claimant Position

[10] The claimant says she filed her claim November 9th, 2004, due to limitation issues. Although she filed a certificate of readiness as required on November 7th, 2005, she did not attach a medical-legal report; firstly, because the treatment was not yet complete and, secondly, although the defendant's clinical records were provided in 2009, they were not legible and resulted in solicitors for the College of Dental Surgeons' involvement in obtaining the legible copies of clinical records.

[11] The claimant then obtained an expert report and, pursuant to Judge Ehrcke's order, November 16th, 2010, filed it March 14th, 2011. As a consequence, the claimant maintains the medical report provided along with the statement of expenses totalling \$37,049.73, listing Dr. Nimchuk, Dr. Leung, Dr. McDonald, Dr. Fung, surgery costs, clearly supports a conclusion that the damages arising out of the dental treatment will likely exceed the monetary jurisdiction of the court.

[12] The claimant also says that, in addition to the monetary claim of \$37,000, she now has a claim for wage loss of approximately \$5,000 a year, further treatment costs, general

anaesthetic costs, costs associated with a phobia disability, and costs of litigation, all of which arose since the filing of the claim.

Medical Report

[13] The claimant states Dr. Levant was provided with more complete documentation than Dr. Wyatt was provided in order for him to form his expert opinion. Dr. Levant was not asked for his opinion on the surgery conducted by the defendant. He was asked for his opinion on whether there had been professional misconduct on the defendant's part.

[14] To give that opinion, Dr. Levant examined the clinical records, the claimant affidavit, letters from doctors involved. The claimant says the defendant was not qualified to carry out the surgery and that is part of the complex claim that she would like to transfer to Supreme Court. The claimant says the fact that Dr. Levant is out of province is of no significance.

Defendant Position

[15] The defendant submits the treatment conducted by Dr. Nimchuk did not adversely affect any subsequent treatment the claimant required or might require in the future, and these costs are not appropriately attributed to the defendant in

this matter other than perhaps the approximately \$4,300 incurred during the treatment of the claimant by the defendant.

[16] In addition, the defendant has a contributory negligence argument which is supported by Dr. Nimchuk's charted records and provided to Dr. Wyatt for consideration in forming his expert opinion. The claimant had a longstanding periodontal condition and had undergone prior periodontal therapy. The claimant was aware of her condition and the risks associated with the placement of immediate implants under these circumstances.

[17] The defendant suggested the claimant consider further periodontal treatment prior to implant surgery, but she declined to do so. Further, the claimant was an habitual smoker just prior to the implant surgery and her oral hygiene post-implant surgery is noted in the chart to require improvement.

[18] In addition, it was the claimant's choice to abandon treatment with the defendant despite the defendant's wish to take her to a healthy and satisfactory conclusion to her treatment per Dr. Nimchuk's chart.

[19] The defendant says that on the claimant's best day in court, she will not receive a monetary outcome exceeding that

of \$25,000.

Medical Report

[20] The defendant submits Dr. Levant's expert report is not a proper expert report as contemplated by Rule 7.4(12) for the following reasons:

1. The report is lacking any clear statement of the specific facts or assumptions upon which his opinion can be said to be based.
2. It relies upon the claimant's affidavit for much of the background relevant to this matter.
3. The affidavit contains inadmissible evidence, namely, hearsay evidence, self-serving statements, argument, and scandalous remarks.
4. The claimant's dental care is directly at issue; she cannot be regarded as having the necessary objectivity required to provide reliable evidence, whether that evidence is found to be opinion evidence or not.
5. The report relies on the transcriptions of clinical notes rather than the certified copies of the clinical notes. In addition, Dr. Levant was not

provided with the complete clinical records of the treating practitioners. Further, Dr. Levant was provided with select consultation reports from select treating practitioners.

6. Dr. Levant states in his report:

I was not provided any charts, models, radiographs, or photographs. I did not directly examine you or speak to you directly. I do not know nor did I speak to any of the treating practitioners involved in this matter. My opinions are based strictly on the material with which I was provided without any counter explanations or opinions of the parties involved.

7. Dr. Levant's report draws inferences that are then used to support opinions expressed which is inappropriate. The report of Dr. Levant assesses the justifiability of the claim which is also inappropriate and a task worthy only of the trier of fact.

[21] Finally, the report of Dr. Levant does not discuss, let alone support, a finding of causation as required through Rule 7.4(12).

[22] The defendant submits the report of Dr. Wyatt should be preferred over that of Dr. Levant as Dr. Wyatt is familiar with the standard of prosthodontists in British Columbia which

may differ from the standard in Ontario and, more importantly, as Dr. Wyatt considered the objective information in coming to his opinion, not all of which Dr. Levant was afforded the opportunity to consider.

Discussion

[23] Rule 7.1(1) requires the court to transfer this claim to the Supreme Court where the judge is satisfied on the balance of probabilities that the monetary outcome of the claim may exceed \$25,000. Once the requirements of Rule 7.1(1) have been met, there is no discretion to refuse an application by either party to transfer the file.

[24] The inquiry under Rule 7.1(1) does not include an assessment of the credibility of witnesses or a determination of the legal issues in dispute. The court must examine the pleadings and, in a claim for personal injuries, the medical and other reports filed at the time of the settlement conference to assess whether it is more probable than not the claim may exceed the monetary jurisdiction of the court.

[25] It is not incumbent upon the applicant to establish on the balance of probabilities that the claim will exceed \$25,000. It is sufficient for the applicant to prove there is at least a *prima facie* case that the monetary outcome will exceed the jurisdiction of the court; *Rosenthal v. Burchell*,

[1999] B.C.J. No. 633.

The Decision

[26] Turning to the facts of this case, I agree with defence submissions. I adopt her seven-point argument as outlined above in its entirety.

[27] Further, I prefer the report of Dr. Wyatt over that of Dr. Levant. Dr. Wyatt is familiar with the standard of a prosthodontist in B.C. which may differ from the standard in Ontario and, as well, I find Dr. Wyatt considered all the objective information in coming to his opinion as itemized on page 17 of the defendant's submissions filed this day, not all of which Dr. Levant was afforded the opportunity to consider.

[28] This matter pertains to dental treatment conducted in the years 2002, 2003, over approximately a five-month period. The action was filed on November 9th, 2004. It is now June 2012. The purpose of the *Small Claims Act* per s. 2(1) and (2) dictates that the court may make any order it thinks necessary to achieve the purpose of this Act and the Rules which is to have matters conclude in a just, speedy, inexpensive, and simple manner. The inordinate delay in this matter needs to be addressed and not to be continued.

[29] Based on all the above, I am not satisfied on a balance of probabilities that the monetary outcome of the claim may

exceed \$25,000. Accordingly, the claimant's application to transfer the file to Supreme Court per 7.1(1) is dismissed.

[30] Each party will bear their own costs.

[31] MS. BRUN: Could have an order setting a trial conference date, perhaps?

[32] THE COURT: Certainly, however you would like to proceed at this point, either with your application or pretrial conference. What I am going to do is direct that matter be set as expeditiously as convenient.

[33] MS. BRUN: Okay.

[34] THE COURT: So would you like to consider time of what you were wanting to do or how can I be of assistance here?

[35] MS. BRUN: I think it does make sense to seek instructions. I will consider it and --

[36] THE COURT: So what I will do is say that this matter is adjourned to the judicial case manager, that within 30 days, parties are to advise the judicial case manager of what the next step sought is and the judicial case manager will then carry out the steps.

[37] MS. BRUN: Thank you, Your Honour.

[38] THE COURT: Is that satisfactory?

[39] MS. BRUN: Yes.

[40] THE CLERK: And, Your Honour, the application to amend pleadings and adjourn the hearing, that the claimant application --

[41] THE COURT: What we had -- the defendant's application was adjourned generally by counsel.

[42] THE CLERK: That is correct.

[43] THE COURT: -- yesterday.

[44] THE CLERK: Yes, Your Honour.

[45] THE COURT: This is the applicant's application to transfer the file --

[46] THE CLERK: Yes, there was also -- I just -- if I need to -- DARS, and then this there was a sworn application to -- leave to amend pleadings and also to adjourn the hearing so I was just wondering what --

[47] MS. BRUN: So those are mentioned in the application of the claimant in November 14, 2011, but they were substantially withdrawn and it was just the application to transfer that was heard.

[48] THE COURT: That is all I have heard. We began with your application yesterday. We then stopped that application because you adjourned generally. We continued with the application to transfer the file.

[49] MS. BRUN: That is correct.

[50] THE COURT: That is all I have heard.

[51] MS. ALLEN: I am going to be filing an application to abandon so you can actually make your direction accordingly. Unfortunately, it is not going to be possible for me to continue with this. So we can do that now, instructions accordingly, that that, you know, that is unfortunate, but I cannot do it economically and there is just nothing else I can do. So I would like to -- rather than waste more time, you know, and longer amounts of everything else in this court on this matter, I think we should just, you know, put that down now and then it is done.

[52] THE COURT: So similar to having given counsel -- this has been a tiring procedure for everyone. So what I am going to do is I have made the orders I have made. Counsel has 30 days to seek instructions and continue. I leave it to the two of you to take the next step. All right. Is there anything else required?

[53] MS. ALLEN: No.

[54] THE COURT: If you are -- I mean it is on record that you would like to -- I just think everybody is really tired and so I would like to let everybody --

[55] MS. BRUN: I am happy to draft a notice of withdrawal to

make it easy on you and send it to you for your signature if you would like to do it that way, but --

[56] THE COURT: That also will give you time to consider --

[57] MS. ALLEN: Yes.

[58] THE COURT: -- what is going on.

[59] MS. ALLEN: Yes.

[60] THE COURT: All right.

[61] MS. ALLEN: Do we have a -- do we receive a copy of what was just read?

[62] THE CLERK: Yes, Your Honour, I just need a moment to --

[63] THE COURT: That is just fine.

[64] MS. ALLEN: Okay, I was not sure.

[65] THE CLERK: -- listen to it and write it out.

[66] THE COURT: I think given the fact that I have provided oral reasons for judgment because I wanted this to proceed in a timely fashion, I think it may be appropriate for the court to order a transcript of reasons so that both parties will have those reasons available. So I will order a transcript only of the reasons, not of the hearing, all right, and then I will stand down. Madam Registrar will write up the record here. All right.

[67] THE CLERK: Order in court. All rise.

(PROCEEDINGS ADJOURNED)
(PROCEEDINGS RECONVENED)

[68] THE COURT: We are on record. I just want to be of assistance again. What I am going to say at this conclusion is that the parties have 30 days to consider instructions and next steps. Either an application -- or either a notice of withdrawal will be filed within 30 days or counsel for the defendant is at liberty to apply for an application to dismiss or a pretrial conference. All right. So I am just putting a timing element on this for everyone.

[REASONS FOR JUDGMENT CONCLUDED]