File No: 44881
Registry: Vernon

In the Provincial Court of British Columbia

(CIVIL DIVISION)

BETWEEN:

ANNE RAE

CLAIMANT

AND:

DR. S. FOSTER INC.

DEFENDANT

REASONS FOR JUDGMENT
OF
THE HONOURABLE JUDGE DE WALLE

COPY

Counsel for Anne Rae:	D. Lewthwaite
Counsel for Dr. S. Foster Inc.:	J. Brun
Place of Hearing:	Vernon, B.C.
Date of Judgment:	September 22, 2011

[1] THE COURT: I am prepared to give my ruling in this matter. The claimant in this case Ms. Anne Rae, had dental work done to her by the defendant Dr. Foster on February 13th, 2009. The claimant says that the defendant dentist was negligent in the root canal procedure that was performed on her on that occasion, and as a result she filed a claim in these proceedings in the Provincial Court of British Columbia on September the 10th 2009.

[2] On this day, the application is made by the defendant to dismiss the claim pursuant to Rule 16(6)(o), on the basis that the claim is without reasonable grounds, discloses no triable issues, is frivolous and an abuse of the court's process.

[3] Essentially the application is based on the fact that the claimant has not produced any expert evidence in the form of a report to support her claim, as required by the small claims rules. The law in this case is well set out in the cases referred to me by counsel. I have had the opportunity to review the affidavits that were filed by both the claimant and the defendant and the authorities that were referred to, in particular the decisions of Judge Myers in the case of John *Ince v. Dr.*

Okamura on January 27th, 2004 in Vancouver; the decision of Judge Skilnick in *Sigurdur v. Louie*, July 25, 2007 in Abbotsford, and again Judge Skilnick who is a prolific writer, in the case of *Michell v. Emond,* September the 11th 2007, also in Chilliwack.

[4] Now those cases in my view set out the appropriate and applicable law and the principles that I am to apply in applications of this nature, and in my view it is not necessary for me to review in any detail the findings in those decisions and the analysis that was used to arrive at those findings, but clearly the principles and the law is well and correctly in my view, set out in all three of those cases.

[5] The affidavit material before me discloses that despite numerous requests to the claimant personally, she was initially acting on her own behalf, and subsequently to her legal counsel Mr. Lewthwaite, those requests ranging between the dates of October 19, 2009, and May the 9th 2011, that no report has to-date been received.

[6] The material before me also discloses that the claimant saw two dentists subsequent to the procedure that was done by the defendant, but despite requests of those two dentists, neither one of them has produced a

report that has been filed in this action.

[7] Mr. Lewthwaite, counsel for the claimant, essentially says that he agrees with much of what the defendant has set out in the material, and acknowledges that he has also failed to obtain any reports that would be of some assistance in the form of expert reports, to show that there was a failure to abide by a standard of care for dentists in carrying out this particular procedure. However, Mr. Lewthwaite points out that the claimant has filed a complaint with the College of Dental Surgeons of British Columbia. That complaint was filed in June of 2009, and Mr. Lewthwaite urges this court to await the finding of the College before dismissing this action. He advises the court today that the claimant is still awaiting the report from the college. There is some indication that a report may or may not be available in October of this year.

[8] I am not able to speculate as to the possible conclusions of any report from the College of Dental Surgeons. There is really nothing before me to suggest that the report may or may not be relevant to these proceedings, in the sense that it would provide an expert report to indicate whether the procedure performed by Dr.

Foster was negligent on a legal basis, and whether a standard of care, or professional standard of care was breached in the circumstances of this particular court case.

[9] The comments of Judge Skilnick in the third case that I referred to, *Sigurdur v. Louie* in my view are very applicable to the case at bar, and as he points out:

> Fairness must be shown to both parties. Section 2 of the *Small Claims Act* directs this court to resolve claims in a "just, speedy, inexpensive and simple manner."

[10] Based on the facts in that case, and I would point out that in that case, correspondence from counsel in the affidavit material filed, showed that between March 12, 2007, and a subsequent letter dated April 13, 2007, requesting an expert report met with no success, so Judge Skilnick was dealing with a fairly brief period of time. On the other hand in this case, we are dealing with a delay of over two years, and Judge Skilnick goes on to say:

> To delay the proceedings to allow the Claimant to address something [that] she has previously been advised to address would neither be just to the Defendants nor speedy. The Claimant has not demonstrated the ready availability of any suitable witness able to express an opinion which would support her claim. An adjournment would cause

> further delay without any likelihood being shown that the Claimant would be able to produce the requisite evidence. Meanwhile, the Defendants' reputation would remain under aspersion. The Defendants are entitled to a "speedy" determination of the claim brought against them. An adjournment is not a fitting remedy in this case.

[11] Based on all of the material before me, I am satisfied that exactly the same finding is appropriate in this case, so I am going to dismiss the claim and accede to the application brought by the defendants.

[12] In terms of costs, I believe there is a filing fee for $50; I do not know for the reply? I am not sure if that was... Yes --

[13] MS. BRUN: I believe that's correct, Your Honour.

[14] THE COURT: -- or the -- so I am not sure if you are claiming that in this case or not.

[15] MS. BRUN: Our intention was to seek costs, Your Honour, but I think under the circumstances that we're content with the decision and we'll waive.

[16] THE COURT: All right; so the dismissal is without costs.

[17] THE CLERK: Oh, I need to put that in, Your Honour, but --

[18] THE COURT: I can write that in.

[19] THE CLERK: Thank you, Your Honour.

[20] THE COURT: That is with respect to both defendants. Okay, thank you.

[21] THE CLERK: Okay.

[22] I was going to say in my decision at the end, although I neglected to do so, certainly Mr. Lewthwaite, it sounds like you made herculean efforts to get a report and were not successful, so it is certainly not as a result of any steps that you failed to take.

(REASONS FOR JUDGMENT CONCLUDED)