CITATION: Ashrafian v. Kavarana, 2023 ONSC 6944
COURT FILE NO.: CV-18-136386-0000
DATE: 20231208

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN: ALI ASHRAFIAN Plaintiff	)	Mark Stoiko, for the Plaintiff
– and – CYRUS KAVARANA and NISSAN CANADA INC. Defendants	)	Loretta De Thomasis and Colleen Mackeigan, for the Defendants
	)	**HEARD:** November 27, 28, 29, 30 and December 1, 2023

M.L. EDWARDS, R.S.J.

Overview

[1] The representation of a plaintiff in a motor vehicle personal injury trial involves many moving parts. Expert evidence is a normal part of such a trial. The calling of expert evidence requires careful attention to many details. Included in those details is the need to comply with the timelines for the service of expert reports that are set forth in r. 53.03 of the *Rules of Civil Procedure* (the "*Rules*").

[2] Another important detail when marshalling expert evidence is the need to ensure that the expert being retained will be qualified as an expert. In addition it is fundamental that the expert is devoid of any claim that he or she may be biased or in any way related to the lawyer who seeks to tender that evidence at trial.

[3] These Reasons are supplemental to oral reasons given during the course of the trial of this matter in which I ruled that the plaintiff's loss of income expert could not be called as a witness because of the failure to comply with r. 53.03. These Reasons also explain why I declared a mistrial because of a shocking conflict of interest involving the plaintiff's law firm and the expert evidence that plaintiff counsel sought to adduce.

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The Facts – Loss of Income Report

[4] The plaintiff was involved in a rearend motor vehicle accident with the defendant Kavarana in June 2016. The trial record was passed in July 2021. Before a pretrial could be scheduled the court required that the parties agree upon a timetable for the delivery of the expert reports. The agreed upon deadline for the delivery of experts reports was June 10, 2022. Plaintiff counsel sent an email to defence counsel on October 20, 2021 in which plaintiff's counsel confirmed that as of that date he would not be serving any more expert reports.

[5] The first pretrial conference in this matter was held on September 15, 2022. At the time of the first pretrial plaintiff's counsel had not served a Loss of Income Report. The plaintiff had also not served what is commonly referred to as a Cost of Care Report.

[6] A second pretrial was held in June 2023. Again a Loss of Income Report had not been served by the plaintiff. The plaintiff had also not served a Cost of Care Report that typically would address any claim for past and future medical rehabilitation expenses as well as any claim for past and future housekeeping expenses.

[7] On August 14, 2023 Mr. Stoiko obtained a Loss of Income Report prepared by Gurlal Gill CPA, CGA. The report of Mr. Gill was not served on defence counsel until October 16, 2023 i.e. two months after Mr Stoiko received the report. No satisfactory explanation was given for this time lag. The trial in this matter started on November 27, 2023.

[8] At the commencement of trial Mr. Stoiko brought a motion under r. 53.08 seeking leave to adduce the evidence of Mr. Gill. The motion record filed in support of that motion included the affidavit of Mr. Stoiko. Despite the long-standing rule that counsel should not be a witness in a proceeding, I granted Mr. Stoiko leave to argue the motion as his affidavit essentially attached to it, various documents which were sworn to on information and belief.

Analysis – Late Service of Loss of Income Report

[9] The late service of expert reports has been the subject matter of much discussion. In *Agha v. Munroe*, 2022 ONSC 2508 a similar issue also occurred as in this matter . In *Agha* I reviewed at paras. 7 through 16 the comments of a number of judges who had expressed concerns about the chronic state of late service of expert reports. The concerns expressed by my colleagues and others ultimately resulted in an amendment to r. 53.08 which became effective on March 31, 2022. As I indicated at para. 18 of my reasons in *Agha* the amendment to r. 53.08 was intended to change how trial judges will consider motions where a party in default of the timelines set forth in r. 53.03 seek the indulgence of the court for the late service of an expert report and the admissibility of that evidence at trial. The old Rule 53.08 provided that leave of the trial judge "shall be granted" while the new Rule uses permissive language indicating that leave "may be granted".

[10] In addition r. 53.08 has fundamentally changed the basis upon which the court is required to exercise it's discretion. Rule 53.08 states:

> 53.08 (1) If evidence is admissible only with leave of the trial judge under a provision listed in subrule (2), leave may be granted if the party responsible for the applicable failure satisfies the judge that,
>
> (a) there is a reasonable explanation for the failure; and
>
> (b) granting the leave would not,
>
> (i) cause prejudice to the opposing party that could not be compensated for by costs or an adjournment, or
>
> (ii) cause undue delay in the conduct of the trial.

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[11] It is clear from the new provisions set forth in r. 53.08 that the exercise of a trial judge's discretion imposes an onus on the party seeking the indulgence to establish that there is a reasonable explanation for the failure to serve an expert report and that the granting of leave will not cause prejudice to the opposing party that cannot be compensated for by costs or an adjournment or cause any undue delay in the conduct of the trial.

[12] It is important to note that r. 53.03 imposes deadlines for the service of experts reports. The deadline for the plaintiff is 90 days and for the defence it is 60 days. These deadlines are not new. They have been around for years. There is good reason for imposing these deadlines. It requires the parties to focus their attention on the evidence that will be adduced at trial. The parties will know the case that they will have to meet as part of their resolution discussions. Of particular importance is the need to have all expert reports before the pretrial judge.

[13] The pretrial judge needs to know that all of the evidence that he or she is asked to consider at the pretrial, has in fact been served on all parties. The purpose of a pretrial includes two very important components. The first is a to focus the parties on resolution. The second is to conduct trial management. It simply is impossible to conduct a meaningful pretrial if the parties have not served all of their expert reports.

[14] In this case, prior to any pretrial date being scheduled the parties were required by the court to agree on a timetable. Mr. Stoiko, as part of that process, advised defence counsel by email dated October 20, 2021 that he would not be obtaining any more expert reports. As events unfolded a first pretrial was conducted on September 15, 2022 and a second pretrial was conducted on June 22, 2023. No loss of income report had been served for either of those pretrials. This state of affairs is a reflection of Mr. Stoiko's representation to the defence on October 20, 2021 that he would not be serving any more expert reports.

[15] No reasonable explanation was provided to the court by Mr. Stoiko for the late service of the loss of income report prepared by Mr. Gill. No explanation was offered to reconcile the contents of Mr Stoiko's email of October 20,2021 with the commissioning of Mr Gills report after the second pretrial.

[16] In his argument Mr. Stoiko suggested that it was a matter of fairness that a claim by the plaintiff for past and future loss of income should be allowed to go to the jury and that it was the “backbone of the plaintiff’s case”. Rhetorically one must respond to such an assertion that if the plaintiff’s claim for past and future loss of income was the backbone of the plaintiff’s case, why then was no effort made to obtain a loss of income report that would quantify such losses until essentially the eve of trial.

[17] Mr. Stoiko in his argument seeking the indulgence for the late service of the report of Mr. Gill framed his argument as one about trial fairness. I entirely agree that a trial is in fact about fairness, but it must be a trial that is fair to all parties and it must be a trial that reflects compliance with the *Rules of Civil Procedure*.

[18] The facts of this case are particularly egregious in that the court conducted not one, but two pretrials. While it is possible the court may have exercised its discretion had a loss of income report been prepared and served between the first pretrial in September 2022 and the second pretrial in June 2023, there simply is no excuse nor any reasonable explanation why such a report was not prepared in accordance with the deadlines imposed by Rule 53.03.

[19] The onus on the plaintiff to establish a reasonable explanation has not been made out on the facts before this court. Furthermore, the plaintiff has not established that their would be no prejudice to the defence that cannot be compensated for by costs or an adjournment. This matter relates to an accident that occurred in 2016 and a Statement of Claim that was issued in 2018. The trial in this matter should not be delayed and as such, I exercised my discretion to exclude the report of Mr. Gill.

The Facts – The Conflict of Interest that Caused the Mistrial

[20] The statement of claim in this matter was prepared by the Masgras Professional Corporation. Georgina Masgras (Ms. Masgras) is shown as the lawyer for the plaintiff.

[21] To the point when a mistrial was declared, the evidence called by the plaintiff included the evidence of a chiropractor and a family doctor, both of whom testified as treating doctors. The plaintiff also testified. The plaintiff then sought to call the evidence of Dr. Friedlander. Dr. Friedlander is a specialist in anesthesiology with a special interest in chronic pain. Dr. Friedlander was not a treating doctor and as such he is a medical legal expert or what is commonly referred to as a non-participant expert.

[22] Dr. Friedlander conducted an assessment of the plaintiff on February 17, 2021. His report was written on the letterhead of Meditecs Health Management And IME (hereinafter “Meditecs”).

[23] Prior to the evidence of Dr. Friedlander being called, I conducted a *voir dire* in the absence of the jury. Dr. Friedlander confirmed that he received the request to conduct the independent medical evaluation through Meditecs although his report does indicate that it was “prepared for Masgras Personal Injury Lawyers”. Dr. Friedlander testified that it

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would have been his normal course in 2021 to render an account somewhere between $1,500 and $2,000 for his report.

[24] In addition to hearing the *voir dire* evidence of Dr. Friedlander the court also heard the evidence of Omar Irshidat. Mr. Irshidat testified that he has been married to Ms. Masgras since 2014. Mr. Irshidat is the sole officer and director and owner of Meditecs.

[25] On December 15, 2020 Mr. Stoiko sent a letter to Mr. Irshidat, the essence of which was a request that Mr. Irshidat retain a chronic pain specialist or an orthopaedic surgeon. The letter of December 15, 2020 was five pages in length and contains the type of information that would be typically found in a referral letter to an expert.

[26] On December 30, 2020 an email was sent by Rana Almustafa. Ms. Almustafa's position with Meditecs (and another related company, Spinetec – Health Care Solutions) is not disclosed in the email but it is clear that her email was sent on behalf of Meditecs and was directed to Dr. Friedlander seeking a "tort and AB chronic pain assessment". The email was essentially a word-for-word reproduction of the referral letter of December 15, 2020 from Mr. Stoiko to Mr. Irshidat. The email of December 30, 2020 from Ms. Almustafa also enclosed the acknowledgement of experts duty form. Dr. Friedlander responded to the request from Meditecs with confirmation that he would see Mr. Ashrafian on January 15 "in person" at an address in Richmond Hill.

[27] As events unfolded Dr. Friedlander did not see the plaintiff in person, but rather conducted a virtual assessment of the plaintiff on February 17, 2021.

[28] The apparent conflict of interest that existed between Masgras and Meditecs resulted in a request from the court for production of additional documentation. This request resulted in Mr. Stoiko sending an email to me on December 1, 2023 at 4:36 a.m. and enclosed the various documents that had been requested. These additional documents are reviewed below.

[29] On April 2, 2021 i.e. after the plaintiff had been assessed by Dr. Friedlander, Jeffrey Chupa who is described as the Legal Project Manager of Masgras Professional Corporation sent an email to Mr. Ashrafian (the Plaintiff in this trial) enclosing what he described in his email as an "update to your client records". The email went on to state: "If we do not receive a response within 15 days, **<u>your consent will be deemed accepted</u>** and no further action will be required." (emphasis added)

[30] The document that was attached to the email of April 2, 2021 was a document headed "Consent". Throughout the balance of these reasons I will refer to this document as "The Consent".

[31] The consent referred to Rule 3.4-2 of the Rules of Professional Conduct and stated:

> A lawyer shall not represent a client in a matter when there is a conflict of interest unless there is consent, which must be fully informed and voluntary after disclosure, from all affected clients and

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> the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

[32] The consent went on to state:

> 1. I am aware that Ms. Georgina Masgras-Irshidat (formerly Georgina Sirbu) is the wife of Mr. Omar Irshidat, owner and operator of Spinetec Health Care Solutions (multidisciplinary rehabilitation clinic located in Kitchener), and Meditecs Independent Medical Examinations (independent medical assessment company located in Kitchener) and In Care PSW (personal support worker company located in Kitchener).
>
> 2. **<u>I understand that the above-noted facts create an apparent conflict of interest for my lawyer, Ms. Georgina Masgras-Irshidat,</u>** as she is also the wife of Mr. Omar Irshidat, owner and operator of Spinetec Health Care Solutions and Meditecs Independent Medical Examinations… I do understand that Mr. Irshidat is the sole owner and operator of Spinetec Health Care Solutions and Meditecs Independent Medical Examinations and In Care PSW and Ms. Masgras is his wife. (emphasis added)

[33] The consent then goes on to state:

> If you agree to the above consent letter in relation to the mentioned conflict, we need you to sign and date the consent letter and return it to us. If we do not hear from you within 15 days from the receipt of this letter, **<u>we will consider your consent deemed given,</u>** and there is no further action required. (emphasis added)

[34] The consent was never signed by the plaintiff.

[35] In addition to the report of Dr. Friedlander the plaintiff also served an expert's report prepared by Shahzad Shahmalak. Dr. Shahmalak is a psychiatrist. Dr. Shahmalak prepared a report dated April 4, 2020. The assessment conducted by Dr. Shahmalak was done on March 30, 2020. Dr. Shahmalak's report is prepared on his own letterhead.

[36] On November 19, 2023 Colleen Mackeigan swore an affidavit in support of the defence motion returnable at the commencement of trial to exclude the evidence of Dr. Friedlander. As part of the evidence attached to Ms. Mackeigan's affidavit is a document entitled "Plaintiff Disbursement List" which was provided to the defence on November 16, 2023. The disbursement list reflected the following two disbursements:

November 15, 2023	Meditecs	$12,910
June 30, 2021	Psyc IME Corporation	$ 2,034

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[37] During the course of argument as it related to the *voir dire* of Dr. Friedlander, I raised concerns with Mr. Stoiko that the evidence established that Dr. Friedlander had rendered an invoice to Meditecs in the range of $1,500 to $2,000 and that the defendants had been presented with a disbursement list reflecting an invoice from Meditecs of $12,910. Mr. Stoiko indicated that the Meditecs disbursement of $12,910 might have reflected either two reports from Dr. Friedlander or the cost of the psychiatric examination of Dr. Shahmalak.

[38] Mr. Stoiko provided further clarification with respect to the disbursement cost, when he provided further details under cover of his email of December 1. Included in that material was a document headed Meditecs – Independent Medical Examinations Account Activity Ashrafian, Ali. The Meditecs account activity reflected the following:

Type	No.	Created	Memo/Description	Amt Billed
Invoice	0001958	May 31, 2020	Psychiatry Ax	$7,910.00
Invoice	0002541	April 18, 2023	Chronic Pain Ax	$5,000.00
			Total	**$12,910.00**

[39] The account activity summary prepared by Meditecs appears to reflect that not only was the report of Dr. Friedlander commissioned through Meditecs but also the psychiatric assessment done by Dr. Shahmalak. The account activity from Meditecs would also appear to indicate that the disbursement cost represented to the defendants for Dr. Friedlander's report was $5,000 and not the $1,500 to $2,000 range suggested in Dr. Friedlander's evidence. I have no reason to disbelieve the evidence of Dr. Friedlander and thus can reach no other conclusion other than Meditecs more than doubled the invoice cost of Dr. Friedlander to Masgras . Masgras then represented a disbursement cost to the defendants that was more twice the actual invoice from Dr Friedlander.

Law and Analysis re Conflict of Interest

[40] The law as it relates to a lawyer's duty of loyalty to his or her client is nothing new. As the Supreme Court of Canada in *R. v. Neil*, [2002] 3 SCR 634 noted, an advocate's duty of loyalty dates back to the time of King George IV when the Lord Chancellor in his defence to Queen Caroline against the charge of adultery addressed the House of Lords in part as follows:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client…

[41] The Supreme Court in *Neil* goes on to state that the duty of loyalty is still with us and that,

> … It endures because it is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained…

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[42] There can be little doubt that a lawyer acts in fiduciary capacity when acting for a client. As noted in *Neil*,

> The duty of loyalty is intertwined with the fiduciary nature of the lawyer-client relationship. One of the roots of the word fiduciary is *fides*, or loyalty, and loyalty is often cited as one of the defining characteristics of a fiduciary…

[43] One of the aspects of the duty of loyalty includes a duty of candor to the client on matters that are relevant to the retainer. It is clear from the evidence in this case that Ms. Masgras clearly understood that she was in a conflict of interest as revealed in the conflict document that was sent to the plaintiff on April 2, 2021.

[44] The clear conflict arose from the fact that the Masgras law firm utilized Meditecs to retain the services of both Dr. Friedlander and Dr. Shahmalak. The obvious conflict arose from the fact that the owner of Meditecs was Ms. Masgras' husband, Mr. Irshidat. This conflict was never revealed to the plaintiff until after he actually attended the assessments with Dr. Friedlander and Dr. Shahmalak. Both doctors assessed the plaintiff prior to the disclosure of the conflict. The conflict was not only not disclosed to the plaintiff until after the assessments, the conflict was never revealed to the defence until essentially the eve of trial and only as a result of information obtained by the defence, not information supplied by the Masgras law firm.

[45] What is particularly troubling from the evidence is the attempt by Masgras to have the conflict waived by the plaintiff after the fact i.e. after the plaintiff had been seen by Dr. Friedlander and Dr. Shahmalak. What is even more troubling is the suggestion that the plaintiff would be "deemed to have waived the conflict" if he did not respond within 15 days of the email of April 2, 2021 from the Masgras law firm. Deemed consent by silence as it relates to a lawyer's conflict of interest can never be condoned by the court.

[46] What is also particularly egregious from the facts as revealed by the *voir dire* is the fact that Meditecs more than doubled the invoice cost of Dr. Friedlander's report. There is absolutely no evidence to support such an egregious increase in the cost of an expert's report. As Mr. Irshidat confirmed in his evidence, the income that he derives from Meditecs is an income that would be shared within the family unit i.e. between himself and his wife, Ms. Masgras. Ms. Masgras was therefore the indirect beneficiary of the undisclosed doubling of Dr. Friedlander's account to Meditecs.

[47] During the course of argument I asked Mr. Stoiko as to whether or not there was anything that he could offer the court that could lead the court to any conclusion other than the Masgras law firm was in a direct conflict with its client, Mr. Ashrafian. Mr. Stoiko was entirely candid in his response to the court that he could offer no such evidence nor could he offer any explanation that would avoid the court ultimately concluding that the role of Meditecs and Masgras put plaintiff's counsel in an irreconcilable conflict of interest.

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[48] What is also extremely concerning as it relates to the obvious conflict as now conceded by Mr. Stoiko, relates to a decision of the Law Society Tribunal Hearing Division in a case called *Law Society of Ontario v. Ortiz*, 2023 ONLSTH 60. Ms. Masgras is described as one of the respondents. Under the subheading "Ms. Masgras" at para. 20 Barbara Murchie writing for the panel of the Law Society Tribunal stated:

> From the inception of her own practice in 2014, Ms. Masgras accepted clients who were treated or assessed at the clinics (Meditecs and Spinetec). Starting in 2015, as part of the retainer procedure, **she required clients to sign voluntary written consents** to her acting despite being advised of the potential conflict (consent form). She also made efforts to ensure pre-existing clients, like Mr. S, had signed the form. **In March 2016, she stopped sending clients to or accepting referrals from the clinics**. Existing clients continued to use the services of the clinics if already doing so. (emphasis added)

[49] The motor vehicle accident, which is the subject matter of this action occurred on June 28, 2016. There is no evidence that Mr. Ashrafian was a client of Masgras prior to June 28, 2016 and as such it is very difficult to reconcile Ms. Masgras' apparent representation to the Law Society Tribunal that as of March 2016 (i.e. prior to Mr. Ashrafian's motor vehicle accident) she had stopped sending clients to or accepting referrals from the clinics i.e. Meditecs. The evidence revealed by the *voir dire* makes crystal clear that Dr. Friedlander was retained by Meditecs as a result of a request made by the Masgras law firm.

[50] To allow plaintiff's counsel to continue to act for Mr. Ashrafian in a situation where he had never consented to the conflict of interest between Masgras, Meditecs and Mr. Irshidat would, in my view, fundamentally reflect a lack of concern as it relates to the obligation that Ms. Masgras and the Masgras law firm had to their client, both as a fiduciary and as a solicitor. The duty of loyalty and the duty of candor were completely ignored by Ms. Masgras. The court cannot countenance such conduct. To do so would bring the administration of justice into disrepute. As such, I declared a mistrial.

[51] As it relates to the costs of the mistrial, no determination has been made as to who shall be responsible for those costs, nor any conclusion as to quantum. In accordance with r. 57.07(2) notice is given that Ms. Masgras may be found responsible for the mistrial costs. Before making any such determination, Ms. Masgras will be given a reasonable opportunity to make representations to court.

[52] Subject to the availability of counsel the disposition and argument regarding the costs of the mistrial will be heard on February 8, 2024 at 2:00 p.m. in Oshawa. Counsel are to upload to CaseLines written argument, limited to ten pages as it relates to who, if anyone, is responsible for the costs of the mistrial; the quantum of costs, if any; and the timing of he payment of any costs award.

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EDWARDS, R.S.J.

Released: December 8, 2023

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REASONS FOR JUDGMENT

EDWARDS, R.S.J.

Released: December 8, 2023

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