

Case Name:
Sousa v. Akulu

**Between
Sousa, and
Akulu et al**

[2006] O.J. No. 3061

36 C.P.C. (6th) 158

150 A.C.W.S. (3d) 320

2006 CarswellOnt 4640

Court File No. 05-CV-282383PD 3

Ontario Superior Court of Justice

Master R. Brott

Heard: June 19, 2006.

Judgment: July 26, 2006.

(22 paras.)

Civil procedure -- Discovery -- Physical or psychological examination -- Choice of examiner -- When available -- Motion by the defendants to compel the plaintiff to attend at a psychiatric defence medical examination which would not be video-recorded -- The plaintiff did not oppose the request for the assessment, but insisted that it be video-recorded -- Four psychiatrists contacted by the defendants refused to conduct a video-recorded examination -- Motion granted -- The plaintiff was ordered to attend at a defence psychiatric examination, which was not to be video-recorded and which was to be conducted by a psychiatrist chosen by the defendants -- The evidence presented by the plaintiff of her poor memory and lack of English proficiency was weak, and did not outweigh the prejudice the defendants would suffer if they were forced to conduct a defence medical examination with a physician not of their choice.

Motion by Akulu et al to compel Sousa to attend at a psychiatric defence medical examination which would not be video-recorded -- Sousa's action was for damages which allegedly arose from a motor vehicle accident -- The examinations for discovery had been completed and the action set down for trial - - In light of Sousa's physical and mental health being in issue, Akulu et al sought to have the plaintiff submit to a psychiatric assessment pursuant to the Rules of Civil Procedure and the Courts of Justice Act -- Sousa did not oppose the request for the assessment, but insisted that the assessment be video-recorded -- Akulu et al agreed to a video-recorded examination subject to the agreement of the assessing psychiatrist -- They consulted four psychiatrists and four medical centres, all of whom refused to conduct a video-recorded psychiatric examination -- Sousa submitted that her limited knowledge of English coupled with her cognitive and memory problems could lead to her being misunderstood without a

recorded examination -- Further, she asserted that it would be difficult or impossible for her to critique the assessment or report without the video record -- Akulu et al contended that without an effective medical evaluation, they cannot know the case they have to meet -- While they did not disagree that Sousa should have the right to test all that transpired at the defence medical, they asserted that by video-taping the examination against their physician's will, they were basically being denied an "effective medical examination" because the observations and conclusions of the psychiatrists would be deleteriously affected by the presence of both the recording equipment and the operator of the equipment -- HELD: Motion granted -- Sousa was ordered to attend at a defence psychiatric examination, which was not to be video-recorded and which was to be conducted by a psychiatrist chosen by Akulu et al -- The onus was on Sousa to provide substantial and compelling reasons why the defence medical examination should be recorded -- The evidence of her poor memory and lack of English proficiency was weak, and did not outweigh the prejudice Akulu et al would suffer if they were forced to conduct a defence medical examination with a physician not of their choice -- The purpose of the defence medical examination is to balance the parties' rights to attack one another's reports -- Sousa was examined by her physician and reports were written without video-tapes and without the involvement of Akulu et al or their counsel in regards to choice of physician -- As Sousa failed to satisfy the onus by demonstrating no compelling reason for a video-taped psychiatric defence medical, there was no reason for this court to exercise its discretion to set terms and conditions for the defence medical examination.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 1.04, Rule 33.06(1), Rule 48.04

Counsel:

Rob **Betts**, for the Moving Party/Defendants

Kevin Wolf, for the Responding Party/Plaintiff

ENDORSEMENT

1 MASTER R. BROTT (endorsement):-- This is a motion by the defendants to compel the plaintiff to attend at a psychiatric defence medical examination which is not video-recorded.

2 In this action the plaintiff is advancing a claim for damages allegedly arising from a motor vehicle accident which occurred on April 14, 2003. The examinations for discovery have been completed and the action was set down for trial by the plaintiff. A mediation is scheduled for August 2006.

3 In light of the plaintiff's physical and mental health being in issue, the defendants sought to have the plaintiff submit to a psychiatric assessment pursuant to the Rules of Civil Procedure and the Courts of Justice Act. The plaintiff has not opposed the defendants' request for the assessment, but the plaintiff has insisted that the assessment be video-recorded. The defendants agreed to a video-recorded examination subject to the agreement of the assessing psychiatrist. The defendants consulted four psychiatrists and four medical centres and all have refused to conduct a video-recorded psychiatric examination.

Preliminary Issues

- (a) Are the defendants entitled to bring this motion as they consented to the action being placed on the trial list? (Rule 48.04)

4 The plaintiffs assert that because the defendants agreed to the pre-trial and trial dates, they have, in effect, consented to having the action set down for trial. As there are no extraordinary circumstances, the plaintiff opposes the defendants' 'supplementary' request for leave to have the motion heard.

5 Rule 1.04 permits flexibility in the rules. Both parties consent to the video-taped defence medical examination. It is the psychiatrists who are not prepared to conduct the assessment, on the (plaintiff's) condition that it be video-taped. To deny the defendant the right to bring the motion could in effect, be denying the defendants the right to have their medical examination. This would be prejudicial, leading to unfairness and imbalance at trial. Leave to bring this motion is accordingly granted.

- (b) Should paragraphs 15 and 19 of the Affidavit of Lorne Farovitch sworn May 4, 2006, and paragraph 10 of the Affidavit of George Bonn sworn May 9, 2006, delivered by the plaintiff in response to this motion, be struck as improper on the basis that they fail to disclose the sources of information upon which their knowledge, information and belief is based?

6 As the defendants have chosen not to even examine either of the deponents on the affidavits and as the defendants failed to provide the courtesy to the solicitor for the plaintiff alerting her to this preliminary issue, taking into account the importance of having the substantive issue on this motion heard expeditiously, the defendants' request is denied.

VIDEO-TAPED DEFENCE MEDICAL EXAMINATION

7 In *Bellamy v. Johnson* (1992), 90 D.L.R. (4th) 564, the Ontario Court of Appeal discussed the recording of defence medicals, and held that a plaintiff has no right to determine how an examination is to be conducted or whether it is to be recorded. The court determined that only a court has the jurisdiction in appropriate circumstances, to set the terms and conditions relating to a defence medical examination. In deciding whether or not to allow a recording device, Justice Doherty in *Bellamy*, supra, highlighted three factors that the Court should consider:

- 1) The ability to learn the case it has to meet by obtaining an effective medical evaluation; 2) The likelihood of achieving reasonable pre-trial settlement; 3) The fairness and effectiveness of the trial.

8 Both the plaintiffs and the defendants have attempted to establish that their ability to learn the case they have to meet will be compromised by the medical evaluation, without and with the video-tape respectively.

9 Counsel for the plaintiff submits that the plaintiff's limited knowledge of English coupled with her cognitive and memory problems could lead to her being misunderstood without a recorded examination. Further, plaintiff's counsel asserts that it would be difficult or impossible for the plaintiff to critique the assessment or report. In *Willits v. Johnson* [2003] O.J. No. 1442 Master Dash noted that a defence medical examination appears to be highly subjective and the plaintiffs would be placed at a significant disadvantage to support an alternate version of the events occurring at a defence medical. In *Gutierrez Jr. v. Jaffer* [2006] O.J. No. 650 where the plaintiffs were seeking a video-taped examination of a neuropsychological assessment, the court relied the reasoning in *Willits*, supra and noted that "the inability for the injured plaintiff to record what transpired at or during the examination [will] render it virtually impossible for plaintiff's counsel to rebut and the plaintiff would be disadvantaged in responding to the defence medical".

10 In other words, according to the plaintiff, in order for the defence medical to provide a full and

reliable and unbiased account of what transpired during the defence medical examination, it is necessary to have it video-taped.

11 Rule 33.06(1) provides that:

"After conducting an examination, the examining health practitioner shall prepare a written report setting out his or her observations, the results of any tests made and his or her conclusions, diagnosis and prognosis and shall forthwith provide the report to the party who obtained the order."

12 It is the defendants' submission that without an effective medical evaluation, they cannot know the case they have to meet. The defendants do not disagree that the plaintiff should have the right to test all that transpired at the defence medical. However, they assert that by video-taping the examination against their physician's will, they are basically being denied an "effective medical examination". It is their submission that the observations and conclusions of the psychiatrists would be deleteriously affected by the presence of both the recording equipment and the operator of the equipment.

13 Dr. Margulies' position paper annexed to the Affidavit of Michael Taylor sworn May 3, 2006, at Exhibit "J" notes how the video-tape would seriously impact the quality of the observation as the presence of the video-tape and the operator would seriously affect the performance and behaviour of both the doctor and the patient. Dr. Goldstein's correspondence annexed as Exhibit "L" to the Affidavit of Michael Taylor sworn May 3, 2006, outlines his concerns of how a video-taped assessment could serve to prompt certain responses from the party being examined and further, how it would not permit the physician to omit non-relevant personal information. Dr. Hershberg states at correspondence dated April 24, 2006, annexed as Exhibit "P" to the Affidavit of Michael Taylor sworn May 3, 2006, that the video-tapes "would greatly interfere with the process and one's ability to reach a meaningful conclusion". There is no sworn affidavit evidence before the court from the physicians and accordingly the plaintiff has been unable to cross-examine the psychiatrists on their evidence.

14 Regarding the second and third criteria of Justice Doherty, it is clear that neither a pre-trial settlement nor a fair trial are possible if one party is placed in an advantageous position by virtue of a video-taped assessment. As stated at paragraph 27 of *Crone v. Blue Cross Life Insurance Co. Of Canada* [2001] A.J. No. 1234:

"the purpose of defence medical examinations is to put the parties on a basis of equality as nearly as it is possible in terms of collecting evidence of the injuries of the parties ... it seems incongruous, again without compelling reason, to order that the plaintiff may videotape the defence medical examination, which will, of course, be ruthlessly scrutinized by the plaintiff's experts while at the same time there will be no equivalent tape provided to the defence of the plaintiff's doctor's examinations. This has an air of unfairness to it which does not exist in the absence of any recordings, in which case the parties are on equal footing in terms of having an equal opportunity to attack one another's reports and medical examiners in cross-examination."

15 In order to maximize fairness, and attempt to keep the parties on an equal basis at a pre-trial and trial, the parties should as much as possible be granted equivalent tactical and strategic advantages. In the same way as a plaintiff has a right to select its physician of choice throughout the litigation, the rules provide that the defendant has a prima facie right to select its physician of choice to conduct the defence medical(s). While the Court has discretion to order another physician, or terms and conditions of a defence medical, the plaintiff has the burden of providing valid and legitimate reasons why another physician or terms are necessary.

16 The plaintiff has the onus to show compelling reasons why a court should permit recording during a defence medical. Those reasons must be balanced with the physician's judgment that the examination can be conducted in a fashion that best permits the physician to do his/her job effectively. In other words, the interests of all of the parties and the physician must be balanced when the court is called upon to exercise its discretion in setting the terms of the defence medical examination.

17 Here the plaintiff has proffered evidence of the plaintiff's weak English language ability but it is noteworthy that the plaintiff's examination for discovery was conducted in English without an interpreter. Further, the plaintiff submits that the plaintiff has suffered a head injury which has resulted in cognitive deficits but there is a paucity of medical evidence to support the submission. In *Willits*, the court relied on the "overwhelming medical opinion filed ... which supports the efficacy and usefulness of a video-recording of psychiatric examinations." In *Otote v. Shenouda 26 May 2005 Ontario the transcribed endorsement of Master Dash* clearly outlines that there was evidence of severe on-going memory problems.

18 Applying Justice Doherty's factors, the parties' ability to learn the case it has to meet by obtaining an effective medical evaluation are equally balanced in terms of the advantages and disadvantages of a video-taped recording. However, for the medical evaluation to be effective, the psychiatrists evidence is persuasive.

19 Even if the Court reduces the weight of the psychiatrists information in light of the fact that it was not sworn testimony subject to cross-examination, the onus rests with the plaintiff to provide substantial and compelling reasons why the defence medical examination should be recorded. The evidence of the plaintiff's poor memory and lack of English proficiency is weak. The evidence before the court on these issues does not outweigh the prejudice the defendants would suffer if they were forced to conduct a defence medical examination with a physician not of their choice. The purpose of the defence medical examination is to balance the parties' rights to attack one another's reports. The plaintiff was examined by her physician and reports were written without video-tapes and without the involvement of the defendants or their counsel in regards to choice of physician. As the plaintiffs have failed to satisfy the onus by demonstrating no compelling reason for a video-taped psychiatric defence medical, there is no reason for this court to exercise its discretion to set terms and conditions for the defence medical examination.

20 The second and third factors are weighted in favour of the relief sought by the defendants in that the plaintiff will be granted the right to scrutinize the complete video-taped defence medical examination while the defendants will not be granted the same advantage.

21 The defendants' motion is therefore granted. The plaintiff shall attend at a defence psychiatric examination, which is not video-recorded and which is conducted by a psychiatrist of the defendants' choice.

22 If costs cannot be agreed upon by the parties, the defendants may within 7 days, either request a telephone case conference wherein oral submissions will be made or alternatively may, within 14 days, deliver to opposing counsel and the court concise written submissions which shall be responded to by the plaintiff within 7 days thereafter.

MASTER R. BROTT

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