

Case Name:
Oudeerkirk v. Clarry

**Between
Oudeerkirk, and
Clarry**

[2005] O.J. No. 5031

143 A.C.W.S. (3d) 1006

Court File No. 03-CV-244370CM3

Ontario Superior Court of Justice

H.E. Sachs J.

November 24, 2005.

(7 paras.)

Civil procedure -- Applications and motions -- Conduct of hearing -- Adjournments -- Second adjournment of trial allowed for defendant because plaintiff failed to produce all relevant medical information as required by the rules -- The medical information was critical to the issues and in the interest of justice an adjournment was appropriate.

Request by defendant, Clarry, for an adjournment -- Request based on the fact that during trial preparation it became clear that the plaintiff, Oudeerkirk, had failed to produce all relevant medical information and records -- This was the second adjournment sought by Clarry -- Oudeerkirk argued that Clarry had ample time to request these records in advance -- HELD: Adjournment allowed -- While it was true that Clarry could have brought these matters to Oudeerkirk's attention well before trial, Oudeerkirk had a responsibility under the Rules to list all relevant documents, and comply fully with all undertakings, which she did not -- If the trial were allowed to proceed, the jury would have been put in the position of having to decide the case without the benefit of all the information that could have a significant impact on their deliberations -- This was not in the interest of justice.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure

Counsel:

Martin P. Forget, for the Defendant, Moving Party

H.M. Lewin, for the Plaintiff, Responding Party

ENDORSEMENT

1 H.E. SACHS J. (endorsement):-- This case was scheduled for trial a 10 day jury trial, commencing November 21, 2005. On that day the Defendant appeared requesting an adjournment of the trial. This was the second time that the Defendant had requested that the trial be adjourned. The matter was initially scheduled to be heard in June of 2005. The Plaintiff opposed the Defendant's request. I granted the Defendant's request and indicated that written reasons for doing so would follow. These are my reasons.

2 The Defendant's request was based on the fact that during their trial preparation they went through the productions they had received from the Plaintiff and from those productions it became apparent that the Plaintiff had failed to produce all relevant medical information and records. Some of these documents were the subject of undertakings, which the Plaintiff had thought they had satisfied. Others were never mentioned by the Plaintiff, either in her Affidavit of Documents or during her discovery. Of particular concern was a reference in the records of the Plaintiff's family doctor to her having been an inpatient at a facility known as "Lakeridge Health Pinewood Centre (Destiny Manor)". The family doctor's notes contained a reference that was dated April 15, 2002 and that indicated that the Plaintiff was going for inpatient treatment at Pinewood-Destiny Manor. As part of their trial preparation the Defendant's counsel pulled up the website for Pinewood and discovered that it was a residential treatment centre for women with substance abuse problems.

3 The family doctor's file also contained a consultation report from a psychiatrist at Lakeridge Health Centre in Oshawa. The Plaintiff had undertaken to provide the Defendant with all of her records from Lakeridge, including the records of any psychiatric consultations. The report in the family doctor's file was not included in the records that came in purported satisfaction of that undertaking. The report in question contained a reference to multiple suicide attempts and to the "patient" (who was identified as the Plaintiff at the top of the report) as having been on a methadone program.

4 In this action the Plaintiff is seeking damages for physical and psychological injuries that she asserts she sustained as a result of an accident that occurred in May of 2002. On May 11, 2002 the Plaintiff fell from a deck that was located at the Defendant's home. As a result of that fall she fractured her ankle. On June 1, 2002, she tried to commit suicide. On discovery she took the position that this suicide attempt and the psychological state that prompted it was caused by the pain that she suffered from her fractured ankle. According to her, this was clear because she had never attempted suicide before the accident. On discovery the Plaintiff was also asked questions about any alcohol or drugs that she had consumed on the day of the accident and about any history of substance abuse that she had. The Plaintiff did not indicate that she had been in a residential treatment centre for substance abuse the month before the accident.

5 On the motion in support of the adjournment the Defendant submitted that in order to effectively cross-examine the Plaintiff and present his case he needed to have the full particulars of these

records. According to the Defendant, the information in these records could impact on liability, damages and on the Plaintiff's credibility and reliability. The Plaintiff's counsel agreed that these records were relevant, but asserted (correctly) that the Defendant's counsel had had all the information he needed for some time through which he could have discovered that the records were missing. If he had requested the records earlier, they could have been provided and the trial would not have had to be adjourned. Instead, the Defendant's counsel waited until the week before the second trial date to do his preparation and to ask the needed questions. This put the Plaintiff in the position of being unable to get the records in time. Further, the Plaintiff's counsel suggested that he had reason to doubt whether the Plaintiff had ever been a patient at Pinewood and reason to doubt whether the Consultation Report was in fact in reference to the Plaintiff. However, he was unable to clarify these matters without further inquiry.

6 I agree with the Plaintiff's counsel that the Defendant could have brought these matters to his attention well before the week before the trial. If he had, the information could have been produced before the scheduled trial date. However, the Plaintiff had a responsibility under the Rules to list all relevant documents in her Affidavit of Documents, to comply with her undertakings and to correct any answers that were incorrect on her Discovery. Most compellingly, if the trial had proceeded on November 21, the jury would have been put in the position of having to decide the case without the benefit of information that was apparently available and, if it was known, could have had a significant impact on their deliberations. In other words, to have proceeded with the trial in the absence of the records would have been to knowingly engage in an exercise where the jury would have been forced to reach conclusions about issues in the absence of potentially significant information that was available about those issues. This cannot be in the interests of justice.

7 For these reasons I granted the adjournment. The parties may address me in writing on the question of costs within 10 days of the release of this endorsement.

H.E. SACHS J.

cp/e/qw/qlmpp