

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

KEN HAHLOWEG AND DR. KEN HAHLOWEG)	
MEDICAL CORPORATION,)	<u>Troy Harwood-Jones</u>
)	<u>Jeffrey King</u>
)	for the plaintiffs
plaintiffs,)	
)	<u>Cynthia Lazar</u>
- and -)	<u>Kelby Loepky</u>
))	<u>Allison Kilgour</u>
WOMEN'S HEALTH CLINIC INC.,)	for the defendant
)	
defendant.)	<u>Judgment Delivered:</u>
)	January 8, 2024

TOEWS J.

INTRODUCTION AND BACKGROUND

[1] This action can be described in summary as a wrongful dismissal and breach of contract claim advanced by the plaintiffs. Various other causes of action are also pled by the plaintiffs in relation to the defendant's termination of the plaintiffs' relationship with the defendant. This matter is set for trial on February 12 – 21, 2024.

[2] A further pre-trial had been requested by defendant's counsel who advised by letter dated November 14, 2023, that in view of the upcoming trial date, it was necessary to address various outstanding items in advance of trial and to have certain pre-trial deadlines updated, as prior deadlines had not been complied with. In response to that

letter, on November 15, 2023, my administrative assistant contacted counsel for both parties advising them that they were to contact the appropriate court administrator to set a pre-trial date in December 2023.

[3] According to a letter received from counsel for the defendant dated November 27, 2023, it appears that counsel for the plaintiffs would not consent to setting the one-hour pre-trial on dates provided by the court administrator. The dates proposed by the court administrator were December 5, 7, 11-15 all at 9:00 am. In light of the inability of the parties to arrive at a suitable date and time by consent, counsel for the defendant requested that I schedule a pre-trial on December 12 or 13, 2023 at 9:00 am, stating in her correspondence that a pre-trial was necessary "to ensure this case is on track" for trial in February 2024.

[4] In response, I directed my administrative assistant to advise counsel that I would hold the pre-trial on either of the two dates suggested by the counsel for the defendant at 9:00 am and that if 9:00 am was not convenient to counsel, I would also be available at 8:00 am or 1:00 pm on either of those two dates. In her e-mail correspondence to counsel dated November 28, 2023, my administrative assistant advised counsel that if no response was received by counsel within two days, I would set a time on one of those two dates for the pre-trial hearing.

[5] By response e-mail dated November 28, 2023, counsel for the plaintiffs advised that either December 12 or December 13 at 9:00 am were suitable and accordingly, the court set December 13, 2023 at 9:00 am for the pre-trial hearing. Owing to the urgency of this matter and the importance of ensuring that counsel understood exactly what was

required to be completed for the purposes of the trial, this matter was conducted on the record in a courtroom with both parties' counsel appearing by way of video-conference call.

[6] The materials filed by the parties for the purposes of the pre-trial included the pre-trial conference brief of the defendant filed December 11, 2023, and the pre-trial conference brief of the plaintiff filed December 12, 2023. In addition, on December 7, 2023, the plaintiffs had filed an affidavit of Dr. Jeffery Charles Waldman, with an attached 18-page medical report. This report included a number of exhibits prepared for the purposes of the trial (the Waldman affidavit). As explained by counsel for the plaintiffs, the plaintiffs intended to rely upon this medical report as expert evidence in relation to the issue of damages allegedly suffered by the plaintiffs arising out of the termination of his contract by the defendant.

[7] In addition to the medical report and the briefs filed by the parties, counsel for the plaintiffs also filed an affidavit from his assistant on December 11, 2023, attaching e-mail correspondence from September 2022 between the parties in respect of the filing deadline schedule set by the court on June 2, 2022. This e-mail correspondence referred to an extension of the deadline set by the court in respect of expert reports and any other consequential amendments to those filing deadlines.

[8] There was also a motion filed by the counsel for the plaintiffs for a sealing order and publication ban of the Waldman affidavit and an issue raised by the defendant concerning the attendance of one of its witnesses at the trial by way of video conference.

ORDERS AND DATES SET BY THE COURT ON DECEMBER 13, 2023

[9] After hearing from both parties at the December 13, 2023 pre-trial hearing, deadlines were set by the court in order to ensure various matters are attended to by the parties prior to the commencement of the trial in February 2024. This included:

- a) Both parties answer and provide responsive answers to questions previously answered which arose out of the examinations for discovery by December 20, 2023;
- b) The plaintiffs are to provide a list of witnesses for trial by December 20, 2023;
- c) The defendant is to provide a list of witnesses for trial by December 27, 2023;
- d) Both parties provide "can say" statements of the witnesses to be produced at trial by January 15, 2024;
- e) An agreed book of documents is to be filed by January 26, 2024;
- f) An agreed statement of facts is to be filed by February 1, 2024; and
- g) Books of authorities are to be exchanged and filed by February 8, 2024.

[10] The parties also agreed to the sealing order and publication ban requested by plaintiffs in respect of the Waldman affidavit and the court agreed to the sealing order and publication ban based on the grounds set out in the notice of motion. As noted in the formal order itself, the court specified that the publication ban and sealing order is: "Subject to any reference in the reasons for decision to be delivered."

[11] Furthermore, the parties agreed to the attendance of one of the defendant's witnesses who resides in Toronto, Ontario by way of video-conference rather than by personal attendance at the trial.

[12] However, I reserved decision on the request by the defendant to strike the Waldman affidavit in its entirety on the basis that it was filed after the date set for the filing of expert reports by the court on June 2, 2022. After a consideration of the arguments advanced by counsel, these are my reasons for striking the Waldman affidavit in its entirety.

STRIKING THE WALDMAN AFFIDAVIT

[13] To provide an appropriate context for the decision to strike the Waldman affidavit, it is instructive to consider the following background material.

[14] The conduct of this action involved several procedural and substantive difficulties occasioned in part by the pleadings. Those difficulties are set out in my decision in ***Hahlweg et al. v. Women's Health Clinic Inc.***, 2024 MBKB 1, also released on today's date. While there had been some attempt made by the court to streamline the proceedings at the first pre-trial conference held on September 30, 2021, it was at the second pre-trial conference held on June 2, 2022, where several decisions were made in respect of pre-trial proceedings and filing dates. After setting the trial dates for February 12 – 21, 2024, other pre-trial filing dates were set to ensure that this matter proceeded in a timely fashion and that the hearing of the action in February 2024 would not be compromised by any delay.

[15] The dates set at the pre-trial hearing on June 2, 2022, included the dates for the filing of an agreed statement of facts, the filing of an agreed book of documents, the filing of books of authorities, the filing of witness “can say” statements, the notification of the Chief Justice of the court in respect of any intention to proceed to settlement discussions by way of a court supervised JADR [Judicially Assisted Dispute Resolution] mediation, and the notification of the court by either party of their intention to bring a leave application for summary judgment.

[16] Furthermore, and more importantly in respect of the Waldman affidavit, the court at that time also directed the following in the memorandum issued by the court on June 8, 2022:

II Status

The plaintiffs intend to provide *viva voce* evidence from the individual plaintiff and two nurses. The plaintiffs will also call one or two experts relating to: an actuarial report as to lost income and another report on setting up an abortion clinic. The plaintiffs will provide the intended experts’ reports **by January 2, 2023.**

The defendant intends to call 3 witnesses – one from the clinic and two former employees. At this time the defendant is not intending on calling any expert evidence, however if the defendant intends to provide an expert report in reply, this report will be provided **by April 28, 2023.**

[Underlining added; bold emphasis in the original]

[17] Aside from the December 15, 2023 deadline in respect of the agreed book of documents and the parties’ respective books of authorities, which date had not yet passed at the date of this pre-trial, none of these deadlines have been met. Accordingly, the court set new deadlines at the pre-trial hearing on December 13, 2023.

[18] What is clear from the materials filed and the submissions made by counsel on December 13, 2023, no expert reports in respect of actuarial matters or the establishment of an abortion clinic were provided to the defendant by January 2, 2023, even though the plaintiffs' counsel acknowledged the January 2, 2023 deadline in a letter to the court dated September 20, 2022. However, after that acknowledgement, no further communication was received from the plaintiffs to the defendant or to the court regarding any expert reports or any extension of the timeline for the filing of any expert reports.

[19] It was not until December 7, 2023, six days before the December 13, 2023 pre-trial that the plaintiffs provided the defendant with a copy of the Waldman affidavit and filed it with the court. Furthermore, the report attached to the Waldman affidavit deals with the individual plaintiff's personal medical issues and is not in any way related to the reports that the plaintiffs stated on June 2, 2022, they were contemplating filing by January 2, 2023.

[20] Counsel for the plaintiffs stated that they decided to have that expert medical report prepared in the beginning of October 2023 and provided it to the defendant in short order after having received it from their proposed medical expert. Counsel for the plaintiffs admits he did not provide notice to the defendant of his intention to produce the report in advance of providing the defendant a copy of the report on December 7, 2023. He also states that the report was produced and provided to counsel two months after retaining the medical expert in October 2023 to produce the report. Counsel states it is not his practice to provide such advance notice nor do the rules require him to do so.

[21] At this point, I would note that the report itself states that the individual plaintiff was personally interviewed for the purposes of the report on September 27, 2023 and that documents were provided and reviewed by the expert prior to the expert meeting with the individual plaintiff on September 27, 2023. It is evident that counsel for the plaintiff had decided to retain the medical expert to prepare the report sometime in advance of the October date suggested by the plaintiff's counsel in his submissions on December 13, 2023. How much in advance of the September 27, 2023 interview date is not clear.

[22] The defendant states that the Waldman affidavit be struck in its entirety on the basis that it was filed after the applicable deadline, being January 2, 2023. Although that is certainly an appropriate course of action available to the court, my decision to strike the Waldman affidavit is not only based on the passing of that deadline. There is a more extensive factual matrix that needs to be considered here. As set out in the ***Hahlweg*** companion case, there have been a number of procedural and interlocutory matters that may have made the January 2, 2023 date impractical to comply with. Had the plaintiffs approached the defendant and the court in a timely fashion and explained why the delay had occurred, it would have been well within the power of the court under the rules to grant a reasonable extension. Certainly, prior to the January 2, 2023 filing deadline, defendant's counsel had expressed a willingness to agree to be flexible in that respect.

[23] However, based on the submissions of counsel and the facts in this case, I am satisfied that the plaintiffs' failure to provide timely notice to the court and to the defendant of their decision to retain a medical expert and to produce this particular expert

report, the admission into evidence of this affidavit and attached report at this late date, would place the scheduled trial date in jeopardy and has persuaded me to strike the Waldman affidavit.

[24] There has never been any indication by the plaintiffs during these proceedings (until December 7, 2023), that they intended to produce an expert report of this nature. The other experts which the plaintiffs advised (on June 2, 2022) they were considering retaining were never retained. Counsel for the plaintiffs, despite acknowledging the January 2, 2023 deadline in correspondence prior to that date, effectively let that deadline in respect of those experts pass without raising the matter again.

[25] The plaintiffs nevertheless argue that there was a commitment by the defendant's counsel to be flexible with the filing dates set by the court, relying on correspondence from counsel for the defendant in which she stated in an e-mail dated September 19, 2022:

... As we indicated to you by phone, we are willing to agree to an extension on your deadline to provide expert reports so that you do not have to expend resources on experts prior to November 22, 2022....,"

(See paragraph 2 of the affidavit of Sara Domok filed December 11, 2023)

[26] However, as stated by the defendants at para. 4 of their brief filed December 11, 2023:

4. With respect to the January 2, 2023 deadline for the Plaintiffs to provide intended experts' reports, this deadline was acknowledged by the Plaintiff's September 20, 2022 correspondence (Letter from Troy Harwood-Jones to the Honourable Mr. Justice Toews dated September 20, 2022 - Court Doc #17). No further communication was received from the Plaintiffs regarding any expert reports.

[27] The defendant made no specific commitment to indefinitely, if at all, delay the filing of any expert reports and as a result of the plaintiffs' failure to seek any specific extension of that filing date, either with the court or by advising the defendant's counsel, the defendant had every reason to assume until December 7, 2023, that the plaintiffs would not be calling any experts mentioned by the plaintiffs as their intended experts on June 2, 2022. In fact, the plaintiffs have now confirmed they will not be calling the experts referred to in the June 2, 2022 pre-trial hearing.

[28] More importantly, insofar as the impending trial date is concerned, the plaintiffs failed to take any steps to advise the defendant of their intention to seek another expert in a different field of expertise to provide evidence at trial. It was only on December 7, 2023, that the defendant had any indication the plaintiffs were relying on a medical expert at trial, six days before this pre-trial and only two months before the trial itself.

[29] Given the specialized type of evidence contained in the expert report now submitted by the plaintiffs and the fact that it took the plaintiffs well over two months to find and retain an expert to produce the report, it would not be fair to the defendant that it now be forced to take steps at the eleventh hour to find and retain an expert who would then have to review all of the relevant material and schedule one or more interviews with the individual plaintiff (as was the case with the plaintiffs' medical expert) in order to prepare an expert report.

[30] I would note that in the original schedule set on June 2, 2022, counsel agreed that a four-month time frame from the receipt of the plaintiffs' expert reports was necessary in order for the defendant to prepare a proper expert reply (January 2, 2023 to April 28,

2023). Furthermore, unlike the situation here, that time frame did not include the traditional holiday time widely celebrated in the last week of December and which the court as a general practice takes into account in setting deadlines.

[31] There was no agreement here to delay the filing of expert reports in the manner suggested by counsel for the plaintiffs in his material. The fact that the defendant was prepared to be flexible in the circumstances, does not then allow counsel for the plaintiffs to essentially ambush the defendant on December 7, 2023 with a substantive expert medical report, approximately two months before trial. Indeed, that action runs completely contrary to the reasons why the pre-trial process has been recently reformed and why the one judge model has been incorporated into the pre-trial and trial process. Its purpose is to prevent exactly the type of situation here. In my opinion, for the defendant to properly prepare its case to respond to the plaintiffs' expert report, would necessitate the adjournment of the February trial date.

[32] Admittedly, the deadlines which the court set here in respect of the production of expert reports were focused on two different types of experts. However, it does not then follow that because this is a new and different type of expert being retained and report being produced, the deadlines set on June 2, 2022 for the filing of expert reports can simply be ignored or that there is no obligation to advise the court and the opposite party of their new intention to retain different types of experts.

[33] The court made inquiries of the parties 18 months ago about what expert reports they might be relying on, and the plaintiffs specified two different types of expert reports. The intent of setting deadlines for the filing of expert reports was to identify all possible

experts as quickly as possible and to ensure that there was sufficient time for both parties to prepare for trial. In these circumstances, it is incumbent upon a party to advise the court and the opposite party that their intentions in respect of filing an expert report had substantially changed from the representations made at a prior pre-trial hearing.

[34] The court takes issue with the plaintiffs' position that in these circumstances, the rules do not require him to provide notice at the eleventh hour of their intention to rely on a previously undisclosed expert report dealing with a different field of expertise. The lack of timely notice by the plaintiffs here will either jeopardize the trial dates if the Waldman affidavit is admitted or the admission of the Waldman affidavit and proceeding with the trial on the scheduled date will place the other party at a patently discernible disadvantage. Rempel J. in **6165347 Manitoba Inc. v. Winnipeg (City)**, 2021 MBQB 165, [2021] M.J. No. 223 (QL), addressed a similar concern, in a remarkably similar situation when he noted as follows in his reasons:

26 The delay in the plaintiffs' disclosure of the fact that they were contemplating the production of an expert report and then releasing it at the eleventh hour prior to trial reeks of trial by ambush. ...

27 The **Queen's Bench Rules** are intended to avoid the kind of fundamental unfairness and injustice that arises from trial by ambush. It stretches my credulity past its breaking point that the request for the creation of an expert report that is as extensive as the BDO Report was not contemplated well in advance of the ... pre-trial conference. This is not the kind of report that takes a few weeks to prepare, yet counsel for the plaintiffs made no mention of it while the preparation of the BDO Report was in progress.

[35] Implicit in Rempel J.'s comments is that there is a continuing obligation on counsel to provide notice to the court, as well as to the party opposite, where a fresh, substantive decision has been made to retain a different type of expert and that the answer in respect

of retaining experts provided to the court at an earlier pre-trial is no longer fulsome or otherwise accurate. In respect of important filings such as expert reports, counsel is well aware of the possible complications in terms of the time required and the expense involved in retaining experts if there is no timely disclosure. Indeed, as is the case here, the plaintiffs' failure to provide notice of their intention to file an expert's report until two months before the trial date, is jeopardizing the trial proceeding on schedule.

[36] During the pre-trial hearing, I raised the possibility of bifurcating the trial and allowing the plaintiff to file the expert report at this late date. I proposed that if I ruled in favour of its relevance and admissibility at trial, the trial could then be adjourned for a further period, to allow the defendant to seek and provide an expert report in reply to the plaintiffs' expert. However, I have considered that course of action in reviewing the submissions of counsel and the material filed at this pre-trial and am persuaded by the defendant's submission that such a course of action is neither fair nor proportionate in view of the circumstances here. The solution of bifurcation, occasioned by the deliberate decision of the plaintiffs' counsel to not notify the defendant's counsel in a timely fashion of its intention to produce the expert report, would undoubtedly significantly delay the completion of the trial and add further unwarranted costs and trial time to the carriage of this action.

[37] Accordingly, I have concluded that the Waldman affidavit, including the report attached as an exhibit to the Waldman affidavit, is struck and shall not be admitted at trial. The costs for this pre-trial hearing shall be in the cause at the applicable tariff rate.

_____. J.