

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN: )  
)  
David McKee )  
) Mark Klaiman, Counsel for the  
Plaintiff ) Plaintiff  
- and - )  
)  
Shanelle Marroquin, EM Data )  
Consultants Inc. and Nissan Canada )  
Inc. c.o.b. as Nissan Canada )  
Finance ) Surina Sud, Counsel for the  
Defendants ) Defendants  
)  
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)  
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)  
) HEARD: August 16, 2021

**JUSTICE G.D. LEMON**

**Endorsement**

**Introduction**

- [1] The defendants move for an order
- (a) granting them leave to bring this motion pursuant to Rule 48.04 *Rules of Civil Procedure*, in the event that it is required;
  - (b) striking this action from the January 2022 Brampton trial list;

- (c) compelling Mr. McKee to produce his complete files from the Human Rights Commission/Tribunal, Workplace Safety and Insurance Board, and Workplace Safety and Insurance Appeals Tribunal, along with his complete employment file from Imperial Irrigation, contact information for Peter Micha, all medical, specialist, and treatment records relating to his work place injuries to his lower back and right shoulder injury and any diagnostic imaging of his lower back and right shoulder from June 1, 2005 to June 10, 2016; and,
- (d) compelling Mr. Mckee to answer his outstanding undertakings to produce
  - (i) all source documents relating to his 2019 T1 General tax return, including the disability certificate and all medical records provided to the Canada Revenue Agency in support of Mr. Mckee's claim for a caregiver benefit;
  - (ii) his complete employment file from State Group; and,
  - (iii) his application to become a National Health and Safety Officer and the complete file relating to his program description, courses and exams, licensing, and education.

[2] In short, due to the defendants' late investigation, they have now uncovered what they say are relevant documents that should have been produced by Mr. McKee. The defendants also seek proper responses to the undertakings given by Mr. McKee at his examination. The defendants say that such production will require the delay of the trial.

[3] While I agree that some documents need to be produced by Mr. McKee in the immediate future, that will not necessarily delay the trial.

### **Background**

[4] In this claim, Mr. McKee alleges that he was injured in a motor vehicle accident on June 10, 2016. He issued a statement of claim on August 21, 2017.

[5] Mr. McKee was examined for discovery on April 13, 2018. At that time, he was asked whether he had any back pain before the motor vehicle accident. He denied having had any back pain before the accident.

[6] From May 2018 to September 2019, Mr. McKee saw three specialists and again denied having had any low back pain prior to the accident. He also denied making any claims to the Workplace Safety Insurance Board.

[7] However, in April of this year, the defendants discovered that Mr. McKee did make a WSIB claim and initiated an application at the Human Rights Tribunal/Commission. The investigation disclosed that Mr. McKee alleged that he had a low back and right shoulder injury for which he was disabled in 2006.

[8] Upon discovery of this information, the defendants requested that Mr. McKee correct his evidence at discoveries and sought the production of the Tribunal/Board files, and any employment files and medical records relating to that injury. Mr. McKee has refused to do so.

**Leave to Bring the Motion**

[9] Mr. McKee first argues that the defendants are late in bringing this motion and that they ought not to be granted leave to proceed.

[10] The action has already been set down for trial.

[11] Rule 48.04 (1) of the *Rules of Civil Procedure*, R.R.O. 190, Reg. 194, confirms that a party who has set an action down for trial shall neither initiate nor continue any motion nor form of discovery without leave of the court. However, that rule does not apply to relieve a party from complying with undertakings given by the party on an examination for discovery, to disclosure of documents or errors subsequently discovered, or disclosure of information subsequently obtained. Leave of the court is not required for a motion to compel compliance with any of those obligations.

[12] Particularly with respect to the WSIB/Human Rights Tribunal/Commission records as set out below, Mr. McKee is clearly under an obligation to provide those records and leave is not required. If leave were required, I am content that the late investigation that led to their discovery is a sufficient change in circumstances to support leave.

**WSIB/Human Rights Tribunal/Commission Records**

[13] On April 8, 2021, counsel for the defendants located a Human Rights Tribunal decision relating to Mr. McKee. According to that decision, in 2006, Mr. McKee alleged that he was terminated by his employer, Imperial Irrigation, as a result of a disability for which he claimed WSIB. Apparently, he injured his right shoulder in June 2005 and his lower back in July 2005. He was off work until March 13, 2006, when he returned on modified duties. The evidence in that case supported the finding that in March of 2006, Mr. McKee could only walk a short distance, could sit for no more than five to ten minutes, and was limited in lifting or stair climbing. He could not bend or twist his lumbar spine and other related symptoms. It was reported that his recovery time was “unknown”.

[14] The defendants submit that the evidence contained in the HRT/WSIB/WSIT files will be relevant with respect to Mr. McKee’s pre-accident disability, his prognosis for recovery, the nature of his injury, and his employment restrictions as a result of the injury. Further, the defendants say that there may be specialists’ reports contained in the files that speak to the permanence and severity of Mr. McKee’s prior disability and injury. The defendants say that it would be unjust for them to proceed to trial without that information.

[15] Further, the defence submits that their defence medical expert relied on Mr. McKee’s report that he did not have any low back pain or workplace accident prior

to the accident. They submit that once these records are produced, there will necessarily be a further defence medical assessment.

[16] In response, Mr. McKee submits that based on a strict reading of the questions asked by defence counsel at the examination, Mr. McKee did not provide an incorrect answer. Rather, many of the questions were focused on the period five-years prior to the accident. Since defence counsel had the opportunity to ask more detailed questions, they should not be given a further opportunity for questions and productions. Mr. McKee submits that his prior injuries do not change his “baseline of health on the date of the accident and does not alter the general damages analysis”.

[17] Mr. McKee says that defence counsel “did not explain the scope or meaning of “pre-accident” . . . [h]ad defence counsel asked whether the plaintiff had *ever* had injuries before the subject accident, the plaintiff’s response could have been quite different.” [Emphasis in the original] In my view, the plaintiff takes far too strict a line with respect to his obligation for disclosure.

[18] In his examination, Mr. McKee answered “no”, to the question “any low back pain pre-accident?”. He expressed the same view to the three specialists. There is no evidence from Mr. McKee to suggest that he did not understand the question. At the very least, this is an answer that needs to be corrected.

[19] The information obtained by the defendants shows that the 2005 injuries were significant. Even though the injuries apparently occurred 10 years before this

accident, those documents are relevant to the baseline of Mr. McKee's health and may well alter the damages analysis. Further, in the face of the plaintiff's denial and failure to produce to this point, these documents will certainly be relevant to issues of credibility.

[20] Mr. McKee argued that such production would be disproportionate but there was no specific objection to the wording of the request as set out in the notice of motion. I am not in a position to tailor that request and presume that the defendants will be sensible in any requests arising out of this order.

### **Undertakings**

[21] Although the defendants sought a number of answers to outstanding undertakings, they were reduced to three by the time of the motion.

#### ***i. 2019 Caregiver Benefit***

[22] Mr. McKee's counsel provided the defendants with his 2019, T1 General on March 26, 2021. In that document, Mr. McKee claimed a caregiver benefit for having to care for his sister who was living with him. The defendants requested documentation relating to any disability certificates or medical notes confirming Mr. McKee's sisters' disability and outlining the type of care that Mr. McKee was providing to her in 2019. The defendants also wish to know the duration that Mr. McKee's sister had been residing with him requiring his caregiving services. The defendants submit that because Mr. McKee has claimed for future care, a loss of

quality of life, and an inability to engage in his activities of daily living, it would be inconsistent that he was providing caregiving services to another individual.

[23] Mr. McKee submits that the tax credit was based on the financial support that he provided to his sister. He submits that the benefit was accrued only because he was providing financial assistance to his sister and not providing caregiving services.

[24] I agree with Mr. McKee that he has provided the necessary documentation to comply with the undertaking. Even if the defendants' view of tax law is correct, this request is disproportionate to the real issues between the parties.

***ii. Employment Files***

[25] The defendants seek the complete employment file from Mr. McKee's employer, The State Group Inc. However, the responding material from Mr. McKee shows that documentation has been provided June 10, 2019, February 26, 2020, and March 31, 2021. Further, State Group advised on April 12, 2021, "this is to confirm that we provided you with all his payroll records we have in our system". I am satisfied that Mr. McKee has complied with this request.

***iii. Application to Become a National Health and Safety Officer***

[26] Although Mr. McKee denied that he had made an application to be a Health and Safety Officer, the defendants were able to obtain a copy of such an appointment dated November 8, 2019.



[27] Mr. McKee's counsel followed-up with the employer with respect to the information required from the undertaking. The employer advised that all of the information regarding Mr. McKee's appointment had been provided and that the application was not available. However, the employer also provided a website for additional information. There is no evidence from Mr. McKee on what efforts he has personally made to obtain the application and related information in response to the undertaking.

[28] From the materials filed, I am not satisfied that Mr. McKee has complied with this undertaking. He shall do so within 30 days.

**Removing Trial from the List**

[29] The defendants submit that the trial will need to be delayed in order to respond to these new documents and to arrange for a new defence medical.

[30] In response, Mr. McKee points out that the trial record was filed on April 20, 2018, and the judicial pretrial occurred on November 15, 2019. At that time, both parties advised that they were ready to proceed to trial on the May 2020 trial sittings.

[31] The trial was adjourned as a result of the pandemic. A second pretrial was held on June 17, 2020, and all parties advised that they were ready to proceed with the trial. A virtual Assignment Court was held on February 17, 2021 and all

parties were advised that the trial would begin at the end of 2021 or in 2022. It is now set to be heard on the January 2022 trial sittings.

[32] Mr. McKee has failed to provide the records relating to his 2005 injury; however, this motion was brought late because of the defendants' delay in carrying out its investigation until April of this year. The materials provide no explanation for that delay. Accordingly, both parties are responsible for it.

[33] On the materials that I have, I see no reason to expect that there would be undue delay in obtaining the records now ordered. Indeed, I advised both counsel to expect that this order would follow. It may be that, in due course, a delay of the trial will become necessary but that is not clear now.

[34] Accordingly, I dismiss the defendants' present motion to strike this matter from the trial list but that is without prejudice to the renewal of such a request on events that may occur after the date of this motion.

### **Result**

[35] Accordingly,

- (a) Within 30 days of this order, Mr. McKee shall produce his complete files from the Human Rights Commission/Tribunal, Workplace Safety and Insurance Board, and Workplace Safety and Insurance Appeals Tribunal, along with his complete employment file from Imperial Irrigation, contact information for Peter Micha, all medical, specialist, and treatment records relating

to his work place injuries to his lower back and right shoulder injury and any diagnostic imaging of his lower back and right shoulder from June 1, 2005 to June 10, 2016.

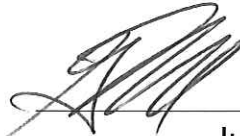
- (b) Within 30 days of this order, Mr. McKee shall produce his application to become a National Health and Safety Officer and the complete file relating to his program description, courses and exams, licensing, and education.
- (c) All other requests are dismissed.

### Costs

[36] It appears that success has been divided and that a costs order would be inappropriate. There may, however, be factors to consider of which I am not aware. If either party seeks costs, they shall do so within the next 15 days. Any response shall be within 15 days thereafter.

[37] Each submission shall be no more than three pages, not including any Bills of Costs or Offers to Settle. No reply submission will be accepted unless I request it. If I have not received any submissions within the time frames set out above, I will assume that the parties have resolved the issue and I make no order as to costs.

[38] Any costs submissions shall be forwarded to my office in Guelph by electronic transfer to [GuelphOffice.SCJ@ontario.ca](mailto:GuelphOffice.SCJ@ontario.ca) or by mail to Guelph Superior Courthouse, 74 Woolwich St., Guelph, N1H 3T9.



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Justice G. D. Lemon

**Released:** September 7, 2021

McKee v. Marroquin, COURT FILE NO.: CV-17-3604 (Brampton File)  
DATE: 2021 09 07

ONTARIO  
SUPERIOR COURT OF JUSTICE

**BETWEEN:**

David McKee

Plaintiff

– and –

Shanelle Marroquin, EM Data Consultants Inc.  
and Nissan Canada Inc. c.o.b. as Nissan  
Canada Finance

Defendants

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**RULING**

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Justice G.D. Lemon

**Released:** September 7, 2021