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DATE: 2024-09-10

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: [redacted] v. RIPLEY'S WATERPARK RESORT L.P. et al

BEFORE: ASSOCIATE JUSTICE D. MICHAEL BROWN

HEARD: May 1, 2024 [by videoconference]

COUNSEL: P. Regan, for the moving parties/defendants

I. Kirtsman and N. Taylor, for the responding plaintiff

E N D O R S E M E N T

[1] This is a motion by the defendants brought under Rule 30.06 seeking an order that the plaintiff produce a further better affidavit of documents that includes, among other things, the plaintiff's medical records back to 2009, medical and expert reports relating to a 2009 motor vehicle accident, and "all relevant social media posts, photographs, videos, images, audio recordings, public messages, and textual and/or audiovisual media". For the reasons that follow, the motion is dismissed.

[2] This action relates to injuries the plaintiff is alleged to have suffered as a result of a slip and fall incident on the defendants' premises on December 7, 2019. The Statement of Claim was issued on October 21, 2021 under the Rule 76 simplified procedure. The plaintiff served an unsworn affidavit of documents in May 2021 and was examined for discovery on June 17, 2021.

[3] At the examination for discovery, counsel for defendant requested on at least two occasions that the plaintiff produce her medical records for the period five years prior to the slip and fall incident. On each occasion the request was refused, with the plaintiff instead undertaking to produce such records for the more limited period of three years prior to the incident. The defendants have never moved on these refusals. The plaintiff was not examined for discovery on her social media history and no request was made at discoveries for production of social media records.

[4] The plaintiff set this action down for trial in December 2021. On April 4, 2023, the parties attended a pre-trial conference before Associate Justice Brott. The pre-trial was adjourned at the request of the defendants to allow the defendants to obtain a responding engineering report. A second pre-trial was conducted on October 11, 2023 before Associate Justice McAfee. At that pre-

trial, the defendants advised that they would not, in fact, be delivering an expert engineering report. Instead, the defendants advised for the first time their intention to bring this motion. As a result, the pre-trial was adjourned again pending this motion.

[5] The defendants assert that this motion was necessitated by their discovery that the plaintiff commenced and settled a 2011 action relating to injuries she is alleged to have suffered as a result of a 2009 motor vehicle accident. That 2011 action was settled by the plaintiff in 2020 for a total payment to the plaintiff of $8,235.86. The defendants have produced a copy of the October 21, 2020 judgment approving the settlement of the 2011 action (which involved a minor plaintiff) and a copy of the Statement of Claim in the 2011 action. The defendants have not provided evidence as to how and when they learned of the 2011 action. According to the plaintiff's evidence the 2009 motor vehicle accident was disclosed to the defendants in an expert report served by the plaintiff dated March 7, 2022.

[6] In support of the request for social media documents, the defendants point to the fact that the plaintiff has a Facebook account. The defendants' affidavit evidence includes screenshots of postings on the plaintiff's Facebook page dating back to June 2019.

[7] The defendants' motion is procedurally irregular. A motion for a further and better affidavit of documents should be brought before examinations for discovery have been concluded. That way, the documents produced in the further affidavit of documents may be subject to examination for discovery without additional delay. The relief requested by the defendants would require the re-opening of the discovery process three years after examinations for discovery were completed and after the matter has been listed for trial, causing a significant delay in this proceeding. The defendants could have and should have sought production of these documents much sooner.

[8] The defendants have provided no explanation as to why the social media documents were not sought before or during examinations for discovery. Defendants in personal injury actions routinely seek production of a plaintiff's social media history and postings. In delivering an affidavit of documents that contained no documents from her social media accounts, the plaintiff was taking the position that she had no relevant social media documents. The defendants could have challenged that position by seeking a further and better affidavit of documents before examinations for discovery, or by examining the plaintiff about her social media accounts on examination for discovery and seeking production by way of undertakings. The defendants did neither.

[9] I am also not satisfied on the record before me that the plaintiff has relevant social media documents in her possession, power or control, that ought to have been included in her affidavit of documents. The defendants argue that photographs in the plaintiff's social media postings may display the plaintiff engaging in activities relevant to her claim of a loss of functionality. On review from the plaintiff's social media postings attached to the defendants' affidavit, there do not appear to be any photographs that, on their face, are directly or plainly relevant to that issue.

[10] The defendants also failed to pursue the production of the medical records they now seek at or before examinations for discovery. The defendants seek production of the plaintiff's medical

records going back ten years prior to the incident. On examinations for discovery the defendants sought production of medical records for only five years prior to the incident. After the plaintiff took the position that medical records earlier than three years before the incident were not relevant, the defendants never moved on the refusal for the additional two years. I find that in failing to move on the refusal, the defendants have acquiesced in the plaintiff's position that records more than three years prior to the incident are not relevant and need not be produced on discovery.

[11] The plaintiff's position that medical records more than three years prior to the incident are not relevant is reasonable. Prior medical records are relevant to the issue of the plaintiff's state of health immediately prior to the incident. In this case, the plaintiff has produced three years of medical records prior to the incident that includes records of 27 visits to her family physician consisting of over 200 pages of documents, in addition to records produced from other medical practitioners. In my view, these productions should be sufficient to establish the plaintiff's state of health at the time of the incident. Medical records from before this three-year period would be of marginal relevance.

[12] I disagree with the defendants' assertion that the plaintiff denied ever having been injured in any previous accident in her examination for discovery. The plaintiff's answers on discovery were repeatedly qualified to be limited to the three years prior to the incident. Her answer that she had not injured herself beforehand must be read in that context. In any event, the fact that the plaintiff was involved in a 2009 motor vehicle accident and related litigation commenced in 2011 does not alter the relevance of medical records for the pre-incident period. Medical records relating to the 2009 motor vehicle accident and the 2011 lawsuit that report on the plaintiff's medical circumstances more than three years before the incident are no more relevant than any other medical records for this time period. I find that plaintiff's medical records relating to the 2009 motor vehicle accident are of, at most, marginal relevance.

[13] I am not satisfied on the record before me that the plaintiff has omitted relevant documents from her affidavit of documents that are within the plaintiff's possession power or control. I would dismiss the defendants' motion on this basis alone. I would also dismiss the plaintiff's motion on the basis that the requested production is not proportional. As Master Muir held in *Blake v. Drandic*, 2017 ONSC 5030 (CanLII), proportionality goes beyond simple production. In this case, the production of the requested documents would likely require additional examinations for discovery. The additional medical records produced may require review and consideration by the parties' experts and could result in the delivery of additional expert reports.

[14] The proportionality principle requires consideration of the amount being sought. This is a Rule 76 simplified procedure action and the $200,000 relief sought militates against production the requested documents. The resulting reopening of discoveries almost three years after the examinations were completed and the action was set down for trial would be inconsistent with the policy behind Rule 76 of limiting the number of procedural steps in the litigation and reducing costs. Production at this late stage would unduly interfere with the orderly progress of the action which further militates against production per subrule 29.02.03(1)(d). Given the marginal relevance of these documents, I find that their production would not be consistent with the principle of proportionality.

Disposition

[15] The defendants' motion is dismissed. If the parties cannot agree on costs of the motion they will be determined in writing. The parties may deliver written costs submissions no longer than two pages, exclusive of any Cost Outline, by sending the submissions by email to my assistant trial coordinator, Gobiga Amalakumar at Gobiga.Amalakumar@ontario.ca. The plaintiff shall deliver their costs submissions by September 26, 2024. The defendants shall deliver their costs submission submissions by October 3, 2024.

D. Michael Brown, Associate Judge

DATE: 2024-09-10