CITATION: Randhawa v. Minerva Pain Management Group Inc., 2023 ONSC 5054
COURT FILE NO.: CV-23-80884-0000
DATE: 20230906

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Navraj Randhawa, Plaintiff

AND:

Minerva Pain Management Group Inc., Defendant

BEFORE: Justice L. Sheard

COUNSEL: Jennifer Chan for the Plaintiff

Kathy Chittley-Young for the Defendant

HEARD: August 8, 2023 - Virtually

ENDORSEMENT

Overview

[1] The plaintiff, an internationally trained physician, was not qualified to work as a physician in Canada and was employed by the defendant, a pain management clinic (the "Clinic"). The parties agree that the plaintiff provided direct care to patients of the Clinic.

[2] On September 27, 2022, after being notified that a complaint involving the plaintiff was made to the College of Physicians and Surgeons of Ontario (the "CPSO"), the Clinic terminated the plaintiff's employment. The complaint was brought to the attention of the Clinic's principal, a physician.

[3] The plaintiff sued the defendant for wrongful dismissal.

[4] In its statement of defence, the Clinic asserts that the plaintiff was terminated for cause, based on evidence disclosed to the Clinic's principal by the CPSO. In particular, the defendant asserts that the CPSO provided evidence of the plaintiff's sexual misconduct with a patient, which breached the Clinic's workplace policies and the CPSO's Rules of Professional Conduct, to which, the Clinic alleges, the plaintiff is subject.

[5] The plaintiff moves to strike out paragraphs 11, 12, 14, 15, 16 and 17 of the statement of defence, without leave to amend, on the basis that those paragraphs contravene certain of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 (the "Rules"), and/or s. 36 of the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, (the "RHPA").

[6] The plaintiff relies on the following:

A. The Rules:

Rule 25.06(1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved.

Rule 25.06(2) A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded.

Rule 25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) May prejudice or delay the fair trial of the action;
(b) Is scandalous, frivolous or vexatious; or
(c) Is an abuse of process of the court.

B. The RHPA

Interpretation

s. 1(1) In this Act,
"member" means a member of a College

Evidence in Civil Proceedings

s. 36 (3) No record of a proceeding under this Act, a health profession Act or the Drug and Pharmacies Regulation Act, no report, document or thing prepared for or statement given at such a proceeding and no order or decision made in such a proceeding is admissible in a civil proceeding other than a proceeding under this Act, a health profession Act or the Drug and Pharmacies Regulation Act or a proceeding relating to an order under section 11.1 or 11.2 of the Ontario Drug Benefit Act. 1991, c. 18, s. 36 (3); 1996, c. 1, Sched. G, s. 27 (2).

The Facts

[7] The following is not in dispute:

(a) the plaintiff's employment was terminated by reason of the information the defendant learned through the CPSO concerning a complaint lodged by a patient of the Clinic;

(b) the CPSO complaint was lodged against the principal of the Clinic, a physician, as the CPSO has no jurisdiction over the plaintiff, who is not a registered/regulated health professional;

(c) the CPSO provided the defendant with a copy of text messages/texted photograph(s) exchanged between the plaintiff and a patient of the Clinic, which evidence was put forth to the CPSO in support of the complaint;

(d) the plaintiff admits that he exchanged "consensual text messages" with the patient, but asserts that he no longer has the texts on his phone; and,

(e) apart from what was provided by the CPSO, on this motion, there is no evidence that the defendant has any other evidence that the plaintiff engaged in improper conduct with a patient of the Clinic that would merit termination.

The Law and Analysis

[8] The defendant submits that while s. 36(3) of the RHPA "creates a blanket prohibition against admitting in a civil proceeding any records, report or documents directly related to a proceeding under the RHPA" the *fact* that a complaint was lodged, investigated and a decision rendered are not encompassed by s. 36(3). In addition, s. 36(3) does not "create an evidentiary privilege relating to the information or evidence used to prepare such orders, decisions reports, documents, things or statements". Anything not specifically mentioned in the RHPA is "fair game": see, *K.K. v M.M.*, 2022 ONCA 72, at paras. 47, 48.

[9] The defendant asserts that the text messages themselves were not prepared for the proceeding and are, therefore, "fair game".

[10] The plaintiffs agree that the text messages are, themselves, not prohibited evidence. Rather, the plaintiffs submit that it is the evidence provided to the defendants by the CPSO (i.e. the *copies* of the subject text messages) that the defendant is prohibited from referring to or using. The plaintiffs acknowledge that, for example, there would be no prohibition against the defendant using the texts they obtained directly from the complainant and/or her phone, on the basis that the texts, themselves, were not created for the purpose of a complaint.

[11] The distinction that the plaintiffs ask the court to draw may seem a fine one, but it is one that our appellate courts have made clear: see *K.K. v M.M.*, at paras. 52 and 53, quoting with approval from *F.(M) v. Sutherland* (2000), 188 DLR (4th) 296 (Ont. C.A.), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 531:

> [52] As this court explained in *Sutherland*, at para. 29,
>
> > The purpose of s. 36(3) is to encourage the reporting of complaints of professional misconduct against members of a health profession, and to ensure that those complaints are fully investigated and fairly decided without any participant in the proceedings – a health professional, a patient, a complainant, a witness or a College employee – fearing that a document prepared for College proceedings can be used in a civil action.

[53] The “broad objective” of the provision “is to keep College proceedings and civil proceedings separate”: *Sutherland,* at para. 31; see also *Lipsitz*, [[2011] ONCA 466] at paras. 101-3.

Application of s. 36(3) to the impugned pleadings

[12] The plaintiff acknowledges that the defendant may introduce as evidence text messages obtained from a source other than the CPSO but submits that that s. 36(3) prohibits the defendants from using, in any way, the copies of the text messages provided to the defendant by the CPSO. That submission is supported by the jurisprudence. There is limited evidence on this motion as to how or why the copies of the text messages provided to the defendant were created; that they came to the defendant from the CPSO allows me to infer, however, that the copies were, in fact, prepared for use in a proceeding brought under the RHPA. As such, I conclude that s. 36(3) operates to render those particular documents inadmissible in this litigation.

Should the paragraphs be struck?

[13] *Sutherland* provides instruction on whether a pleading should be struck out on the basis that the pleading, or a portion of it, offends s. 36(3) of the RHPA. At paras. 43 to 45, the Court stated:

> [43] Rule 25.11 permits the court to strike out any part of a pleading that may prejudice or delay the fair trial of an action. A pleading of documents that are inadmissible at trial will prejudice or delay the fair trial of the action. The pleading is irrelevant to the action. Therefore, the impugned paragraphs in Dr. Sutherland's statement of defence and counterclaim should have been struck out under Rule 25.11. In this case nothing turns on which rule was used to decide the motion. I would therefore not interfere with the decision of the motions judge or the decision of the Divisional Court.
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> [44] I add three qualifying comments. First, my reasons turn on my view that s. 36(3) of the RHPA is an absolute bar to the admissibility of the complaint and the sworn recantation in the civil action. Had I been of the view that either the complaint or the recantation might be admissible despite the language of s. 36(3), I would of course have left their admissibility to be determined by the trial judge.
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> [45] Second, s. 36(3) refers to a "report, document or thing," suggesting a distinction between, for example, a written complaint and the fact of a complaint having been made. The document, the written complaint, is inadmissible, but the fact a complaint was made may be provable at trial. That distinction, however, does not arise in Dr. Sutherland's pleading because he has pleaded the written complaint and the sworn recantation and their contents to support his defence, and it is these documents he seeks to prove at trial. Moreover, Dr. Sutherland did not draw this distinction in his submissions to this court.

Application of the law to the statement of defence

(a) Paragraph 11:

[14] Applying the principles set out above to the statement of defence, I conclude that the following words in paragraph 11 of the statement of defence contravene the provisions of s. 36(3) and, under r. 25.11, should be struck: "…and provided evidence to Dr. Suneel Upadhye, Medical

Director of Minerva, of the sexual misconduct of the Plaintiff with a patient of Minerva's clinic. The evidence demonstrated that…".

[15] I have considered whether the balance of para. 11 offends the provisions of r. 25.06(1) and determined that it does not. As a result, no further portions of this paragraph are struck.

(b) Paragraph 12:

[16] This paragraph makes no reference to the CPSO investigation and need not be struck out on that basis. I have also considered the plaintiff's submissions that para. 12 offends r. 25.06(2) on the basis that it pleads a conclusion of law without, it is alleged, pleading the material facts that support it.

[17] The alleged conclusion of law is that the CPSO Rules of Professional Conduct apply to the plaintiff. I find that the facts supporting that conclusion were pleaded at paras. 7. and 8. of the statement of defence and, conclude that no portion of paragraph 12 need be struck.

(c) Paragraph 14:

[18] This paragraph consists of reference to the CPSO complaint and must be struck in its entirety.

(d) Paragraph 15:

[19] This paragraph also relates entirely to the CPSO complaint and must be struck on that basis. Also, it offends r.25.06(1) in that it does not contain material facts, or facts at all, and has no place in this pleading. It will be struck in its entirety.

(e) Paragraph 16

[20] This paragraph refers to "the evidence" which, I infer, refers to the evidence provided to the defendant by the CPSO. As a result, the following words are to be struck: "…maintains that the evidence clearly and unequivocally proves the intent and actions of the Plaintiff."

[21] While some revision to paragraph 16 may be required from a grammatical point of view, the balance of this paragraph does not offend s.36(3) or any rule, and nothing further need be struck.

(f) Paragraph 17

[22] For reasons similar to those set out above respecting paragraph 16, the following words must also be struck from paragraph 17: "The evidence will prove that…"

Disposition

[23] Portions of the statement of defence are to be struck as per the above.

[24] In addition, I have considered and reject the plaintiff's submissions that the defendant be denied leave to amend its defence. As such, the defendant shall have leave to amend its defence.

Costs

[25] As there has been mixed success on this motion, and having reviewed the Costs Outlines filed, I determine that the fair and reasonable costs of this motion should be fixed at $5,000, plus HST, and payable in the cause.

Date: September 6, 2023

Justice L. Sheard