

SUPERIOR COURT OF JUSTICE – ONTARIO

ENDORSEMENT

		File No. CV-19-136 Owen Sound
Date:	2021-09-02	
Counsel:	Plaintiff(s): Linda Duncan, Warren Elder, Erica Lee H. Cooper	
	Defendant(s): Garbutt Construction, Complete Content Restoration A. Yolles	
Justice:	Fitzpatrick	

Background

1. This motion is brought by the Plaintiffs pursuant to Rule 31.10 seeking leave to bring this motion and, if leave is granted, for an order to examine a non-party, Jason Kirkham (“Kirkham”).
2. The Plaintiffs, Linda Duncan (“Duncan”) and Warren Elder (“Elder”) are spouses. They had a flood in the basement of their home on or about February 4, 2019.
3. The Defendant company (“Garbutt”) was hired to address the flood and restoration issues.
4. Troy Nicholson (“Nicholson”) was the first employee of Garbutt to attend at the residence. He arrived there just after midnight and remained into the early morning on February 5th. Nicholson was an “on call” project manager

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sent to assess the scope of the work, including the team required to perform that work.

5. It would appear that six Garbutt employees attended at the residence to perform remedial work on February 5th. These six employees were split into two separate shifts of three workers. All of these workers attended sometime after Nicholson was first on site and before Duncan tripped.
6. One of the three workers from the first shift to attend at the residence the morning of February 5th erected a plastic containment barrier in the door frame at the bottom of the stairs leading into the flooded area of the basement.
7. Duncan tripped upon the plastic barrier in the early evening of February 5th sustaining injuries. This incident forms the basis of the action herein.
8. Another Garbutt project manager, Kirkham, attended at the residence on February 6th after Duncan tripped and in response to that incident.
9. Kirkham inspected the plastic barrier. During this inspection, the Plaintiffs allege that Kirkham in the presence of Elder turned pale and made a statement admitting fault for Duncan's injury.
10. Kirkham provided Garbutt's insurer with a typed and handwritten statement related to these events dated March 12, 2019 (the "Statement"). That Statement was identified in the Defendant's draft Affidavit of Documents where privilege was claimed. The Statement has not been produced.
11. Counsel for the parties communicated to schedule examinations. The Plaintiffs served a Notice on May 11, 2020 seeking to examine

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Kirkham on behalf of the Defendant. The same day, counsel advised that Kirkham was no longer employed by the Defendant suggesting another representative, Trevor Jay. Counsel for the Plaintiffs requested and it was agreed that Nicholson would be produced.

12. The examination of Nicholson was completed on June 24, 2020. Counsel for the Plaintiff's asked for "the particulars" of Kirkham's Statement during this examination. Counsel for the Defendants then provided a summary of the Statement.
13. The Plaintiffs set this action down for trial on December 16, 2020. The Plaintiffs filed their Certification Form with the Trial Coordinator on March 22, 2021. A pre-trial date has been set for November 24, 2021. No trial date has yet been set.

Analysis

14. The Plaintiffs must persuade the Court that the following three-part test for leave to be granted under Rule 31.10 have been satisfied:
 - (a) The information sought cannot be obtained from other persons the Plaintiffs are entitled to examine or from Kirkham;
 - (b) It would be unfair to require the Plaintiffs to have a trial without examining Kirkham; **and**,
 - (c) The examination of Kirkham will not cause undue delay of the trial, unreasonable expense or unfairness to Kirkham.
15. There is no evidence of trial delay, unreasonable expense or unfairness to Kirkham should leave be granted. The desired examination

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would take no more than one hour and can be conducted remotely by video. The examination can be scheduled quickly to ensure that the November 24th pre-trial can proceed. This presents an efficient plan both in terms of time and expense. There is no unfairness to Kirkham.

16. I am not, however, satisfied that the other two parts of the test have been met.
17. The Plaintiffs examined Nicholson. I have reviewed the transcript of that examination filed as part of the Plaintiffs' Motion Record.
18. Nicholson was asked about his attendance at the residence and related involvement. He was asked about his knowledge of the attendance by and involvement of all other employees of the Defendant, including discussions and interactions by such employees with the Plaintiffs.
19. Photos of the plastic barrier were taken by each of the Plaintiffs and the Defendants after Duncan's incident. The Plaintiffs took eleven photographs and the Defendants three.
20. The photos taken by the Plaintiff were shown to Nicholson and related questions posed, including about the process for the installation of the barrier.
21. Nicholson was asked for his opinion of the barrier and whether anything should have been done differently based on the pictures taken by the Plaintiffs and those by the Defendant. Nicholson's response was "No, it looks like a very standard solid containment."
22. Plaintiffs' counsel asked for and was provided with the details of the Kirkham Statement during the Nicholson examination. The summary

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provided consumed five pages of the examination transcript. The summary advised of Kirkham's attendance, that he examined the plastic barrier and concluded that the barrier "looked normal" similar to hundreds Kirkham had seen previously.

23. Counsel for the Plaintiff asked Nicholson if he had knowledge of the alleged conversation between Kirkham and Elder, including any admission of fault then made by Kirkham. Nicholson stated that he had no knowledge.
24. No further details of Kirkham's involvement were asked of or otherwise sought through Nicholson. Specifically, Nicholson was not asked to make any inquiries of Kirkham about his inspection of the barrier or otherwise.
25. The only related undertakings sought by Plaintiff's counsel at the examination were for Kirkham's contact information and that of other involved former employees, copies of emails between Kirkham and the Plaintiffs, and copies of email communications or correspondence from Kirkham from February 6th forward in relation to the incident.
26. The Defendant provided answers to these in February, 2021. There is no suggestion that these answers were incomplete. The Plaintiffs only say that the emails produced did not provide further details of Kirkham's inspection or observations of the barrier.
27. Counsel for the Plaintiffs were able to contact Kirkham in May, 2021. Kirkham provided his personal email and mailing address. Kirkham declined to provide any further statement or information in relation to this action.

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28. The Plaintiffs submit that they require the opportunity to examine Kirkham about “his inspection of the plastic barrier”.
29. I do not doubt that Kirkham may have additional information about his inspection of the barrier beyond the summary details provided at the examination of Nicholson.
30. Kirkham has refused to provide further details. However, the Plaintiffs were entitled to ask Nicholson to make inquiries of Kirkham in pursuit of further details. No such request was made respecting Kirkham or any of the several other employees who attended at the residence. Accordingly, I do not accept that the Plaintiffs were unable to obtain any such further details through Nicholson. They never tried perhaps in the misplaced confidence that Kirkham would cooperate. Regardless, they could have asked Nicholson to make these inquiries of Kirkham. Not doing so is fatal to the Plaintiffs’ motion.
31. I am also not persuaded that it would be unfair for the Plaintiffs to proceed to trial without being able to examine Kirkham about his inspection of the barrier. As noted, the Plaintiffs took photographs of the barrier following the incident. The Plaintiffs will be able to give evidence respecting the state of the barrier. The Plaintiffs know from the summary of the Statement that Kirkham’s conclusion was that the barrier “looked normal”.
32. Kirkham will no doubt be called as witness by the Defendant. The Plaintiffs will have full opportunity to show all available photos to Kirkham, question him about his inspection and observations and challenge Kirkham in that regard, including about his opinion the barrier “looked normal”. This is very typical of the process for opposing witnesses in any trial.

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Witnesses are not normally examined under oath prior to trial. There is nothing unfair in this process as it pertains to Kirkham. The Plaintiffs will be in a similar position with respect to the other six employees who attended at the residence and, in particular, the employee who constructed the barrier. I would dismiss the Plaintiff's motion on this basis also.

33. I have considered the general directive provided by Rule 1.04 in deciding this motion. That directive is foundational. The Court should always strive for process efficiencies. That general directive cannot assist the Plaintiffs here where they have failed to meet the specific test articulated in Rule 31.10.

34. In conclusion, the Plaintiffs' motion is dismissed. If the parties cannot agree on the costs for this motion then the Defendant shall provide written submissions not exceeding three pages double spaced with standard margins along with a Bill of Costs and any relevant Offer(s) within 15 days of the date of this endorsement. The Plaintiffs shall provide their submissions not exceeding three pages double spaced with standard margins along with a Bill of Costs and any relevant Offer(s) within 25 days of the date of this endorsement.
