

CITATION: Hearn v. Maslak-McLeod Gallery Inc., 2018 ONSC 962
COURT FILE NO.: CV-12-455650
DATE: 20180208

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Kevin Hearn, Plaintiff

– AND –

Estate of Joseph Bertram McLeod, Deceased and Maslak-McLeod Gallery Inc.,
Defendants

– AND –

White Distribution Limited, 2439381 Ontario Inc., and Nathaniel Big Canoe,
Intervenors

BEFORE: Justice E.M. Morgan

COUNSEL: *Jonathan Sommer*, for the Plaintiff

Michael Pinacci, for the Intervenors

HEARD: February 8, 2018

**INTERVENORS' MID-TRIAL MOTION TO QUALIFY A SECOND EXPERT
WITNESS**

[1] Mr. Pinacci, on behalf of the Intervenors who are participating in this trial in the shoes of the Defendant, has tendered Kenneth Davies as an expert in graphoanalysis and forensic analysis of handwriting and signatures, with a view to opining on the authenticity of the handwriting and signatures on the object of art in issue here.

[2] There is some procedural irregularity in this motion – specifically, there was considerable delay in serving Mr. Davies' expert report. Mr. Sommer advises that he only received the report 2 days ago. The same issue arose yesterday with respect to the Paul Bremner report. I did not allow Mr. Bremner to give expert witness testimony, in part due to the late date on which Mr. Sommer was served with that report – only a day or two before the testimony was scheduled. A similar thing has happened with the Davies report. However, unlike with the Paul Bremner report, the issue here is strictly with the timing not the content of the report. The Bremner report was devoid of the requisite content for an expert report. That accusation is not being levelled at the Davies report – only the late arrival of the report is complained of.

[3] Mr. Pinacci responds that there are reasons for the lateness – both Mr. Davies and Mr. Pinacci himself have had some health issues. Moreover, there appears to be a bit of tit-for-tat between counsel. Mr. Pinacci states that when he requested a copy of the Carmen Robertson expert report in late October 2017, Mr. Sommer referred him to a copy of that report posted on John Goldi’s website. I am aware of Mr. Goldi’s website because Mr. Goldi himself appeared before me in a motion on October 2, 2017 applying for Intervenor status. I declined to grant that status to Mr. Goldi, but in the course of my reasons I noted that he already had an expert report in hand, being the report by Mr. Davies. At that time, I was advised that the Davies report was also posted on Mr. Goldi’s website, and I specifically commented in my endorsement that the Davies report might be useful to Mr. Pinacci in preparing his case if his own clients were granted intervenor status (which they eventually were).

[4] Mr. Sommer has conceded in his argument that he read the Davies report on the internet some time ago, but that he did not have a copy formally served on him until very recently. Accordingly, while there is a violation of the *Rules of Civil Procedure* in this late service, Mr. Sommer was not particularly prejudiced in his preparation of cross-examination. I understand his objection that the Plaintiff did not want to invest money in obtaining an expert of his own to respond specifically to Mr. Davies without knowing whether a formal report would be served and a response would be needed, but that does not persuade me that I should not hear Mr. Davies’ testimony. He is an acknowledged expert in his field and Mr. Sommer is apparently prepared to cross-examine him – he is at least as well prepared as Mr. Pinacci was to cross-examine Dr. Robertson.

[5] While the formal *Rules of Civil Procedure* are important, Rule 1.04(1) requires that the “rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.” I would be doing an injustice to this case if I did not allow the Intervenors to have this expert witness testify, as that would be putting the formality of the rules over the merits of the case. I allowed the Intervenors into this case partly because I thought it helpful to have experts appear from both sides – whatever the particular field of expertise or approach to the issues might be. Unfortunately, Mr. Bremner’s report created an unfairness to Plaintiff’s counsel that could not be overcome; Mr. Davies report does not create an unfairness of the same nature. Mr. Sommer will have ample time to test Mr. Davies through cross-examination, and I am confident that his preparation for that task will have been as thorough as has been his preparation for the entire trial.

[6] Mr. Davies has testified numerous time in Alberta Provincial Court, the Alberta Court of Queen’s Bench, the British Columbia Supreme Court, the Saskatchewan courts and before the Law Society of Alberta. He is an acknowledged expert in graphoanalysis, which is the analysis of handwriting and signatures. He was a document examiner for the Ontario Ministry of Revenue, and worked for the Insurers’ Advisory Organization in document authentication. He has a Certification from the International Graphoanalysis Society as a Graphoanalyst. He works with wills, various legal documents, paintings and other objects of art, and has even analyzed a purported Stevie Ray Vaughan signed guitar.

[7] Mr. Davies has signed the Expert witness form and understands that his opinion is to be objective and independent.

[8] I hereby qualify Kenneth Davies as an expert witness in graphoanalysis and forensic analysis in handwriting and signatures.

Morgan J.

Date: February 8, 2018