

SUPERIOR COURT OF JUSTICE

5 B E T W E E N:

SILVANA CEFARELLI

Applicant

10 -and-

HAMILTON HEALTH SCIENCES

COREY SAWCHUK

15 ANTONIO COSTANTINI

Respondents

20 R U L I N G

BEFORE THE HONOURABLE JUSTICE D.S. CRANE
on May 3, 2013, at HAMILTON, Ontario

25
30 APPEARANCES:

M. Handelman/A. Procope

Counsel for the Applicant

C. Clarke

Counsel for the Respondents

(i)
Table of Contents

SUPERIOR COURT OF JUSTICE
T A B L E O F C O N T E N T S

W I T N E S S E S

WITNESSES

Examination
in-Chief

Cross-
Examination

Re-
Examination

5

10

E X H I B I T S

EXHIBIT NUMBER

ENTERED ON PAGE

15

RULING

1

20

REASONS FOR JUDGMENT

REASONS FOR SENTENCE

25

30

Transcript Ordered:

May 3, 2013

Transcript Completed:

May 15, 2013

Ordering Party Notified:

May 15, 2013

1.
Ruling
Crane, D.S.

- . . . APPLICATION BY MR. HANDELMAN
- . . . SUBMISSIONS ON APPLICATION BY MS. CLARKE
- . . . SUBMISSIONS IN-REPLY BY MR. HANDELMAN

R U L I N G

CRANE, D.S. (Orally)

The relief asked on this application is restricted to an interim order to suspend the no-CPR order to consideration by the Consent and Capacity Board which is currently hearing a palliative care plan, proposed by Dr. Sawchuk. Dr. Sawchuk made a medical order on the respondent's chart of 30 April, 2013 to come into effect 2 May, 2013 at 9:00 a.m. as follows: no chest compressions, no defibrillation. A further order was made amending the order to change the "come into" effect provision to Friday, 3 May at 1700 hours. In addition, a clinical note was attached. This application is brought in the Superior Court.

The applicant seeks the exercise of the jurisdiction of the Superior Court to grant an order that, in effect, directs the treatment of the respondent patient, albeit on the basis that the no-CPR order is not a continuation of the existing post, in accordance with the physician-ordered plan of treatment of Dr. Jones, dated November 2012. I find that these are not the facts here, and that the post remains in place. The post includes within

2.
Ruling
Crane, D.S.

5
10
15
20
25
30

it the discretion of the most responsible physician with regard to the components of cardiopulmonary resuscitation. Here, the component of interest is cardiac compression. Dr. Sawchuk, the present MPR, makes the same medical assessment as Dr. Jones, the author of the post of November 12th, as to these components, that is, as to the application of these components. Recognition of treatment discretion residing in the MPR is found in at least three cases that have been cited to me; *Rasouli vs Sunnybrook*, a decision of our Court of Appeal, 107 Ontario Reports 3rd, page 9 with reference at paragraph 46; secondly, a decision of the Manitoba Court of Appeal in *Child and Family Services of Manitoba vs R.L.*, 154 Dominion Law Reports, 4th series, 409 at paragraphs 15 to 17; and further, a decision of this court, an unreported decision of Justice Conway of 22 October 2010, *Cheah vs Sunnybrook*. The applicant overreaches on the jurisdiction of the Consent and Capacity Board to that which properly resides in the authority of the treating team through their most responsible physician, the respondent Dr. Sawchuk. The applicant in this application is in effect seeking CPR treatment, a CPR treatment response that will harm the patient with no possibility of benefit. See, for example, paragraphs 52 and 53 of Dr. Sawchuk's affidavit. Accordingly, there is no irreparable harm demonstrated if the injunction is not granted. Further, it is my view there is no serious question to be tried. I find that it is in

3.

Ruling

Crane, D.S.

5
10
15
20
25
30

the best interests of the patient, Mr. Costantini, that CPR not be performed. I conclude on all the evidence before me in making the best interest assessment that the applicant's love for her father and her desire that he live has so consumed her judgement that she is currently is not functioning in a role of substitute decision-maker. In my view, she is not acting under her informed consent requirement, emphasis on informed. Indeed, it appears from her evidence that she believes that she is acting in the enforcement of her father's wishes, expressed, I can only conclude, some long time past when he enjoyed capacity, but in my view, without the applicant rationally considering the change of her father's health since the time of such an expression of his wishes. In any event, whatever the applicant's motivation, I find that her decision here does not represent the best interests of the respondent. I have decided this application relying heavily on the affidavit of Dr. Sawchuk. I accept the opinions as set out in paragraph 65, and order accordingly: this application is dismissed respectfully to the applicant and all of the family of the respondent, Antonio Costantini. I'll endorse the record, the application record, upon reasons given orally, the application is dismissed. I see there's a claim for costs.

Are there submissions as to costs, or are there other matters that should be dealt with? It may be

4.

Ruling

Crane, D.S.

that this is just a small step in a larger process and you may want to have me defer the costs, I don't know.

5
10
15
20
MS. CLARKE: It's an excellent question Your Honour. I, in many respects, can anticipate that my friends may suggest this is a matter that's not appropriate for costs, and I-I understand that submission. I think if the traditional pattern is that on a successful outcome of such a matter that costs would be awarded, and I think that it is reasonable that a modest sum be awarded given the amount of time and energy that's gone into this, and I think that a-would suggest to Your Honour that a-a sum which is reasonable and modest relative to the actual costs incurred would be in the range of about \$1,500 and would make the point to the applicant of the significant and ongoing, I guess- that such matters ought not be brought lightly, but I-I won't make a strong submission on it and invite either way, Your Honour.

25
THE COURT: No, I understand. Alright. I had raised the costs because the applicant had asked for them, so it's in issue before me. Mr. Handelman, what do you say as to costs?

30
MR. HANDELMAN: Your Honour, I think it's traditional to ask for costs in any application and in replying to them to ask for costs as well. I'm fairly certain that Your Honour would be the first Superior Court judge in Ontario to award costs on a matter arising out of the Consent and Capacity Board proceedings, given the rather unique nature,

5.
Ruling
Crane, D.S.

5 and although my friend's client has been successful in this matter, I ask Your Honour in deciding whether or not to award costs, to consider the perspective of the applicants in all of the circumstances and decide that costs are not appropriate. Thank you.

THE COURT: Thank you. Do you have a reply Ms. Clarke?

MS. CLARKE: I don't, Your Honour...

10 THE COURT: Alright

MS. CLARKE: ...we're here about the substance...

THE COURT: Alright

MS. CLARKE: ...not that issue. Thank you.

15 THE COURT: I made the following endorsement and on the submissions of counsel for the respondent suggesting only a modest sum and on the submission of counsel for the applicant of the public interest in the issues here, there will be no order as to cost. I thank counsel for your presentation and preparation of this interesting issue. I shall follow it with interest-I think it's important, and I'm glad you brought it forward.

20

25

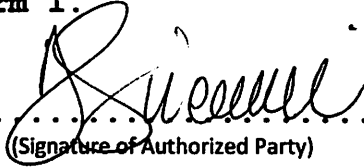
30

6.
Certification

Form 2
Certificate of Transcript
Evidence Act, Subsection 5(2)

5 I, J. Sivcevic, certify that this document is a true and accurate transcript of the Recording of Silvana Cefarelli vs. Hamilton Health Sciences, Corey Sawchuk, and Antonio Costantini in the Superior Court of Justice, held at 45 Main Street East, taken from Recording No. 4799-608-20130503-102606 which has been certified in **Form 1**.

10 May 15, 2013
(Date)

..... 
(Signature of Authorized Party)

15

20

25

30