THE SUPREME COURT OF BELIZE A.D. 2017

CLAIM NO. 532 of 2016

BRENAE TIMMONS **FIRST CLAIMANT**
BY NEXT FRIEND BERNARD TIMMONS
KEISHA RENEAU **SECOND CLAIMANT**

AND

MINISTRY OF HUMAN DEVELOPMENT **DEFENDANTS**
PICKSTOCK DEVELOPMENT ASSOCIATION
BRIAN ESPAT
ATTORNEY GENERAL OF BELIZE

BEFORE the Honourable Madam Justice Sonya Young

Hearings
2017
15th May

Written Submissions
1st and 4th Defendants – 12thMay, 2017

Decision
15th May, 2017

Mr. Kareem Musa for the Claimant.
Mrs. Alifia Elrington-Hyde for the Second Defendant.
Mr. Herbert Panton for the Third Defendant.
Ms. Leonia Duncan for the First & Fourth Defendants.

Keywords: Civil Procedure – Application for Witness Summons to issue – Such Witness to Produce a Document Not Disclosed – Application for Appointment of Expert – Applications made at Pre-trial Review – Good Reason – Case Management Order having been made – Proper Procedure for Disclosure and Production of Documents

ORAL DECISION

1. On the 3rd and 4th May, 2017, applications for the appointment of an expert (a neurosurgeon) and for a witness summons to issue respectively, were filed by the Claimant. The claim concerned the personal injury of Brenae, a child. The neurosurgeon was being requested as a witness to render an opinion on her present condition and prognosis for the future. The witness summons was sought to have the Chairman of the Central Building Authority testify and present a Report he had prepared assessing the iron gate that had fallen on and injured Brenae. The application was listed for hearing at the pre-trial review on 9th May, 2017. On that date directions were given for affidavits and submissions to be filed in response. The pre-trial review was adjourned to the 17th May, 2017 in an attempt to preserve the trial dates of the 23rd and 24th May.

2. The court considered the applications and the affidavits filed in support of and in opposition thereto, as well as the written and oral submissions made. Counsel for the second Defendant did not file an affidavit and informed that there was no objection to any of the applications. This is my oral decision.

The Witness Summons

Consideration:

3. On the 7th March, 2017, a Case Management Conference was conducted where certain orders were made. The Claimant was present in person and participated actively through senior counsel holding for his attorney. One of these orders made it clear that witness statements were to be filed and served for any witnesses intended to give evidence at the trial. Those witness statements were ordered to be the evidence-in-chief for any witness called. There was no provision for witnesses giving only oral testimony. Moreover,

dates were given for the filing of written objections and responses to anything contained in those witness statements and/or their attachments. Further, Rule 29.11 provides an automatic sanction where a witness statement for any such witness has not been served within the time ordered. That witness cannot be called to give evidence unless the court permits.

4. No application has been made for the extension of time in which to file a witness statement or summary for this intended witness or for the relief from sanction. Nor is there, before the court, an application for permission for the intended witness to give only oral testimony despite the Case Management Order that was made. This court is well aware that the general rule is that evidence of witnesses is to be given at trial by their oral evidence but this, of course, is subject to provisions to the contrary contained in the Rules and any order of the court – see Rule 29.2.

5. At Case Management an order was also made for the number of witnesses each party was allowed to call. During that process, each party was asked to disclose orally not only the number of witnesses they expected to call but also who those witnesses were. It is therefore not correct to say that the Claimant only became aware of who the first and fourth Defendants' witnesses were when the witness statements were served. In any event there is no property in witnesses and it was open to the Claimant to organize his case as he desired.

6. That Case Management Order also made provision for standard disclosure on or before the 21st March, 2017. The Claimant was aware since early 2016 that this report existed. He was also aware since the date ordered for disclosure that this document had not been disclosed. The Rules provide a

number of actions, any of which he could have chosen to take in response. He could have sought specific disclosure pursuant to Rule 28.5. It must not be forgotten either that the duty of disclosure in accordance with any order for disclosure continues until proceedings are concluded, as Rule 28.12 informs. Further, such a disclosure order could be enforced pursuant to Rule 28.13(2), through an application to strike out a party's statement of case or some part thereof. Additionally, an application could have been made for the production of that document at a production hearing before trial – see Rule 33.16. This may have been of particular assistance if production of the document could not have been enforced against any of the parties as it may have been in the possession of a non-party to the claim. A request for information pursuant to Part 34 may also have been of some use to the Claimant.

7. However, he chose not to avail himself of any of these avenues. Rather, at this very late stage, he seeks permission to issue a judgment summons for a witness to produce a document the contents of which he seems unaware or unable or unwilling to disclose. Whether the document is admissible or not is unknown. This is of course one of the tests for issuing a witness summons for the production of a document. The document must not only be relevant it must be admissible. In their submissions the first and fourth defendants raise issues of privilege. I state only that claims of right to withhold disclosure cannot be made by submissions, see Rule 28.14.

8. This document has not been disclosed by the Claimant and so he is barred from using it at trial unless he is given permission. He has not sought any such permission. Counsel may have been able to use the witness summons to secure the witness's attendance at a production hearing but certainly not at

the trial of a matter where specific Case Management Orders have been given. For completeness it is noted that the consequence of any party's failure to disclose a document by the date ordered means only that the defaulting party may not rely on that document at trial.

Findings:

9. This is a managed case where the case management powers of the Court have been applied and orders made accordingly. These orders and the Rules of Court ought to be complied with.

10. To my mind a witness summons could be issued where no order such as the ones referred to above had been made. But to allow the order of the court and the applicable rules to be circumvented in this manner, militates entirely against the overriding objective. For all these reasons this application is dismissed with costs to the first, second and fourth Defendants.

The Expert Report
Consideration:

11. This court is aware that an application for leave for the appointment of an expert ought to be made at Case Management Conference. However, the courts powers at pre-trial review are the same as they are at Case Management. The question now is whether the Claimant has a good reason for bringing the application at this time and whether the other parties would be prejudiced if his request was allowed.

12. The Applicant in his second affidavit in support states:

> *"2. Prior to the filing of this Application, two experts in the field of neurology/neurosurgery had conducted medical examinations of Brenae after the gate had fallen on top of her on the 29th of January, 2016, namely Dr. John Sosa and Dr. Javier Dupuy.*
> *3. When I asked the said doctors if they would be willing to provide expert evidence and to testify in these proceedings, they indicated that they were not*

comfortable doing so as they were employed by the Government of Belize and this claim involved the Government of Belize.
4. As they were unwilling to testify I had to locate another medical practitioner that specialized in the field of neurology/neurosurgeon.
5. On or around the 2nd of May, 2017, I contacted Dr. Andre Joel Cervantes, a neurosurgeon, who confirmed that he would be willing to testify and provide expert evidence as it related to the condition, diagnosis and prognosis of Brenae."

13. He also submits that the report had already been completed in anticipation of a successful application.

Findings:

14. The Claimant has presented a good reason for making this application at this stage. There will be no inconvenience or prejudice caused to the Defendants since it is not in issue that Brenae was injured. The expert report is expected to speak only to the extent of her injuries and perhaps a prognosis for her future. These are only relevant to the assessment of damages. Such an assessment could easily be left until after a trial and finding on liability. The original trial date could therefore be preserved and a fresh date be given for the assessment, if necessary.

15. Further, I find the evidence to be provided through the expert to be not only relevant but necessary. Indeed, it was incumbent on the Claimant to secure the co-operation of his witnesses even prior to Case management for the efficient progression of his case. So while I do not appreciate the time at which this application is being made, in the circumstances, in the interest of justice and relying on the overriding objective I will allow it. But he will be condemned in costs.

IT IS THEREFORE ORDERED:

1. The application for leave to issue a witness summons for Mr. C. Phillip Waight is dismissed.
2. Leave is granted for the appointment of Dr. Andre Joel Cervantes as an expert and to render a written report in this matter.
3. That written report must be filed and served by 18th May, 2017.
4. Any written questions may be put to the expert no later than 26th May, 2017.
5. Written answers to those questions must be filed and served by 2nd June, 2017.
6. Costs to the first and fourth defendants on both applications in the sum of $1,000.00.
7. Costs to the 3rd Defendant on both applications in the sum of $1,000.00.

SONYA YOUNG
JUDGE OF THE SUPREME COURT