[2022] JMSC CIV. 157

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013HCV02655

BETWEEN	**DUELING HINDS**	**CLAIMANT**
AND	**AUGUSTUS MCLEAN**	**DEFENDANT**

IN CHAMBERS

Mr Vaughn O. Bignall instructed by Bignall Law

Miss Jacqueline Cummings instructed by Archer Cummings & Company

Heard: March 17, 2022 and June 9, 2022

SUMMARY JUDGMENT – Canon V (p) of The Legal Profession (Cannons of Professional Ethics) Rules - whether an Attorney can rely on his own affidavit - the defendant's duty to comply with CPR 10.5- whether the provisions are mandatory- CPR 26.2 and the requirement to be heard

ORR, J (AG)

Background to the Application

[1] On October 12, 2012 a collision occurred on Spanish Town road in the vicinity of Riverton Meadows, in the parish of Saint Andrew. This collision involved motor vehicle registered 2832 EA owned and operated by the Defendant Augustus McLean and another vehicle registered 9775 FJ in which Dueling Hinds, the Claimant was a passenger.

[2] Mr. Hinds subsequently commenced this claim on May 1, 2013 claiming damages for negligence and more particularly damages for the injuries he alleges that he sustained in the motor vehicle accident on October 12, 2012.

[3] In his Particulars of Negligence, he outlines several allegations as against the Defendant and/or his driver. So far as is relevant to this application, at paragraph 5(h) of his Particulars of Negligence, he outlines that:

> *"the Defendant whether by his servant and or agent was negligent in that he:*
>
> *h) Failed to keep the blue Nissan Sunny NX motor car numbered and lettered 2832 EA, at a safe distance behind another vehicle along the roadway. Being that the said blue Nissan Sunny NX motor car numbered and lettered 2832 EA, along Spanish Town Road in the vicinity of Riverton Meadows in the parish of Saint Andrew, drove in a careless manner failed to stop and collided into the rear of the grey Nissan La Festa motor car numbered and lettered 9775 FJ, aboard which the claimant was a passenger at all material times, that was travelling in the same direction, slowed indicated to turn right and stationary when the collision occurred, causing the Claimant to suffer injury, loss and damage and incur expense."*

[4] In his defence, Mr. McLean admits ownership of the vehicle as well as the time and date of the collision. He goes further to admit that he was driving the motor vehicle at the material time and also admits to the collision. The defence is most relevant to the application before me and I have therefore outlined it below:

> *"I dispute the claim on the following grounds:*
>
> 1. *The Defendant is unable to admit or deny paragraph 1 of the Particulars of Claim.*
>
> 2. *The Defendant admits that he is the owner and at the material time, driver of motor vehicle registered 2832 EA.*
>
> 3. *The Defendant admits that on the 12th October 2012, his motor vehicle registered 2832EA was involved in an accident along Spanish Town road in the parish of Saint Andrew.*

> 4. *The Defendant denies the Claimant's particulars of injuries, loss and damage suffered by the Claimant and puts the Claimant to strict proof of same,*
>
> 5. *Save as has been hereinbefore expressly admitted the defendant denies each and every allegation in the Particulars of Claim as if same had been herein set out and specifically traversed seriatim."*

[5] On October 11, 2021, the Claimant filed a Notice of Application for Summary Judgment which was before me on March 17, 2022. After hearing submissions from both counsel I reserved my decision which I now outline below.

[6] The Claimant's application was supported by an affidavit from counsel Mr. Vaughn O. Bignall, wherein he outlined that:

> *"the Defendant presented a bare defence which failed to set out their (sic) case or any facts on which the Defendant intends to rely on to dispute the claim, they (sic) simply admit the collision took place on the date in question, and involving the parties in question."*

[7] In his submissions he argued that the defence before the Court was a bare denial and urged the Court to grant the order for summary judgment in favour of the Claimant.

[8] In both her oral and written submissions Ms Cummings challenged Mr. Bignall's ability to rely on his own affidavit at the hearing. Counsel relied on Canon V (p) which she said precluded Mr. Bignall from relying on his own affidavit.

[9] She further submitted that there was no affidavit of merit before the court, as the individual deposing the affidavit must be able to speak to the facts of the accident, or must be someone who was present at the time of the collision.

[10] She submitted further that in order to obtain summary judgment, the Claimant would have to provide first hand evidence by someone who could say how the collision occurred and consequently on the strength of that evidence, the Court would issue summary judgment as the defence would not succeed.

[11] In the circumstances, she argued that the Claimant's application could not succeed as he had not provided any evidence that the Defendant had no prospect of defending the claim on the issue of liability. She went further to remind the Court that it is for the Claimant to prove the negligence on the part of the Defendant.

[12] For the court to find that the Defendant has no reasonable prospect of success, the Claimant has to prove that the Defendant's actions caused the collision, or the Defendant's negligence caused the Claimant's injuries or loss.

[13] In closing, she submitted that the Defendant is not asserting any fact different from the Claimant that a collision took place, and he is merely putting her to strict proof thereof as permitted by CPR 10.5(3)(c).

ANALYSIS

[14] There is merit in counsel's submission that Mr. Bignall is unable to rely on his own affidavit to advance the Claimant's application. Miss Cummings referenced Canon V of the Legal Profession (Canons of Professional Ethics) Rules. Rule (p) provides:

> *"While appearing on behalf of his client, an Attorney shall avoid testifying on behalf of his client, except as to merely formal matters, or when essential to the ends of justice, and if his testimony is material to the cause, he shall, wherever possible, leave the conduct of the case to another Attorney"*

[15] Indeed Mr. Bignall would not be permitted to rely on his own affidavit as it includes evidence that is material to the application before the court.

[16] CPR 11. 9(1) provides that an applicant need not give evidence in support of an application unless it is required by a rule, practice direction or court order.

[17] However, Rule 15.5(1), which is relevant to the Claimant's application, provides that the applicant for summary judgment must file affidavit evidence in support of the application. The use of the word "must" in Rule 15.5 (1) mandates that there has to be affidavit evidence provided in support of the application.

[18] In the absence of permissible affidavit evidence, the Claimant's notice of application for summary judgment could not be determined at the hearing.

[19] Before leaving this issue, Miss Cummings has submitted that the evidence in support of an application for summary judgment must be from someone who can give first hand evidence as to how the collision occurred in order to establish liability. It is to be remembered however, that this is not a strict requirement. The Court can grant summary judgment where the Defendant raises no triable issues on his defence.

[20] In such a case there would be no need for affidavit evidence. The Court in this instance considers the Defendant's statement of case, and not the Defendant's affidavit evidence describing how the accident occurred.

[21] Rule 15.6(1) (a) provides that:

> *"On hearing an application for summary judgment the court may-*
>
> *(a) give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;"*

[22] Thus on an application for summary judgment the Court can be asked to consider the pleadings before the court. Where the Defendant's pleadings do not establish a reasonable defence, the Court may grant an order for summary judgment against a defendant.

[23] In ***Sagicor Bank v Marvalyn Taylor Wright*** *[2018] UKPC 12*, Lord Briggs said at paragraph [19];

> *"The court will, of course, primarily be guided by the parties' statements of case, and its perception of what the claim is will be derived from those of the claimant. This is confirmed by Part 8.9…"*
>
> *He went on to state further at paragraph [21] that:*
>
> *"The Board considers it axiomatic that, if a pleaded claim is met with a defence (whether pleaded or deployed in evidence) on a summary judgment application, which, if true, would still entitle the*

claimant to the relief sought, then generally there cannot be a need for trial…"

[24] Although the Claimant's summary judgment application could not proceed, I have nevertheless considered the defence filed by Mr. McLean. CPR 26.2 grants the Court the power to make orders on its own initiative. CPR 26.2 and the Court's general powers of Case Management also impose a duty on Judicial Officers to manage cases at every stage. This obligation requires the Court to at all times use its powers of Case Management to move every claim towards its final determination; whether by trial or any other order of the Court.

[25] The CPR recognises that while the Court must safeguard each litigant's right to be heard, this right must be balanced with the Court's duty to utilize its time and resources and those of the parties efficiently.

[26] The overriding objective of enabling the court to deal with cases justly includes saving expense and allotting to each case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

[27] The inclusion of Mediation (Part 74) and the various Summary Applications under the Civil Procedure Rules highlights the fact that not all claims will be disposed of by a trial. As Lord Briggs has stated in **Sagicor Bank v Marvalyn Taylor Wright**, (supra) only those matters which raise triable issues will proceed to trial. It is against this background that I have considered the Defendant's defence.

[28] Part 10 of the CPR sets out the procedure for disputing the whole or part of a claim. Rule 10.2 explains how a Defendant is to respond to each type of claim and the consequences for failing to file a defence. Rule 10.3 explains the time period for filing a defence 10.4 speaks to the requirement to serve the defence on all parties to a claim. Rule 10.5 which is most relevant to these proceedings clearly outlines the Defendant's duty to set out his case.

[29] Rule 10.5 is important and is worth repeating here. It provides:

> *"(1) The defence **must** set out all the facts on which the defendant relies to dispute the claim.*
>
> *(2) Such statement must be as short as practicable.*
>
> *(3) In the defence the defendant **must** say -*
>
> > *(a) which (if any) of the allegations in the claim form or particulars of claim are admitted;*
> >
> > *(b) which (if any) are denied; and*
> >
> > *(c) which (if any) are neither admitted nor denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove.*
>
> *(4) Where the defendant denies any of the allegations in the claim form or particulars of claim-*
>
> > *(a) the defendant must state the reasons for doing so; and*
> >
> > *(b) If the defendant intends to prove a different version of events from that given by the claimant,*
> >
> > *the defendant's own version must be set out in the defence.*
>
> *(5) Where, in relation to any allegation in the claim form or particulars of claim, the defendant does not -*
>
> > *(a) admit it; or*
> >
> > *(b) deny it and put forward a different version of events,*
> >
> > *the defendant must state the reasons for resisting the allegation. (emphasis mine)*

The rule is replete with the word "must" which emphasises the mandatory nature of the requirements under this rule. Nembhard, J emphasized the strict interpretation of CPR 10.5 in ***Rasheed Wilks v Donovan Williams*** *[2020] JMSC Civ 234* where she said that:

> *"The use of the word 'must' in the rule emphasizes the mandatory element of the provision."*

She went further to state that:

> *"[35] The language of rule 10.5 of the CPR is plain and precise. The word 'must', as used in the context of the rule, is absolute. It places on a defendant a strict and unqualified duty to adhere to its conformity. Failure to comply with the rule as mandated offends the rule."*

[30] CPR 10.5 unlike its predecessor under the Civil Procedure Code, requires the Defendant to set out his defence clearly so that the Claimant can have a clear understanding of the defence which it must meet.

[31] Morrison, JA (as he then was) said that *"…pleadings…remain important to make clear the general nature of the case which the other side should expect to meet…"*[1]

He adopted the reasoning of Lord Woolf MR where he said *"…pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular, they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader".*[2]

[32] In assessing Mr. McLean's defence he has admitted that he is the owner and driver of the motor vehicle which collided into the vehicle in which the Claimant was a passenger. These facts on the Claimant's claim are therefore no longer in issue.

[33] The Claimant goes on to say that as a result of this collision he suffered injury and loss. The Defendant denies this injury and loss without more.

[34] Negligence as a tort is the breach of a legal duty to take care which results in damage. As Lord Wright explained in ***Lochgelly Iron and Coal Co. Ltd. v Mc Mullan*** *[1934] AC 1, 25*:

> *"… in strict legal analysis, 'negligence' means more than heedless or careless conduct, whether in omission or commission, it properly*

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[1] Gasoline Retailers of Jamaica Limited v Jamaica Gasoline Association [2015] JMCA Civ 23 para [48]
[2] McPhilemy v Times Newspapers Limited & Othrs [1999] 3 All ER 775

connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing"

[35] Miss Cummings has argued that the burden is on the Claimant to prove that the Defendant's wrongdoing was the cause of the Claimant's injuries and this is what the Defendant is asking the Claimant to prove. She is correct, but before the Defendant can seek to challenge the Claimant at trial, he must first put the Claimant's statement of claim in issue in his defence.

[36] Rule 10.1 requires a Defendant to set out all facts which he relies on to dispute the claim. Rules 10.5(4) (a) and (b) impose a duty on a Defendant who denies an allegation to state his reasons for doing so. Where he intends to rely on a different version of events, he must set out his version of events in his defence. Indeed, Rule 10.7 provides that a Defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out in the defence, unless the court gives permission.

[37] In his defence, Mr. McLean has not put forward an alternative set of facts to explain how the collision occurred such that in assessing the defence filed, the court can consider that based on the Defendant's pleadings, causation cannot be imputed to him.

[38] He has not for example denied the Claimant's presence in the vehicle, or countered that the impact of his vehicle was not "violent" or "forceful" such that the Claimant could not have sustained any serious injury. These are a few examples of responses which would fulfil the requirement under Rules 10.5 (1), (4) and (5) and in doing so put causation and therefore liability in issue. The necessity for the Defendant to set out his own version of events in his defence is because this is the only way that he can join issue with the Claimant's claim in order to challenge the Claimant at trial.

[39] The Defendant has therefore failed to comply with CPR 10.5 (1), (4) and (5). The defence as pleaded amounts to a bare denial of the Claimant's claim. How fatal is this breach of the rules by the Defendant?

[40] This court's decision in ***Medine Forrest v Kevin Anthony Walker & Anor***[3] is instructive as the facts in that case are quite similar to the instant case.

[41] Medine Forrest was travelling in a vehicle which became stationary when the Defendant's vehicle collided into the rear of the vehicle. In her Particulars of Claim, Miss Forrest clearly outlined the Defendant's Particulars of Negligence and her resultant Particulars of Injuries.

[42] The defence filed in that case was similar to the one filed by Mr. McLean in that the Defendant did not deny that the Claimant was in the other vehicle, he simply said that no one was injured in the accident and that he challenged the Claimant to strict proof of her injuries. He did not provide any information that would join issue with the claim.

[43] Rattray, J in considering the Claimant's application for summary judgment also considered Rule 10.5 and concluded that:

> *"Rule 10.5 of the CPR indicates that bare denials do not constitute a good Defence. That particular Rule places an obligation on a Defendant to state all the facts on which he relies to dispute the claim, and in the circumstances a simple denial is not sufficient."*[4]

[44] He referenced the judgement of Sykes J (as he then was) in the often cited **Janet Edwards v Jamaica Beverages Limited** Suit No. C.L 2002/E-037, a judgment delivered on the 23rd March, 2010 where he said:

> *"32. …According to Part 10 of the CPR, it is no longer possible to have a series of bare denials. Rule 10.5(1) says that the defendant*

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[3] [2019] JMSC Civ. 25
[4] Supra paragraph 25

must set out all facts on which it relies to dispute the claim. Rule 10.5 (3) says that the defendant 'must' [that word again] say which (if any) of the allegations in the claim form or particulars are admitted; which (if any) are denied; and which (if any) are neither admitted nor denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove' (my emphasis)

33. Rule 10.5 (4) specifically states that where the defendant denies any of the allegations in the claim form or particulars of claim the defendant 'must state the reason for doing so; and if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence' (my emphasis).

34. Rule 10.5 (5) specifically states that where a defendant does not admit an allegation or does not admit the allegation and does not put forward a different version of events, 'the defendant must state the reasons for resisting the allegation' (my emphasis). Neutrality is not a viable option under the CPR.

…

36. It is obvious that the whole of rule 10.5 has relegated to the dust bin of legal history the phenomenon known as a bare denial that bedevilled civil litigation in times past. Rule 10.5 is replete with the word 'must'.

37. … Simply to deny the particulars of claim is not a proper defence under the new rules."

He went on to explain that:

"48. The CPR represents an attempt to modernise civil litigation by emphasizing efficiency, proportionality and reduction of costs while maintaining principles of fairness. It does this by asking that the parties plead in a manner (Parts 8 and 10) which enables the court to carry out is (sic) duty to manage cases actively (rule 25.1) by identifying issues early (rule 25.1 (b)) and deciding which issues need a trial and which can be dealt with summarily (rule 25.1 (c)) or not dealt with at all (rule 26.1 (2) (k)). The vice of the bare denial defence is that no one knows which issues are joined; which issues can be resolved summarily; which issues need a trial and which issues do not need resolution. This is the era of cards faced-up-and-on-the-table litigation so that all can see the cards…"

[45] As I have outlined earlier, Mr. McLean's defence does not fulfil this mandatory requirement. He has simply denied the claimant's allegations. In merely denying Mr. Hinds' injuries and putting him to strict proof, Mr. McLean has not offered a basis for this denial or put forward any facts that would challenge the claimant's allegations that the Defendant's negligence resulted in his loss.

[46] The defence concludes with the sweeping all-encompassing clause:

> *"Save as has been hereinbefore expressly admitted the defendant denies each and every allegation in the particulars of claim as if same had been herein set out and specifically traversed seriatim."*

[47] This is a throwback from pleadings under the Civil Procedure Code which did not require the detail now mandated under CPR 10.5. It is a general denial of the Claimant's claim and cannot therefore assist a Defendant in complying with the requirements of CPR 10.5.

[48] The term 'bare denial' in keeping with the case law is, simply put a denial with no substance. The mandatory requirements of Rule 10.5 are to ensure that the Defendant is not allowed to state simply that he disagrees with the Claimant's case and provide the court with nothing further to consider.

[49] There are no facts pleaded in the Defendant's defence which raise triable issues on the Claimant's statement of case to justify a trial. In the circumstances, it is my intention to strike out the defence and enter judgment for the Claimant with damages to be assessed. As I have outlined, the defence is in breach of CPR 10.5(1), (4) and (5) and as a result, raises no triable issues which justify this claim proceeding to trial.

[50] CPR 26.3(1)(a) and (d) are applicable and allow the court to impose a sanction by striking out a statement of case if it appears to the court that:

> *(a)There has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;*
>
> *…*

> *(d)That the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.*

[51] In keeping with CPR 26.2(2) and the principles of Natural Justice, the Court must give any party likely to be affected by the proposed order a reasonable time to be heard. Accordingly, Counsel for the Defendant is invited to file written submissions in relation to these findings.