



[2019] JMSC Civ. 29

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO 2010 HCV 00924**

<b>BETWEEN</b>	<b>GERTRUDE BLAKE</b>	<b>1<sup>ST</sup> CLAIMANT</b>
	<b>(Administrator of the Estate of Cleopatra Gray)</b>	
<b>AND</b>	<b>GERTRUDE BLAKE</b>	<b>2<sup>ND</sup> CLAIMANT</b>
<b>AND</b>	<b>MILJAVA HEALTH COMPLEX LTD</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>DR SUKANYA PRASAD</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**IN CHAMBERS**

**Mr Jeffrey Daley instructed by Betton-Small Daley and Co Attorneys-at-law for the Claimants/Applicants**

**Ms Jodi-Ann Gaffe instructed by Vascianna Whittingham Attorneys-at-law for the Second Defendant**

**HEARD: 4<sup>th</sup> March 2019**

**Civil Procedure — Application to appoint expert – Whether an expert’s report can refer in detail to the content of a medical report which the defendant has objected to - Civil Procedure Rules 2002 Part 32**

**Master Tania Mott Tulloch-Reid (Ag.)**

**[1]** The oral judgment of this application was delivered on March 4, 2019, which judgment is now reduced to writing.

- [2] The Claimants/Applicants have applied to the Court for an order that Dr Derrick Aarons be appointed as an expert witness. The bases of the application are set out in the Notice of Application for Court Orders filed February 28, 2019 with Affidavit in Support, sworn to by Gertrude Blake, which was also filed on February 28, 2019. The Applicant admits that the Notice of Application was short served on the Second Defendant. The First Defendant was not served at all and counsel for the Claimants has indicated that this was not done as there is a default judgment entered against the First Defendant and as such, while they have to serve the First Defendant with the trial documents, there is no need to serve the First Defendant with the interim applications. The determination of that issue was not necessary at this stage. The Second Defendant did not raise an objection to being short-served with the Application and was able to give full submissions in objection to the Applicants' application.
- [3] The Second Defendant/Respondent did not file an affidavit in response to the application but put forward her objections *via* the submissions made by her attorney-at-law, Ms Jodi-Ann Gaffe. The basis of the objection is that Dr Aarons' report was prepared based on the parties' statements of case which comprise allegations of facts not yet proven to be true and on a medical report prepared by Dr R E Brown, which has been objected to and which the Second Defendant wishes for the doctor to come to Court to be cross-examined on.
- [4] It is not clear to me what is the basis for the Second Defendant to be raising an objection to the medical report prepared by Dr Brown when it simply sets out the findings of her investigations when Ms Cleopatra Gray was admitted to the Princess Margaret Hospital, her diagnosis and how Ms Gray was treated. It does not speak to issues of causation. However, the Second Defendant is allowed to raise her objection and has chosen to do so.
- [5] Dr Brown's attendance in Court, despite Witness Summons being issued for her on the order of Mr Kirk Anderson J on January 31, 2019 is unlikely as she is yet to

be served with the document and appears, in the words of Mr Daley, “to be evading service”.

[6] As Dr Brown is proving to be difficult to locate, the Applicants have now turned to Dr Aarons for assistance in putting their case to the Court. Even if Dr Aarons is treated as an expert and his evidence is accepted by the trial Judge, the Claimants still have to overcome the hurdle of Dr Brown’s missing evidence which would provide the basis for damages to be assessed.

[7] Dr Aarons’ report was filed on February 25, 2019 in the form of an Affidavit. At paragraph 5 of page 2 of the report, he indicates that he was

*“asked to provide a medical opinion as to whether or not the Second Defendant’s actions in diagnosing the patient’s condition and prescribing medication for Cleopatra Gray were consistent with a reasonable and recognizable body of medical opinion and would have been acceptable to the ordinary skilled person professing to have that special skill”*

[8] Dr Aarons concluded on page 5 of his report that the Second Defendant was negligent in failing to visit the nursing home to physically examine the deceased, Cleopatra Gray, before prescribing drugs for her. His expert opinion is that

*“the second defendant’s actions in diagnosing the patient’s condition and prescribing medication for Cleopatra Gray based on information obtained from a telephone call and notes made from the examination of Cleopatra Gray a few weeks before is not consistent with a reasonable and recognizable body of medical opinion and would not have been acceptable to the ordinary skilled person professing to have that special skill.”*

Dr Aarons relied on several authorities in coming to his conclusion, all of which are attached to and mentioned in his report. He admits that he relied on the statements of case pleaded by both the Claimants and the Second Defendants and on the medical report of Dr R E Brown which has been put forward in support of the claim. The Second Defendant has called no expert herself nor has she relied on any authority which would suggest that reasonable medical practice allows her to prescribe drugs to a patient without actually first examining the patient (despite her previous knowledge of the patient’s case).

- [9]** I should also add that at paragraph 15 of her Defence and paragraph 11 of the Amended Defence, the Second Defendant admits that she wrote a prescription for the deceased without examining her.
- [10]** As stated above, the Second Defendant objects to the medical report of Dr Brown being admitted into evidence without the need to call the said doctor and by extension objects to Dr Aarons' report being treated as an expert's report by virtue of the fact that it sets out in detail, Dr Brown's report, which is being objected to. The Second Defendant wishes to have those parts of Dr Brown's report redacted from Dr Aarons' report, if the report is to be treated as an expert's report.
- [11]** An expert in formulating his opinion must consider various documents. Dr Aarons has indicated that he has considered Dr Brown's report. He has not indicated in his expert's opinion whether the failure of the Second Defendant to examine the deceased prior to prescribing drugs was what led to her becoming very unwell to the extent that her left leg had to be amputated. In my view Dr Aarons has given his expert opinion on the question asked by counsel for the Claimants (paragraph 7 refers). The Defendants are open to cross-examine Dr Aarons on his report, either submitting questions to him in writing or in open court at the trial and the issues with respect to whether he can reliably form an opinion based on the documents he has perused, in my view are matters that the trial judge may adjudicate upon. In the circumstances, I do not agree with Ms Gaffe that the content of the medical report prepared by Dr R E Brown should be redacted from the expert's report prepared by Dr Aarons.
- [12]** In the Amended Particulars of Claim, it is indicated that the crux of the matter as it relates to the Second Defendant is that had she visited Cleopatra Gray and examined her before prescribing drugs for her, she would have seen her state and would have been able to advise herself properly as to how best to proceed with the management of Ms Gray's medical care. The Claimants are alleging that her failure to visit before prescribing drugs, among other factors, led to the deterioration in Ms Gray's health and the resulting amputation of her left leg. Those

are issues which relate to liability that the trial judge may be asked to determine. The trial judge may then, based on the weight given to Dr Aarons' evidence, make a determination as to whether in fact the Second Defendant was indeed negligent.

**[13]** The Court orders as follows:

- (a) Dr Derrick Aarons is appointed expert witness in the claim and his report filed on February 25, 2019 is to be treated as an expert's report.
- (b) Dr Derrick Aarons' witness statement is to be prepared, filed and served on or before March 7, 2019.
- (c) Dr Derrick Aarons is to be present in person or by way of video link for cross-examination at the trial of this claim.
- (d) Service of the Witness Summons addressed to Dr Rafierra E Brown is to be effected on her by publishing it once in the Daily Gleaner on or before March 8, 2019 and by serving the Medical Council of Jamaica on or before March 7, 2019 and service by these two methods is to stand as good service.
- (e) Costs shall be costs in the claim.
- (f) The Claimants' attorneys-at-law are to prepare, file and serve orders made herein.