

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

No.2015/CLE/gen/00978

BETWEEN

BURNELL CARDRON

Plaintiff

AND

DWAYNE MICHAEL ELLIS

First Defendant

AND

THE MINISTRY OF FINANCE

Second Defendant

AND

THE ATTORNEY GENERAL

Third Defendant

Before: Deputy Registrar Carol D Misiewicz

Appearances: Ms. Lisa Fox for the Plaintiff
Mr. Christopher Francis for the 1st Defendant
Ms. Lukella Lindor and Mr. Kirklyn Mackey for the 2nd and 3rd Defendants

Hearing Dates: 18 October 2017 and 5 December 2017

DECISION

1. This is an application by the Second and Third Defendants to strike out the Plaintiff's claim on the ground that it is vexatious and an abuse of the process of the Court, or alternatively on the ground that the claim as against the Second and Third Defendants is statute barred.
2. On 27 March 2015 the Plaintiff was in a traffic accident when the Honda Stream car she was driving collided with a Dodge Ram pick-up truck driven by the First Defendant. In the action she alleges that as a result of the collision she suffered a number of physical injuries, including whiplash, neck pain, left should pain, spinal injury bulging disk and depression.
3. The Plaintiff, who happens to be a medical doctor herself, brought an action against the First Defendant by Writ of Summons filed 3 July 2015, seeking damages for personal injuries caused by the negligence of the first Defendant.
4. A Notice to Insurers was filed on behalf of the Plaintiff on 9 July 2015, issued to J.S. Johnson Insurance Company Limited. The body of the Notice is in the following terms:

"WE HEREBY GIVE NOTICE pursuant to Section 12 (2) of the Road Traffic Act, Chapter 220 of the Revised Statute Laws of The Commonwealth of The Bahamas that **Burnell Cardron** began an Action in the Supreme Court of the aforesaid Commonwealth of its Common Law and Equity Division being Action Number 2015/CLE/gen/00978 against **Dwayne Michael Ellis**. A certificate of Insurance was delivered by you to **The Ministry of Finance** in compliance with Section 10(4) of the aforesaid Act in regard of a Policy of Insurance issued by you as such insurers of the said **Ministry of Finance** and Dwayne Michael Ellis.

This said action has been instituted to recover damages/ loss from the above-named **Dwayne Michael Ellis** which was occasioned to Burnell Cardron in respect of a collision involving a 2010 Dodge Ram, registration number T-1432 registered to **The Ministry of Finance** and driven by Dwayne Michael Ellis and a 2000 Honda Stream registration number 237647 registered to Donald Linda Maskenuba and driven by Burnell Cardron, which said collision was caused by the negligent driving of **Dwayne Michael Ellis.**"
(Emphasis as per original.)

5. The First Defendant retained counsel and has defended the action. There have been several interlocutory applications over the course of these proceedings. After an order for discovery was made and complied with the Plaintiff made an application to amend the writ to add the second and third defendants, which application was granted.

Pursuant to the leave granted by Justice Grant Thompson on 30 March 2017 an Amended Writ was issued on 6 April 2017, adding the Ministry of Finance and the Attorney General as Defendants in the Action.

6. Counsel for the Plaintiff argued that the Defendants deliberately concealed the policy document until after the discovery process to gain a tactical advantage. It was argued further that the Plaintiff did not know that the Second Defendant was a proper party until she had sight of the Police report in April 2016. Counsel relied upon section 41(1) of the Limitation Act ("Act") that excludes the operation of the limitation provision in cases of deliberate concealment of facts from fraud.
7. Counsel for the Plaintiff submitted at the hearing that it was only after the (now First Defendant's) List of Documents was filed and served was it known or discovered that the Ministry of Finance was a proper party to the action. That List was filed on 27 January 2017. It is noted that the application to amend the writ was not filed until 9 March 2017. An appearance was entered erroneously for "the Defendants" on 20 April 2017 by the Office of the Attorney General. Of course, the First Defendant was already represented by Baycourt Chambers, who continue to be his attorneys of record.
8. On 6 July 2017 a Summons was taken out on behalf of the Second and Third Defendants seeking an order striking out the action as against them. It is supported by the Affidavit of Theominique Nottage, filed on the same date as the Summons. In her Affidavit Ms. Nottage, who is counsel within the Office of the Attorney General, notes that the claim is for general and special damages as a result of a traffic accident on Farrington Road in Nassau, and further states that according to the Act this action was statute barred by virtue of Section 12.
9. What Ms. Nottage did not say, but which however appears from paragraph 8 of the Amended Statement of Claim indorsed on the Amended Writ, is that the Second and Third Defendants were being sued because the First Defendant was employed by the Ministry of Finance, and that the Dodge truck he was driving was owned by the Ministry of Finance and driven by the First Defendant in the course of his employment.

10. Counsel for the Applicant/Defendants in their written submissions referred to sections 9 and 12 of the Act, and submitted that based upon the language of Section 9 (6) and Section 12, that the case was covered by section 12; that as a result the Plaintiff's argument was 'void'. Counsel further relied upon the case of **Wells, JP v Wallace and another [2014] 3 BHS J. 60** where Winder J said: *"the scheme of the statute does not make any allowances for the calculation of the limitation period from the date of knowledge where section 12 applies."* Accordingly, counsel submitted, the Plaintiff's argument that time begins to run from the date of her knowledge as to who was the proper party to the action was invalid and bound to fail.
11. It was further submitted on behalf of the Applicant/Defendants that there was no fraud committed or mistake made by the [2nd and 3rd] Defendants with respect to the Plaintiff's claim; there was no concealment of any information which would have hindered the Plaintiff in determining the proper parties to the action. There is nothing in the affidavit from the Plaintiff that provides an evidential basis for the alleged concealment, and since the allegation of fraud must be specifically proven, yet there was a bare allegation with no evidence supplied.
12. There are some difficulties in reconciling the other arguments on behalf of the Plaintiff. In the then sole-defendant's List of Documents the certificate of insurance is listed at item 19, and is in the section of documents for which there was no objection to their production. This also undermines the concealment argument. But in addition, it is clear that the vehicle was insured from the time the original writ was filed, as is clear from the Notice to Insurers; all the Plaintiff had to do was ask for it.
13. Regarding the alleged availability of the Police report, this was mentioned by counsel in her oral argument but there is nothing in the affidavit from the Plaintiff that speaks to when it was actually produced or made available.
14. The court accepts the submissions of the Applicant/Defendants that the fact that the Dodge truck was owned by a government entity ought to have been known to the Plaintiff, and at least was not concealed. The Plaintiff did not need to wait on a police report to add the Defendants to the civil suit. Having regard to the terms of the Notice to Insurers this was clearly known to the Plaintiff. The failure to add the Ministry of Finance

or the Attorney General as parties to the action must be taken to have been an unfortunate oversight.

15. The court further accepts the submission by counsel for the Applicant/Defendants that the term continuance of injury is interpreted to mean the continuance of the act which caused the damage. This case appears to be a plain and obvious case and there is no need for it continue, to put the parties to expense of pleading the limitation point in a defence and then waiting for trial to have the matter struck out or dismissed. The litigation as against the driver is already at an advanced stage.
16. In the result I order that the Amended Writ be struck out pursuant to Order 18 rule 19 (1) (b) and or under the inherent jurisdiction of the court on the ground that the claim against the Second and Third Defendants is statute barred pursuant to section 12 of the Limitation Act.
17. The Plaintiff has already borne the cost of the amendment to add the 2nd and 3rd Defendants, and Mr. Mackey has indicated that they would not be seeking costs on this application. As such the application is granted with no order as to costs.

Dated the 2nd day of October, A.D., 2018

A handwritten signature in black ink, appearing to read "Carol D. Misiewicz", with a long horizontal flourish extending to the right.

Carol D. Misiewicz
Deputy Registrar