

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
2011/COM/lab/FP/005
BETWEEN**



**CECIL MOORE
Plaintiff**

AND

**BRADFORD GRAND BAHAMA LIMITED
Defendant**

AND

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
2012/CLE/gen/FP/00311
BETWEEN**

**CECIL MOORE
Plaintiff**

AND

**BRADFORD GRAND BAHAMA LIMITED
Defendant**

BEFORE: The Honourable Justice Petra M. Hanna-Weekes

APPEARANCES: Mr. James R. Thompson for the Plaintiff
Mrs. Karen Brown for the Defendant

HEARING DATE: January 21, 2019 and

RULING

Hanna-Adderley, J

Introduction

1. These are two consolidated actions commenced by the Plaintiff alleging that the Defendant's failure to properly secure a material known as silica dust used during

the course of his employment resulted in disease and damage to his lungs and the development of Reactive Airways Dysfunction Syndrome and silicosis. The Plaintiff also alleges that the Defendant ceased to contribute to his insurance resulting in the loss of coverage and inability to pay for medical expenses and coverage.

2. During the trial Counsel for both parties made objections to the admissibility of the evidence adduced before the Court. The first objection was made by Counsel for the Defendant, Mrs. Karen Brown while the Plaintiff gave viva voce evidence on January 21, 2019. Mrs. Brown's objection was in response to the document found at Tab 57 in the Plaintiff's Bundle of Documents. Counsel for the Plaintiff, Mr. James R. Thompson during the examination-in-chief of Doctor Ilan Feingold on behalf of the Defendant also objected to the admissibility of the image(s)/document contained at Tab 10 of the Defendant's Fourth Bundle of Documents. The said image(s)/document is a written report and CT scan from Doctor's Hospital, New Providence, allegedly in reference to the Plaintiff.
3. The Court reserved its ruling on the admissibility of both documents until the completion of the trial and now provides its ruling in respect of the same.

Defendant's Objection to Document at Tab 57 of the Plaintiff's Bundle of Documents

4. During his evidence-in-chief the Plaintiff stated that he took a photograph of the warning label on the sandbag used in his employment and gave a copy of it to his attorney.
5. Mrs. Brown's objection to the admissibility of the warning label was that the document found at Tab 57 is not attached to anything and that the Defendant does not have a way to confirm what it was attached to. Mr. Thompson in response stated that the witness's evidence is that he took direct evidence from the bags that he used and gave a copy to his lawyer and was prepared to identify the same.
6. Prior to the objection by the Defendant the Plaintiff was shown numerous photographs and identified the protective material and machinery used for sandblasting during the course of his employment. The Plaintiff when shown a

photograph of bags of sand stated that the bags of sand shown at the 15th photograph was not the color of the sand used during his employment. He also stated that the bag in the photograph did not look like the bag he used during his employment and that he used a brown bag. Further, he stated that he was able to tell that the bag was different as he used silica sand and what was shown was not silica sand and that it was similar to another type "known as black beauty" used as it was the same color however the silica sand was white.

7. The Court following the objection from the Defendant stated at page 17, lines 6-7 of the transcript dated January 21, 2019:-
"6 THE COURT: Well, I am going to allow it but I
7 don't know if I can attach any weight to it."
8. The Plaintiff also stated in his evidence that he took the picture of the warning label a few years after he brought it to the attention of the Defendant and that the warning label was taken from the bags the Defendant gave him to use in his sandblaster. The Court stated that it had seen the warning label and the Plaintiff subsequently read the contents of the warning label into the record.
9. The weight the Court gives to a particular item of evidence is essentially a matter of fact decided by common sense in light of the circumstances of the case, and the views formed by the Court on the reliability and credibility of the witnesses and exhibits.
10. The Plaintiff's evidence after questions from the Court was that the copy of the warning label was taken after he had advised the Defendant of the danger of the using the substance contained in the bag. The Plaintiff's case as I understand it is that the said substance used during his employment given to him by his employer resulted in damage to his lungs and the development of Reactive Airways Dysfunction Syndrome and silicosis.
11. While I accept that a warning label may have been attached to the bags which the Plaintiff used during the course of his employment, it is difficult to conclude from the Plaintiff's own evidence that the warning label found at Tab 57 is the same warning label attached to the same bags of silica sand that he used during the

course of his employment and that these were the same bags of silica sand he alleged to have inhaled which resulted in his injuries. Moreover, the Plaintiff in his evidence when shown photographs of bags of silica sand by the Defendant stated that the bags in the photographs were not the same bags used during the course of his employment. Further, his evidence was that he took a photograph of the warning label years after bringing the same to the attention of the Defendant.

12. Therefore, considering the Plaintiff's evidence on this issue before the Court, I accept the submissions of Mrs. Brown and conclude that the label in the circumstances has no probative value and that the Court can attach no weight to the said document at Tab 57 of the Plaintiff's Bundle of Documents. The Plaintiff's evidence as to what he observed on the bags and what he told the Defendant about any alleged warning label will be considered with the rest of the Plaintiff's testimony and the Court will look to whether there is any corroboration of his evidence by any other witness, and further, the Court will assess the Plaintiff's credibility on that issue, as it will in respect of all other evidence led by the Plaintiff and his witnesses.

CT Scan

13. During the examination-in-chief of Dr. Feingold on behalf of the Defendant on August 20, 2019, Mr. Thompson objected to the admission of the images or photographs contained in the Defendant's 4th Bundle of Documents. He stated that the documents are from photographs that were sent from Doctor's Hospital and his objection was on the basis that the Defendant failed to lay the proper foundation for photographic evidence to be admitted as evidence and that of the witness as an expert to look at the same and decide medically what it shows.

14. Mrs. Brown in response to the objection stated that the photographs were documents sent to the Defendant by Plaintiff's Counsel, the documents were already put to the Plaintiff during cross-examination and no objection was made at that time by Counsel for the Plaintiff nor was any objection taken to any of the documents contained in the Defendant's Bundle. Further, she stated that the

witness, Dr. Feingold would have referred to the images in his Witness Statement and the images were referred to in the report of Dr. Jose Ramirez.

15. Mr. Thompson in reply stated that there had to be evidence that those photographs are the actual photographs of the Plaintiff and that had not been done. In addition to his objection, Mr. Thompson also stated that the Plaintiff objected to the witness giving any evidence in respect of the said document (CT Scan) and that the document was not signed by anyone and could have been easily produced by a computer.
16. While it was pointed out by the witness, Mrs. Brown and the Court that the document was electronically signed, Mr. Thompson maintained his objection that the document is purely that of a computer. Mrs. Brown in response stated that the said document was provided to herself by Counsel for the Plaintiff pursuant to a specific request made for the images referred to in the medical report of Dr. Jose Ramirez. Counsel for the Defendant complied with the request as found in its letter to Counsel for the Plaintiff dated December 6, 2018 found at Tab 10 of the Bundle of Documents.
17. As I understand the objection, the Plaintiff objects to the Defendant's witness, Dr. Feingold giving evidence relative to "statements" or "images" contained in documents at Tab 10 which were produced by computers, without the proper evidentiary foundation having been laid, and which as a result are inadmissible. I also understand that the CT Scan and Report from the radiologist are not being relied upon by the Plaintiff in his case and that the same were produced by the Plaintiff during the Discovery process, as the Plaintiff was obligated to do.
18. As defined by Section 2 of the Evidence Act ("**the Act**") a photograph is considered a document which is referenced by the Act.
19. Section 61 of the Evidence Act contains the provisions that govern the admissibility of statements produced by a computer in civil proceedings.
20. Section 61(1) states:-

"(1) In any civil proceedings a statement contained in a document produced by a computer shall, subject to rules of court, be admissible as evidence of

any fact stated therein of which direct oral evidence would be admissible, if it is shown that the conditions mentioned in subsection (2) are satisfied in relation to the statement and computer in question.”

21. Section 61(6) of the Act defines a computer as any device for storing and processing information.

22. In considering whether the Court should admit into evidence a document produced by a computer, Section 61(2) of the Act provides that there are four conditions that must be satisfied in relation to the statement and computer in question. These conditions are:-

“(2) The said conditions are —

(a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any body, whether corporate or not, or by any individual;

(b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;

(c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and

(d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.”

23. Mr. Thompson has stated that the document/photograph i.e. the CT Scan and the Report were documents generated by a computer and there is no dispute between the parties that same were generated using computer processing.

24. Considering the above provisions, the Court must then be satisfied that the conditions found in Section 61(2) of the Act are met. To my mind, the conditions identified at Section 61(2) of the Act is to ensure that as at the time of the production of the document the computer was a reliable source. Therefore, proof of the existence of the four conditions listed in Section 61(2) of the Act may be provided in two ways: (i) by evidence of a witness who would have been responsible for maintaining the computer; and (ii) tendering a written certificate in accordance with the provisions of Section 61(4) of the Act. **See R v Shephard 96 Cr App R 345 at page 350.**
25. During the trial the Defendant did not call on a witness who could speak to the maintenance and reliability of the computer nor was a written certificate in accordance with Section 61(4) of the Act tendered to the Court. Further, it was and still is, in light of the fact that the Defendant has not formally closed its case, well within the purview of the Defendant to call on the technician who conducted the scan of the Plaintiff to give evidence of the same and to call the radiologist rendering the Report.
26. Therefore, without more, and in the absence of failing at this juncture to satisfy the conditions as outlined in Section 61(2) of the Act, the CT Scan and the Report in relation thereto found at Tab 10 in the Defendant's 4th Bundle of Documents is at this juncture inadmissible together with any testimony given by Dr. Feingold in connection with the same.

Dated this 8th day of August A. D. 2022


Petra M. Hanna-Adderley
Justice