REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **CV2014-02749**

BETWEEN

LYNETTE HUGHES
Representative for the Estate of Cindy ChloeWaldropt (Deceased)

1st Claimant

LYNETTE HUGHES
Guardian ad Litem and next friend for Kailon Waldropt

2nd Claimant

LYNETTE HUGHES
For and on her own behalf

3rd Claimant

AND

SOUTH WEST REGIONAL HEALTH AUTHORITY

First Defendant

MEMBERS OF THE OBSTETRICS & GYNAECOLOGY TEAM "A"
Doctors S. Persad, Lewattee, Mohammed and Cummings

Second Defendant

MEMBERS OF THE OBSTETRICS & GYNAECOLOGY TEAM "B"
Doctors Jaikaransingh, Hardeo and Pariag

Third Defendant

MEMBERS OF THE MIDWIFRY TEAM
Ms. D. Davis and Ms. J. Ramdan

Fourth Defendant

INSURERS OF S.W.R.H.A. AND/OR DOCTORS

Co-Defendant

Appearances:

The Claimants in Person

For the Defendants: Mr Ravi Mungalsingh instructed by Mr Dipnarine Rampersad

REASONS FOR DECISION

1. There are 4 applications before the court, which for convenience sake are dealt with in one set of reasons. The first application being considered is the application filed by the Claimants on the 2nd May, 2016, seeking the following orders:
    a. That the 10 Appearances and 1 Defence be struck out for failure to comply with the conditions precedent for filing Appearances and/or Defence as regards to format, contents and the personal signature of the Defendant to certify the truth of the Defence.
    b. To strike out and/or give Default Judgement and/or Judgement on Admission against the 10 variously named 1st to 4th Defendants in the 4 actions filed under HCA No CV2014-02749, for failure to personally sign Appearances and Defences and/or certify the truth of the statements made in the Defence in accordance with the CPR stipulated rules and time of filing.
    c. To nullify and/or strike and/or give Judgment in Default of Defence in the 4 actions filed under HCA No. CV2014-02749 for failure to personally sign appearances and Defences and/or certify the truth of the statements made

in the Defence in Accordance with the CPR stipulated Rules of Court and Court Ordered time for filing.

2. The second application is an application filed by the Defendants on the 10th June 2016 for an order that Lynette Hughes's Claim in the capacity as Guardian ad Litem and Next Friend of the minor child Kailon Waldrop be struck out… on the basis that the Claimant, Lynette Hughes does not possess the required capacity to commence and sustain such a claim on behalf of the minor child.

3. The third application (filed first in time) is an application by Lynette Hughes dated the 21st March, 2016, in which she seeks an order appointing her Administrator ad Litem for the Estate of Cindy Cloe Waldropt (First Claimant), and Guardian ad Litem and Next Friend for Kailon Joshua Ike Waldropt (Second Claimant).

4. The fourth application is an application of the Claimant dated the 13th July, 2016, in which the Claimant is seeking judgement in default of appearance and defence against the Defendants.

Factual Background

5. The following is not an exhaustive recounting of the events in this matter, but just those matters which in my view are relevant to the claims before the court. This claim arises out of the treatment of Cindy Cloe Waldropt, the daughter of the 3rd

Claimant, who died on the 7th April, 2010, some 2 months after giving birth to the 2nd Claimant on the 2nd February, 2010. The 3rd Claimant was appointed administrator ad litem of the Estate of the deceased for the limited purpose of bringing this action by order of Seepersad, J dated the 28th July, 2014. For the purposes of these reasons, I shall refer to the 1st and 3rd Claimant as "the Claimant"

6. On the 9th September, 2014, the Claimant filed 4 Claim Forms and on the 3rd October, 2014, 4 Statements of Case with respect to the treatment of the deceased. They were filed under the same action as the application to have the Claimant appointed Administratrix at Litem. It is not immediately clear why this was done by the Court Office, but at the first hearing of this matter, the Claimant intimated that this was done because the Court Office said that the matter was filed under the order appointing the Claimant Administratrix ad Litem for the estate of the deceased, and therefore had to be filed under that action number.

7. For my part, I am not sure that this is the proper procedure to be followed by the Court office, but I do agree with the judge who previously had conduct of this matter, that is to say that the matters complained about by the Claimant with regard to the treatment of the deceased form one series of events that ought properly to be contained in one Statement of Case. In any event, the Claimant took no step to challenge the decision of the Court Office. In the circumstances, in effect

I am of the view that what is filed before the court is one Claim Form and one Statement of Case each in four parts.

8. On the 12th September, 2014, by agreement, the Claim Form (in four parts) and on the 8th October Statement of Case (in four parts) were served on the Senior Legal Officer of the 1st Defendant on behalf of all the Defendants, who then entered appearances on behalf of all the defendants. On the 31st October, 2014, an application was made to extend the time to file their defences. This Order was granted on the 5th November, 2014 extending the time to the 7th January, 2015.

9. On the 26th November, 2014, Messrs Dipnarine Rampersad & Company filed a Notice of Change of Attorneys at Law from Ms. Cudjoe to themselves. It is to be noted however, that the Appearances signed by Ms. Cudjoe were purported to be signed in person. In the circumstances, what was filed by Messrs Dipnarine Rampersad & Company was a Notice of Appointment of Attorney at Law.

10. On the 7th January, 2015, an application was filed by the Defendants for a further extension of time to file and serve their defences. This application was granted without a hearing on the 8th January, 2015 to the 13th February, 2015.

11. On the 8th January, 2015, the Claimant filed 2 Amended Statements of Case with respect to the Medical Malpractice and Compensation for Injuries aspects of the claim. The Amended Statements of Case were served on the 15th January, 2015.

12. On the 13th February, 2015, a third application was filed by the Defendants for an extension of time to file and serve the Defence. Again, this was granted without a hearing on the 19th February, 2015. The extension was until the 13th March, 2015. The Defence was filed on that date. The certificate of truth which is required by Rule 10.7 of the CPR, was signed by Ms. Cudjoe, purportedly on behalf of and on the instructions of all the Defendants.

13. On the 19th February, 2015, the Claimant filed an application for *inter alia* an interim declaration that Ms. Cudjoe acted ultra vires when she purported to sign the Appearances on behalf of the Defendants. This application was withdrawn on the 6th May, 2015 at the first hearing of the First Case Management Conference when the Claimant accepted that the Appearances were no longer in issue.

14. On the 4th May, 2015, the Claimant filed an application for summary judgement and/or to strike out the Defence for not disclosing a Defence. This application was determined on the 22nd July, 2015, with the Notice of Application being dismissed and the time for service being extended to the 4th May, 2015 (according to the signed order of the court). However, the recording of the hearing reveals that at

the hearing, the court did not have sight of the Submissions filed by the parties, that the hearing centred around the service of the Defence, and that the date that the service of the Defence was extended to was actually the 27th April, 2015, the date that the Claimant admitted that she was served with the Defence (see page 4 of the Notice of Application of the 4th May, 2015). Also on the 22nd July, 2015, the Claimant was given permission to file a reply on the 16th October, 2015. It is to be noted that in her submissions in support of the May 4th Application, the Claimant raised the issue of the signing of the Certificate of Truth by Ms. Cudjoe. This was not raised at the hearing on the 22nd July, 2015, and in any event was not a relief sought in the Notice of Application. It is to be further noted that despite the fact that the Notice of Application was dismissed without considering the issue of whether there should be summary judgement against the Defendants, this order was not appealed by the Claimant.

15. The Reply was filed on the 16th October, 2015, without the Claimant taking any issue with, or making any reservation with respect to the fact that the Certificate of Truth was signed by Ms. Cudjoe purportedly on behalf of all the Defendants.

16. On the 6th April, 2016, the Claimant filed an Application for judgement on admissions, which was dismissed with costs on the 9th June, 2016.

17. On the 24th April, 2017, the matter was reassigned to this court and a CMC fixed for the 12th May, 2017. At that hearing, it was noted that the Reply was filed without any expressed reservation with regard to any purported irregularity in the Appearances or defence, and it was directed that the Claimant do file and serve submissions with respect to whether she had waived and irregularity by filing the Reply with no reservation. This was done because in the court's mind this was a relevant issue that had to be considered and felt it that to be fair, the parties ought to be given an opportunity to make submissions on the issue.

18. From the time of the reassignment of the matter to this court, the Claimant has objected to this court dealing with the matter, as she alleges that it is contrary to the provisions of Rule 27.8(5) which provides that "(a) any adjourned case management conference and, so far as is practicable, any procedural applications made prior to a pre-trial review must be heard and determined by the judge or master who conducted the case management conference." No comment is made on that issue as the Claimant has filed separate proceedings with respect to that, which are before the Court of Appeal.

Analysis of the Law

19. From a practical point of view, it is sensible to deal with the application to strike out the Appearances and/or Defence, as if they are struck out, then the Defendant's

application becomes otiose. If it is unsuccessful there is no question of the Application of the 13th July, 2016, becoming relevant.

Waiver

20. With respect to the issue of waiver, it is to be noted that the Claimant is alleging that the Appearances and Defence are a nullity and illegality because of the purported irregularities. If she is correct, then the issue of waiver does not arise, as one cannot waive a nullity. Further, if the is an irregularity, but the Appearances and Defence are not a nullity, there is no equivalent of Order 2 Rule 1 of the RSC in the CPR, so the issue of waiver does not arise immediately.

21. With respect to the Appearances, it is to be noted that the Claimant sought to strike out the Appearances previously on the same ground as in the application dated the 2nd May, 2016, and it was withdrawn at the first hearing of the matter on the 6th May, 2015, with the Claimant agreeing that the Appearances were no longer in issue. In such circumstances, it would be an abuse of the process of the court to allow the Claimant to pursue such relief again. In any event, it is my view that when the firm of Messrs Dipnarine Rampersad & Company came on record, any irregularity in the Appearances would have been rendered otiose.

Is the Defence Filed Invalid

22. With respect to the Defences, the following issues have been raised by the Claimant in her submissions:

    a. Only one defence was filed by all the defendants which is not permissible in law.

    b. Only one defence was filed to the 4 Statements of Case filed in this action.

    c. That the various applications to extend time to file the Defence were unlawful because the original Appearances were unlawful.

    d. That there has been no service of the Defence.

    e. That the certificate of truth is wrongly signed by Ms. Cudjoe, and therefore the Defence is voidable and illegal.

23. Of the various objections raised by the Claimant to the Defence, only one has any merit in the view of the court, that is to say the signing of the Certificate of Truth by Ms. Cudjoe.

24. With respect to the complaint that only one Defence was filed on behalf of all defendants, it has been the practice in these courts from time immemorial that several defendants can file a single Defence if their cases are not inconsistent with each other. In fact, it is the view of the court that this is the preferred course of conduct where it is that that defendants are represented by the same Attorney at

Law. In the circumstances, these Defendants are not running inconsistent Defences, in fact, the SWRHA is admitted to being the employer of all the other Defendants. Therefore this ground has no merit.

25. With respect to the question of one Defence being filed in relation to the 4 Statements of Case, as noted earlier, the 4 Statements of Case were filed in one action. They relate to one series of events, which while they took place over a period of time, all contributed to the death of the deceased. This is in fact one action. Therefore it would be open to the Defendants to file one Defence to the 4 Statements of Case. I would go so far as to say that the mere fact that the 4 statements of Case were filed in the same action number would entitle the Defendants to file one Defence to the 4 Statements of Case. In that regard therefore, that submission has no merit.

26. With respect to the submissions with regard to the efficacy or lack thereof of the applications of the various extensions of time to file the Defence, it is to be noted that orders were made by a court of competent jurisdiction with regard to all these applications. Any complaint therefore with respect to any orders made under these applications ought to have been dealt with via appeal. As a matter of fact, the Claimant did indeed file an appeal with respect to the last extension to file the Defence. That appeal was dismissed. In the circumstances, the Claimant cannot

raise that issue now. It is res judicata. It is certainly not for this court to interfere with these decisions.

27. The same can be said with respect to any issue of whether the Claimant is entitled to judgement on admissions based on the inadequacies of the Defence. This too was the subject of an application and an appeal, both of which were unsuccessful. Therefore, as with the question of the extensions of time to file and serve the Defence, this issue is res judicata, and not within the jurisdiction of this court to grant.

28. The Claimant also complains that the Defence was not properly served on her. This is just simply not true. In her Notice of Application of the 4th May, 2015, she admitted that she received a copy personally on the 27th April, 2015. When one listens to the recording of the proceedings on the 22nd July, 2015, it is clear that the court at that time meant to extend the time for service to the date that she actually received it, that is to say, the 27th April, 2015. Those were the words which fell from the court's lips. The written order says the 4th May, 2015, but that is of no consequence, as that is subsequent to the date that the Claimant actually received the Defence.

29. It may be that the Claimant is of the view that all documents must be served on her via email pursuant to the order dated the 6th May, 2015, but this is not the case.

What this order stated is that the Claimant indicated that she would like to be served via email at the address contained in the order, and by registered mail to the address contained in the order, but this in no means vitiates service by any other means in accordance with Part 6 of the CPR. If it were the intention of the court to limit the means by which the Claimant could be served with documents, then the order would have been far more explicit in that respect. In the circumstances, the Defence was properly served on the Claimant on the 27th April, 2015.

30. This leaves the question as to whether the Certificate of Truth has been properly signed by Ms. Cudjoe on behalf of the Defendants, and if not, what is the consequence of this. The Claimant relies on Rule 10.7(4) which provides that the Defendant must certify on the Defence that he believes that its contents are true. The Defendants submit that Ms. Cudjoe was entitled to sign on behalf of the Defendants, and that there is no irregularity.

31. With the greatest of respect, this cannot be the case. The rule 10.7 is clear as to who may sign a certificate of truth. Either the Defendant, or the Defendant's Attorney at Law must sign. Even in the case of the Attorney at Law, they are only empowered to sign where it is impractical for the Defendant to sign, and the Attorney at Law must certify the reasons why it is impractical for the Defendant

to sign the certificate of truth. In the instant case, at the time that the Defences were filed, Ms. Cudjoe was not the Attorney at Law for any of the Defendants, and only purported to sign the certificates of truth on the instructions of the Defendants.

32. It is to be noted however, that as an officer of the First Defendant, she would be entitled to sign the Certificate of truth on its behalf. The Defence on behalf of the First Defendant is therefore a good defence and free from irregularity. However, with respect to the other defendants, the Defence is irregular as the Certificate of Truth has not been properly signed by them.

33. The issue which therefore falls to be determined is the effect of this irregularity. The Claimant contends that this makes the Defences invalid. No authority is presented for this assertion, and the court is of the view that such an irregularity does not vitiate the Defence, but rather, just makes it irregular. In this regard, I agree with the judgement of Boodoosingh, J in the case of ***Dillon v Trinity Housing Limited***[1], and the observations referred to therein, of Kangaloo, JA in ***Phillip v The Attorney-General of Trinidad and Tobago***[2], where it is observed that errors with

[1] CV2010-05075
[2] Civ App. 148 of 2010

the Certificate of Truth are procedural irregularities which can be cured under Rule 26.8 of the CPR.

34. The question therefore is whether the Defence should be struck out pursuant to Rule 26.2 for the irregularity, or cured under Rule 26.8. In reaching my decision in this regard, the following was taken into consideration.

    a. Apart from the First Defendants, and 3 other defendants in one of the Claim Form, the individual defendants have not been individually named as defendants, but rather as part of "teams", who are the defendants. These "teams" are not legal persons in law and therefore cannot be considered to be proper defendants.

    b. All the individual defendants are employees of, and therefore servants of the First Defendant in respect of whom the defence is not irregular.

    c. The Claimant filed the Reply without specifically reserving her position with respect to the regularity of the Defence. While not operating as a waiver, it is a factor which can be taken into consideration when determining whether to strike out or remedy the irregularity.

    d. The prejudice that would be suffered by the Defendants if the Defence is struck out is greater than the prejudice that the Claimant would suffer.

35. When one considers the above factors, the court is of the view that the proper course would be to allow the Defendants to cure the defect in the Defence as it relates to the defendants apart from the First Defendant.

Capacity

36. With respect to the capacity issues, it is clear that the Claimant has not complied with either Rules 23.7 or 23.8 of the CPR. However, the Court is of the view that this can also be cured under Rule 26.8. This is different from the case where an Administrator ad Litem needs to be appointed before any action can be taken on behalf of the Estate of a deceased person, as it is that grant which gives the person the power. With the next friend, it is compliance with 23.6(2) that gives a person the power to act as next friend, not the certificate under 23.7. The Certificate merely states that the next friend is in compliance with 23.6(2).

37. In the instant case, when one considers that the Claimant in her application filed in July 2014, did apply for an order appointing her next friend for the 2nd Claimant which seems to have been overlooked by the Court granting the order. Further, the Claimant on the 16 July, 2010 was granted joint custody of the 2nd Claimant with care and control to her. There is therefore no question that the Claimant is in compliance with rule 23.6(2). Further still, it would be the 2nd Claimant would be the one who would suffer the most prejudice if the claim in respect of him is struck

out, I am of the view that the proper course of action would be to appoint the Claimant as the next friend of the 2nd Claimant pursuant to Rule 23.8 of the CPR.

Second Application for Default Judgement

38. With respect to the application for Default Judgement filed in July 2016, it is to be noted that it is claiming the same relief as in the application dated the 2nd May, 2016. It was therefore unnecessary. Furthermore, it was filed when there was a defence that was still valid. It was therefore also premature. It is therefore doomed to fail.

39. In the circumstances, the Claimant's Notices of Application dated the 2nd May, 2016 and 13th July, 2016, are dismissed; the Defendant's Notice of Application dated the 10th June, 2016, is dismissed; and with respect to the Claimant's Notice of Application dated the 21st March, 2016, the Claimant is appointed the next friend of the 2nd Claimant.

Conclusion

40. With respect to curing the defects in the Defence, this will require an amendment, but no order is made here as there are several issues that must be sorted out with the proceedings before such and order can be made, including properly naming

the Defendants. It would be more appropriate deal with all of these issues holistically during the case management process.

41. On the question of costs, with respect to the application dated the 2nd May, 2016, even though the Claimant was unsuccessful, it is to be noted that the Defence was irregular, and therefore it is felt that the appropriate order for costs would be no order as to costs. The reverse applies to the Defendants' application dated the 10th June, 2016. The Application was dismissed, but the Claimant was in fact not in compliance with the Rules, and therefore the appropriate order is no order as to costs.

42. However, with respect to the application dated the 13th July, 2016, as noted, this was premature, and unnecessary given the relief sought in the Notice of Application dated the 2nd May, 2016. Because of this, the court is of the view that costs ought to follow the event and the Claimant should pay the Defendants' costs of that application.

Summary

43. To conclude therefore, the order of the court is as follows:

    a. Lynette Hughes is appointed the next friend of Kailon Waldropt, the 2nd Claimant.

b. The Notice of Application dated the 2nd May, 2016, is dismissed with no order as to costs.

c. The Notice of Application dated the 10th June, 2016, is dismissed with no order as to costs.

d. The Notice of Application dated the 13th July, 2016, is dismissed. The Claimant to pay the Defendants costs of the application assessed in the sum of (Five Thousand Dollars) $5,000.00

Dated the 22nd day of June, 2018

Kevin Ramcharan
Judge