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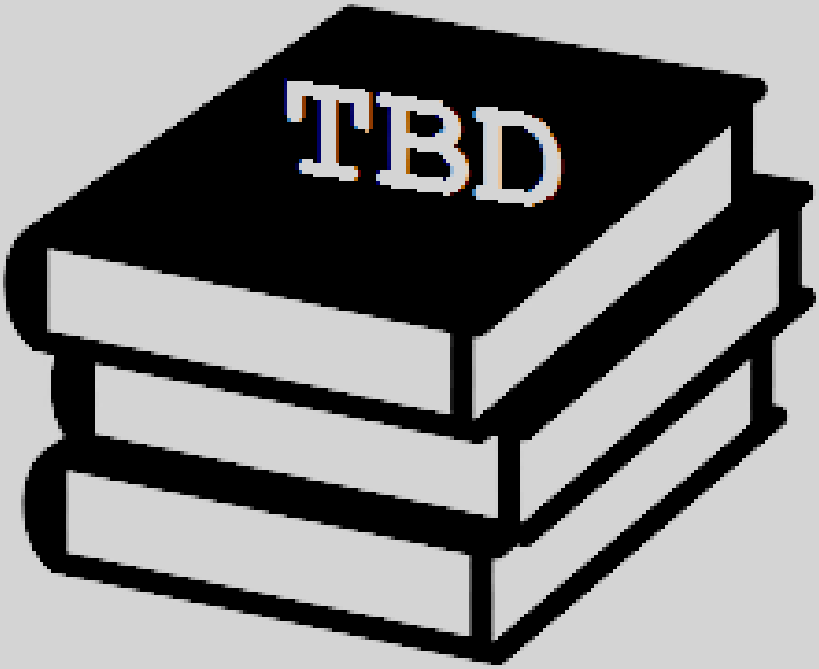

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Filing # 70382700 E-Filed 04/06/2018 05:00:32 PM

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2016-CA-005412

KIMAYA PHILLIPS GORNICK and JAMES ROBERT GORNICK, her husband,

Plaintiffs,

v.

MCCALL SERVICE, INC., a Florida Profit Corporation, and BRADLEY CONAN GORDON, an individual,

Defendants.
_____/

DEFENDANTS' EMERGENCY MOTION TO STRIKE NOTICE OF VOLUNTARY DISMISSAL

COMES NOW Defendants, McCall Service, Inc., and Bradley Conan Gordon, by and through their undersigned counsel, and pursuant to the Florida Rule of Civil Procedure hereby files this Emergency Motion To Strike Notice Of Voluntary Dismissal and as grounds states as follows:

1. This is a cause of action arising from an automobile accident that occurred on September 14, 2015.

2. This case has been in litigation since August 18, 2016.

3. Plaintiff moved to set this matter for trial October 14, 2016 and the matter was set for trial to occur September 2017.

4. As a result of a partial summary judgment filed by Defendants on January 3, 2017, Defendants and Plaintiffs came to an agreement that liability would be admitted in return for Plaintiffs dismissal of their negligent hiring and retention counts on February 10, 2017.

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 04/10/2018 08:08:56 AM

5. Plaintiff, Kimaya Gornick, was treated by Dr. Boehme, a neurologist. Dr. Boehme referred Plaintiff to Dr. Nottmeier, a neurosurgeon. On or about June 5, 2017, Dr. Nottmeier did not recommend surgery for the Plaintiff.

6. At the June 27, 2017 hearing on a motion to continue, the Court inquired as to why this matter was set for trial when Plaintiff had not been placed at maximum medical improvement. Plaintiffs' counsel made representations to this Court that Plaintiff would be done treating very soon.

7. As a result, trial was continued from September 2017 to April 2018 with Judge Cole ordering the parties to return for a case management conference on August 29, 2017 in order to set deadlines.

8. Throughout the discovery process, it was discovered that Plaintiff, Kimaya Gornick, who was employed by her husband at his place of business, had not reduced her salary.

9. Defendants filed a Motion for Summary Judgment regarding past and future lost wage claims. While the summary judgment was denied, it served two purposes that benefited Defendants. It prompted Plaintiff to reduce her salary on the eve of the summary judgment hearing and Plaintiff conceded that Husband, a consortium Plaintiff, would not be able to recover lost profits of his business as a result of his Wife's injuries. This was codified on the Case Management Report.

10. At the August 29, 2017 Case Management Conference, Plaintiffs' counsel agreed to various deadlines, namely that discovery would be closed on December 31, 2017 and expert discovery on January 19, 2018.

11. After multiple depositions have occurred and deadlines passed, Plaintiff moved again on March 9, 2018 to continue trial claiming his client was still not done treating and was actively consulting another newly disclosed neurosurgeon who she did not see until after the close of expert discovery on January 22, 2018.

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12. The Court allowed the trial to be continued as to the date only, but denied Plaintiff's desire to use any new experts, namely Dr. Greenwald, given that he was not timely disclosed.

13. At the time of the motion to continue hearing, Defendants had two motions to strike Dr. Boehme that were noticed for hearing which remain outstanding. Dr. Boehme is Plaintiff's treating physician but was recently retained on or about February 7, 2018 (well after the close of expert discovery) to conduct accident reconstruction and biomechanical causation analysis. The use of Dr. Boehme was also not previously disclosed to Defendants in a timely manner.

14. During the motion for continuance hearing, the Court inquired to Plaintiffs' counsel for case law that supported the notion that a treating physician could also be an expert in other areas (see Hearing Transcript of March 15, 2018, Page 16; Lines 5-8). While the motions to strike unfortunately have not been ruled on, it was relatively clear that the motions to strike Dr. Boehme's testimony regarding accident reconstruction and biomechanical causation were not going to be permitted because of late disclosure as well as his testimony as a hybrid witness.

15. The Plaintiffs then moved for a rehearing on the Court's ruling which limited the use of Dr. Greenwald on March 23, 2018 and the same was denied on March 26, 2018.

16. Plaintiffs claimed that Defendants had the records from Dr. Greenwald in their possession but it was only after filing for rehearing that Defendants requested and received a one-page document indicating a note for pre-operation clearance. It is not clear from the note as to who was ordering the alleged surgery, what surgery was to be conducted, and when the alleged surgery was to take place. (See e-mails and document attached as Exhibit "A.")

17. Dr. Nottmeier's deposition was to occur on April 5, 2018, but on the eve of that deposition, Plaintiffs filed a Notice of Voluntary Dismissal on April 4, 2018.

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18. This case has been actively litigated with substantive motions still outstanding. The following depositions (with transcripts ordered) have been completed in this case:

a. Plaintiff Kimaya Phillips Gornick: January 30, 2017 & January 19, 2018
b. Plaintiff James Robert Gornick: January 31, 2017 & October 24, 2017
c. Defendant driver Bradley Gordon: January 31, 2017
d. Witness Dorie Ortiz: June 11, 2017
e. Dr. Schimpff: January 22, 2018 & March 13, 2018
f. Dr. Steven Lancaster: January 23, 2018
g. Rick Robinson: February 5, 2018
h. Dr. Krimsky: February 1, 2018
i. Dr. Herkov: February 13, 2018
j. Dr. Pulley: March 1, 2018
k. Dr. Boehme: February 15, 2018
l. Dr. Ira Fox: February 28, 2018
m. Dr. Frederick Reed Murtagh: March 6, 2018

19. The following medical examinations of Plaintiff, Kimaya Gornick, have been conducted at the expense of Defendants:

a. Dr. Pulley: July 7, 2017
b. Dr. Shahnasarian: Weekend examination February 17, 2018

MEMORANDUM OF LAW

Motion to Strike Notice of Voluntary Dismissal

At common law, a plaintiff, in an action at law, could enter a voluntary nonsuit as a matter of right at any stage of the proceedings. This right continued to the last moment of trial, even until after the verdict was rendered, or where the case was tried before a court, until the court had pronounced its decision.

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However, in equitable actions, a plaintiff's right to take a voluntary dismissal is more circumscribed. A plaintiff is entitled to a voluntary dismissal as a matter of right unless the defendant is able to demonstrate serious prejudice, such as where he/she is entitled to receive affirmative relief or a hearing and disposition of the case on the merits, has acquired some substantial rights in the cause, or where dismissal is inequitable. Over time, the stage of the proceedings at which a plaintiff could take a voluntary dismissal became governed by statute and the rules of civil procedure, many of which eliminated or severely limited the right to a dismissal. *Patterson v. Allstate Ins. Co.,* 884 So.2d 178 (Fla. 2d DCA 2004) (emphasis added).

There are exceptions to the rule regarding filing a voluntary dismissal: (1) if there is fraud on the court, (2) if the defendant can establish the common law exception to the right of voluntary dismissal, or (3) if the plaintiff dismisses the case at a stage which is deemed the equivalent of a summary judgment. *Service Experts, LLC v. Northside Air Conditioning & Electric Service,* 56 So. 3d 26 (Fla. 2d DCA 2010) (emphasis added).

Fraud on the Court:

The right of a plaintiff to voluntarily dismiss his lawsuit at any time is subject to an exception for where fraud on the court is attempted by the filing of the voluntary dismissal, in which case the court may strike the voluntary dismissal and reinstate the matter. *Romar Int'l v. Jim Rathman Chevrolet/Cadillac*, 420 So.2d 346 (Fla. 5th DCA 1982).

In the case at bar, quite simply, Plaintiffs' counsel does not like the way things are going. This dismissal is simply a way to subvert the Court's authority while motions remain pending and there have been several unfavorable rulings for Plaintiff. As late as August 29, 2017 at the Case Management Conference, Plaintiffs' counsel made representations directly to this Court that Plaintiff would be completed with her treatment well before the end of 2017. Defendant relied on this representation to its detriment and prepared for trial accordingly.

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Plaintiff did not get a surgical recommendation in June of 2017. She then waited for eight months to be seen by another neurosurgeon. The untimely disclosed expert, Dr. Greenwald, was prohibited by this Court. Plaintiffs' counsel explained that she may be receiving a surgical recommendation and the Court made note, in the hearing as well as in its Order, that Plaintiff was free to continue to treat but the surgeon would not be permitted to testify at trial. As a result, Plaintiffs' desire to dismiss this case is fueled by the plan to utilize Dr. Greenwald which is essentially a way to divest the Court's decision-making authority regarding this matter and increase the value of the case.

What is most concerning to Defendants is in Plaintiffs' ability to cure any of their short-comings and make their case that much stronger.

Plaintiffs' fraud on the court by waiting until depositions were taken and experts have been stricken (and some are still subject to outstanding motions to strike) is a way of undoing all the progress Defendants have made through this stage in the litigation and such dismissal should not be permitted to stand now that Defendants have laid out their defense to Plaintiffs.

Prejudice to the Defendants/Stage of Litigation

The only recognized common law exception to the broad scope of the rule allowing voluntary dismissal is in circumstances where the Defendant demonstrates serious prejudice, such as where he is entitled to receive affirmative relief or a hearing and disposition of the case on the merits, has acquired some substantial rights in the cause, or where dismissal is inequitable. *Patterson.*

As in the case at bar, Defendants obtained substantial ground in this case in that two of the counts were dropped after a partial summary judgment was filed, the Plaintiffs' damages were limited to actual lost wages of Kimaya Gornick personally after a second summary judgment was filed, and the limitation of Plaintiffs' experts disclosed well after the disclosure of experts was prohibited preventing Plaintiff from shopping for a doctor to obtain that sought after surgical recommendation. Plaintiffs dismissed their case

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before other substantive motions were to be heard regarding striking Dr. Boehme's testimony. Finally, the Plaintiffs dismissed their cause of action the day before Dr. Nottmeier would have been deposed on record stating that he did not recommend surgery for the Plaintiff. Now, those opportunities are lost for Defendants and Defendants are severely prejudiced by the dismissal because Plaintiff will have possible had surgery by the time this matter is at issue again.

If Plaintiffs are permitted to refile, all of the ground Defendants gained in this case is for naught. While the rule allows for Defendant to recoup costs associated with the litigation (subject of a separate motion under 1.420(d)), the attorney fees, the angst, the planning, the reputation of a well known pest control business and the substantive rights Defendant has obtained along the way cease to exist and the only thing that remains for Defendant is more angst, more attorney fees, an exposed strategy, and additional costs for yet another year of litigation. To allow Plaintiff another bite at the proverbial apple would severely prejudice Defendants on all fronts mentioned herein.

WHEREFORE, Defendants respectfully request that the Notice of Voluntary Dismissal be stricken and the case reinstated. Should any fraud be found, sanctions regarding the same are requested. In the alternative, Defendant requests that this case be reinstated for the limited purposes of dismissing the two counts previously dismissed by Plaintiff to be with prejudice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of April, 2018, a true and correct copy of the foregoing was filed with the Clerk of Duval County by using the Florida Courts e-Filing Portal, which will send an automatic e-mail message to the following parties registered with the e-Filing Portal system: Charles A. Sorenson, Esq., Coker, Schickel, Sorenson, Posgay, & Iracki, P.A., cas@cokerlaw.com;ftb@cokerlaw.com;tap@cokerlaw.com, 136

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East Bay Street, Baywater Square Building, Jacksonville, FL 32202, (904) 356-6071/(904) 353-2425 (F), Attorney for Plaintiff, Kimaya Phillips Gornick.

COLE, SCOTT & KISSANE, P.A.
Counsel for Defendant MCCALL SERVICE, INC., a Florida Profit Corporation, and BRADLEY CONAN GORDON, an individual
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4686 Sunbeam Road
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By: s/ Jennifer L. Watson
JOSEPH T. KISSANE
Florida Bar No.: 512966
JENNIFER L. WATSON
Florida Bar No.: 251940

Peggy M. Labs

From: Jennifer L. Watson
Sent: Friday, March 23, 2018 4:19 PM
To: cas@cokerlaw.com; tap@cokerlaw.com; Joseph T. Kissane; Peggy M. Labs
Subject: Gornick Dr. Greenwald

Mr. Sorenson,

Could you please immediately provide us with the recent Dr. Greenwald documents as referred to in your recently filed motion for reconsideration? We have not seen any such surgical recommendation documentation.

Sent from my iPhone

Jennifer L. Watson

mailto:Jennifer.Watson@csklegal.com
Tel:904-672-4069
Fax:904-672-4050

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FL 32257
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EXHIBIT
tabbies
A

Peggy M. Labs

From: Jennifer L. Watson
Sent: Tuesday, March 27, 2018 2:09 PM
To: 'Theresa Poulin'; Peggy M. Labs; Joseph T. Kissane
Cc: Charles Sorenson; Fran Brozowski
Subject: RE: Kimaya Gornick

Thank you Theresa,

Do you have any more records than this? We don't have anything from Greenwald other than a record from 01/22/18. Please provide his office notes as soon as possible.

Jennifer

Jennifer L. Watson, Esq.

Jennifer.Watson@csklegal.com
Tel: 904-672-4069 | Fax: 904-672-4050
Cole, Scott & Kissane Building
4686 Sunbeam Road | Jacksonville, FL 32257

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From: Theresa Poulin [mailto:tap@cokerlaw.com]
Sent: Tuesday, March 27, 2018 11:48 AM
To: Jennifer L. Watson <Jennifer.Watson@csklegal.com>; Peggy M. Labs <Peggy.Labs@csklegal.com>
Cc: Charles Sorenson <cas@cokerlaw.com>; Fran Brozowski <ftb@cokerlaw.com>
Subject: Kimaya Gornick
Importance: High

Good Morning Ms. Watson. Attached please find a copy of Dr. Greenwald's Pre-Op Clearance Request dated March 19, 2018 for a surgical procedure – ACDF at C4/C5 and C5/C6.

Also, please note that Kimaya has completed all the pre-op clearances and is awaiting a surgical date from Dr. Greenwald. (We are experiencing computer problems today, please let me know that you are able to open the attachment).

3.27.18

Theresa A. Poulin
Paralegal to Charles A. Sorenson, Esquire
Coker, Schickel, Sorenson, Posgay & Iracki, P.A.
136 E. Bay Street, 2nd Floor
Jacksonville, Fl 32202
Tel.: (904) 356-6071
Fax.: (904) 353-2425
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Website: www.cokerlaw.com

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[illegible]

PRE-OP CLEARANCE REQUEST

DATE: 3-19-18

CLEARING PHYS: _____ FAX: _____

PATIENT NAME: Kimarya Lenick DOB: 10-11-79

DATE OF SURGERY: *PENDING CLEARANCE*

PENDING SURGERY:

C4/5, 5/6 ACDF

AS THE PATIENT'S PHYSICIAN,
PLEASE EVALULATE THE ABOVE PATIENT FOR SURGERY

THE FOLLOWING IS REQUIRED BY ANESTHESIA (general)
H&P CHEST X-RAY EKG
{X}CBC {X}CMP {X}PT {X}PTT {X}INR {X}UA
{ }PROCALCITONIN

IF PATIENT REQUIRES
CARDIAC, PULMONARY OR ANY ADDITIONAL CLEARANCE,
PLEASE SCHEDULE AND FORWARD RESULT

PLEASE FAX PRE-OP CLEARANCE
ATTENTION: *Cheryl, Surgical Coordinator*
(904) 800-1316
IF ADDITIONAL INFORMATION IS REQUIRED PLEASE CALL 904-217-7450

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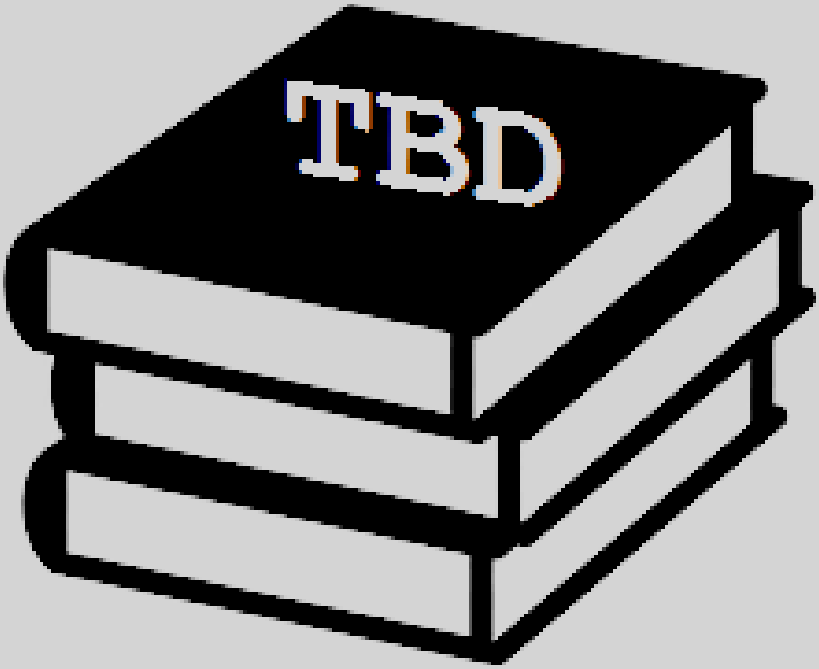

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