State Court of Fulton County
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Civil Division

**IN THE STATE COURT OF FULTON COUNTY**
**STATE OF GEORGIA**

TONY RAY WALDROP and PATRICIA ANN WORLEY,

Plaintiffs,

v.

JOSEPH R. PAYNE M.D., and DERMATOLOGY ASSOCIATES OF ATLANTA, P.C., and ABC CORPORATIONS 1-5 and JOHN AND JANE DOES 1-5,

Defendants.

CIVIL ACTION NO. 17EV004844

**ORDER ON PLAINTIFFS' MOTION TO DISQUALIFY CURRENT DEFENSE COUNSEL**

This matter is before the Court on Plaintiffs' Motion to Disqualify Current Defense Counsel. Defendants opposed the Motion and a hearing was held on the matter. Having considered the arguments and briefs of counsel, the whole record, and relevant law, Plaintiffs' Motion is hereby **GRANTED** for the reasons that follow.

## I. PROCEDURAL BACKGROUND

The above-styled medical malpractice action was originally filed on October 9, 2015, and subsequently renewed on October 10, 2017. Plaintiffs alleged that Dr. Payne was negligent in his care and treatment of Mr. Waldrop over a period of time, from approximately June 2013 through approximately February 2014.

This case was set for trial on February 10, 2020. On February 7, 2020, the Court conducted a pre-trial conference to address potential trial issues. Of particular importance at the proceeding was Plaintiffs' objection to Defendants' Motion in Limine "A" which sought exclusion of "Any Criticisms Pertaining to Alleged Injuries Occurring Prior to October 9, 2013." Defendants based

their motion in limine on O.C.G.A. § 9-3-71(a).[1] Defendants contended that Plaintiffs should be precluded from presenting evidence regarding alleged mistreatment that occurred prior to October 9, 2013. Plaintiffs opposed Defendants' Motion in Limine "A" arguing that the limitations period was tolled because Defendants' fraudulently withheld from production to Plaintiffs a 2-page "Mohs map" documenting Dr. Payne's June 2013 treatment of Mr. Waldrop, which prevented Plaintiffs from filing suit earlier as to the earlier allegations. Plaintiffs aver that the pages show (1) a tumor Dr. Payne excised from Mr. Waldrop's right earlobe exhibited perineural invasion, and (2) Dr. Payne saw the perineural invasion and failed to act on this information.

At the February 7, 2020 hearing in which the issue of the alleged fraudulent withholding of the Mohs map was raised, Defendants and the Court asked Plaintiffs to specify whether they were contending that Defendants and/or their counsel Peters & Monyak ("P&M) committed the fraud, and how the fraud was committed.

> **Mr. Peters:** Mr. Peters is going to make the subsequent response. I would just like to make a couple of remarks. The editorial "they" that they keep talking about, I don't know if they're contending that our firm was involved in some sort of fraud, if they are, they need to say it outright.
>
> **Mr. Bell:** I just denied that we were doing that. I said specifically we are not accusing you or your firm of fraud, so I want to make that real clear.
>
> **The Court:** That was clear to me.

(February 7, 2020 Transcript at 12:2-10.)

> **The Court:** Let me try pin you down, Mr. Bell. Who committed the fraud and how was the fraud committed?
>
> **Mr. Bell:** Dr. Payne, Dermatology Associates of Atlanta, when he got a medical record request from lawyers on a patient regarding Mohs surgery either went back and realized that he had mismanaged PNI, this high risk for

[1] "[E]xcept as otherwise provided in this article, an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred."

> recurrence and withheld the Mohs maps from his attorneys. I think the jury can conclude that [Dr. Payne] deliberately withheld records ....

(Id. at 34:13-22.)[2]

The Court, albeit with some misgivings, permitted Plaintiffs to proceed to trial with a claim that Defendants fraudulently concealed records from production in discovery. At trial, Plaintiffs produced two witnesses attesting to the fraud allegations. Ashley Chronister, who is a paralegal with the Chronister Firm, served as a fact witness for Plaintiffs.[3] When conducting re-direct of Ms. Chronister, Plaintiffs' counsel asked whether she had any way of knowing whether the documents in the envelope P&M received from Defendants Dermatology Associates of Atlanta P.C. (hereinafter, "DAA") had been placed in that envelope just recently, before trial and whether the Post-It note placed by Ms. Johnson on the original envelope with the records had been placed just recently, before trial, clearly intimating fraud and/or fabrication by P&M.

The morning before the second day of trial began, Plaintiffs took the evidentiary deposition of former P&M paralegal Jamie Tiso. In the deposition, Plaintiffs' counsel asked the following questions:

> **Q:** And Mrs. Johnson would have had access to the medical records before they were sent to Ms. Chronister; is that true?
>
> **A:** True.
>
> **Q:** So hypothetically, if there was an inconvenient paper in that record, if Ms. Johnson had held that piece of paper from production, then you would have no way of knowing that?
>
> **A:** Correct.

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[2] In the February 7 hearing, both the Court and Defense counsel expressed concerns as to whether Plaintiffs would be able to establish fraudulent concealment without showing some degree of involvement by P&M.

[3] The Chronister Firm was co-counsel for Plaintiffs in this matter along with the Bell Law Firm.

> **Q:** And if Ms. Johnson had withheld that piece of paper from the production, and then later put it back in the envelope with the other records, you'd have no way of knowing about that either, would you?
>
> **A:** No.

When the trial resumed later that morning, Defendants moved for directed verdict, and in the alternative, raised the possibility of a mistrial because of the potential allegation of fraud by P&M. Initially, Plaintiffs' counsel confirmed what he had stated repeatedly in advance of trial—that the fraud allegations pertained only to Dr. Payne and DAA:

> **Mr. Bell:** Well, the allegations against Dr. Payne and his practice of fraud, there had been questions on both sides that implicate, you know, other possible scenarios, but the allegation is only against Dr. Payne and his practice for fraudulent concealment.
>
> **The Court:** Well, then if that's the issue -
>
> **Mr. Bell:** That's the issue.
>
> **The Court:** Then that's got to be the only issue, that there can't be any questions or suggestions to the jury that somehow defense was involved. If you want that to be part of your theory, then it can't be at this trial.

(February 12, 2020 Trial Transcript at 11.) Thereafter, the Court made clear where the case was headed, based on Mr. Bell's repeated representations that there were no allegations against the firm.

> **The Court:** There's no way fraud happens with [sic, believed to be "without"] either the negligence or intentional fraud of the lawyers. So, if you're not alleging any departure from standard of care by the lawyers or any intentional misconduct by the lawyers, I think it's a directed verdict on the fraud claim. I just don't think that goes to the jury because I don't think you can prove fraud by the doctor in absence of some affirmative act or negligent failure to act by the lawyers.

(Id. at 20.)

After hearing from the Court and some additional discussion, Plaintiffs' counsel then revised Plaintiffs' position.

> **Mr. Bell:** I'm prepared to state our position now. Our position is that there was fraud on behalf of DAA and on behalf-and/or on behalf of Dr. Payne and there was negligence on behalf of the defense and possible fraud on behalf of someone or more of the employees at Peters & Monyak that participated....

(Id. at 32.)

Based on Plaintiffs' newly-asserted position alleging that an employee of P&M committed negligence or fraud, the Court denied Defendants' motion for directed verdict, but granted Defendants' alternative motion and declared a mistrial.

After the Court declared a mistrial, the Court expected based upon P&M's statements at trial that P&M would recuse itself and that new counsel would be retained by Defendants. However, P&M subsequently changed its position on recusal. The Court expressed reservations regarding whether a conflict existed, and suggested that the parties brief the issue of whether the Court could disqualify P&M *sua sponte*. Plaintiffs then decided to file the instant Motion, arguing that the allegation of negligence or fraud against P&M creates an inherent conflict of interest between Defendants and their counsel. Defendants, through P&M, opposed Plaintiffs' Motion to Disqualify. The Court reviewed *in camera* a conflict waiver signed by Dr. Payne, and an email Dr. Payne sent to the Court, with his and opposing counsel copied, emphasizing his desire to be represented by P&M, the counsel of his choice. Plaintiffs raised the issue that neither Dr. Payne nor DAA had been given the opportunity to consult with independent counsel with regard to waiving the alleged conflict. Dr. Payne subsequently consulted with independent counsel, Benjamin H. Brewton of Balch & Bingham LLP, and independent counsel submitted a June 3, 2020 letter to the Court urging the Court to accept the conflict waiver and allow Dr. Payne to proceed with P&M.

## II. ANALYSIS

Disqualifying counsel is an extraordinary step. The comments to Rule 1.7 of Professional Conduct highlight this point:

> Where the conflict is such as clearly to call into question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

Nonetheless, circumstances may arise in which counsel cannot ethically represent his or her client(s). The comments to Rule 1.7 make clear that the lawyer's own personal interests present a special, heightened conflict:

> The lawyer's personal or economic interests should not be permitted to have an adverse effect on representation of a client. See Rules 1.1 and 1.5. If the propriety of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client objective advice.

In the present case, defense counsel Jonathan Peters of P&M acknowledged that the accusation of alleged fraudulent-concealment issue raises a potential inference of "crimes" by P&M lawyers or staff. Mr. Peters also stated that:

> [H]ad we known coming in that our law firm was going to be on trial, okay, then I probably would have recused myself from the case, okay. So my point is this, I cannot defend my law firm as a lawyer in the case.... If their case is supposed to be Dr. Payne in conjunction with me or my associates committed a fraud, then that's a different case and I'm not prepared to defend that case. They cast this case as one where they're going to show Dr. Payne has committed the fraud and the evidence is going to be he didn't have any opportunity to do so, unless it was in collusion with our lawyers.

Mr. Peters continued:

> How in the world is that not calling her [former P&M associate Melissa Johnson] a criminal and a fraud, Your Honor? Now, if that's the case they want to try to make, then we need to know that and I need to have counsel. I need to be allowed to testify.

Plaintiffs' allegations that P&M fraudulently concealed documents necessarily raises the issue of a direct and personal conflict of interest between defense counsel and their clients. P&M

attempts to side step the potential conflict of interest issue by asserting that it will never take the position that Defendants withheld anything—thereby nullifying any potential conflict. This contention is unavailing, however. Regardless of whether P&M refrains from accusing their clients of fraudulently or negligently withholding documents, the implication would remain should P&M hold fast to its denial of any alleged fraudulent concealment or inadvertent failure to produce the document on its part. Thus, a conflict arises by implication.

Nor does P&M's declaration that it will refrain from accusing Defendants of fraudulent concealment bar Defendants from later asserting that P&M negligently or intentionally failed to produce the subject documents. This too necessarily creates a conflict. It is not outside the realm of possibility that should Defendants lose at trial, a subsequent appeal would follow—its primary contention being that an inherent and unwaivable conflict existed which severely limited or curtailed defense counsel from adequately representing Defendants.

The Court of Appeals has emphasized the heightened nature of a conflict involving an attorney's personal interests—"one of the most blatant appearances of impropriety." See Hunter, Maclean v. St. Simons Waterfront, 317 Ga App 1 (2012), vacated on other grounds, 293 Ga. 419 (2013). As the Court of Appeals stated:

> [A] lawyer's representation of a client when the lawyer has a financial or personal interest which will or reasonably may affect the lawyer's professional judgment illustrates one of the most blatant appearances of impropriety. Indeed, when an attorney's own personal interests come into conflict with those of his client, it threatens the attorney's duty of loyalty, the most basic of an attorney's duties to the client.

The Court is unpersuaded that the conflict waiver or Dr. Payne's stated desire to have specific representation resolves the conflict. The Court recognizes that, "because a party is presumptively entitled to the counsel of his choice, that right may be overridden only if compelling reasons exist...." Norton v. Tallahassee Mem'l Hosp., 689 F.2d 938. 941 n. 4 (11th Cir. 1982)

(internal cites and quotes omitted). Nevertheless, although P&M asserts that it will never take the position that Dr. Payne or DAA withheld anything, this does not eliminate the question of whether P&M committed fraudulent concealment or negligence. In other words, the conflict is inherent and not dependent on whether Defendant and defense counsel believes their interests are aligned and that a conflict does or does not exist.[4]

When Plaintiffs' finally unequivocally asserted negligence or fraud by P&M, P&M at first appeared unwilling to even consider raising at trial the possibility of its own negligence in failing to produce the Mohs map. That instinctual first reaction exemplifies the nature of the personal and professional conflict and why conflict rules exist. Later, P&M softened its position and appeared willing to acknowledge at trial that it may have inadvertently (i.e., negligently) failed to produce the Mohs map. P&M argues that its now apparent willingness to acknowledge the possibility of its own negligence at trial negates the underlying rationale for the Court's conclusion at the hearing and in this Order. P&M's argument is unconvincing.

The Court acknowledges that P&M's earlier apparent unwillingness to consider its own negligence at trial was and is a partial rationale for the Court's ruling. However, the Court did not state its entire rationale at the hearing. Just as telling as P&M's position regarding its own negligence is P&M's failure or refusal to consider the possibility that one or more of its employees **intentionally** withheld key documents from production. The reason P&M never considers taking that position is readily apparent. P&M would have to admit to sanctionable and possibly criminal conduct in the presence of the Court and a jury. Such an admission could potentially expose Defendants to additional liability at trial, but could also potentially give Defendants a subsequent claim against P&M. Independent, unconflicted counsel could conduct an independent examination

[4] The June 3, 2020 letter from Balch & Bingham LLP does nothing to change this analysis.

of the evidence and circumstances, and give dispassionate advice to Defendants on what position to take at trial as to P&M's conduct.

While the Court could find no cases exactly on point with the subject case, the Georgia Supreme Court has upheld disqualification of counsel where it appeared a lawyer's personal interest could affect his or her professional judgment. For example, in Registe v. State, 287 Ga. 542 (2010), the Georgia Supreme Court upheld disqualification of criminal defense counsel who had previously been involved in the case as an assistant district attorney. As the Georgia Supreme Court stated:

> Rule 1.7 does not permit Jackson to represent Registe in the murder case or in the two other cases the State plans to seek to introduce as similar transaction evidence at the murder trial. The trial court found that the telephone records obtained with the search warrants applied for by Jackson as an ADA were potentially relevant and probative to the charges against Registe and therefore **could put Jackson in the untenable position of either attacking the warrants he obtained while working on the murder case as an attorney for the State, or sacrificing a potentially fruitful attack on the government's case on behalf of his present client.** Neither choice would be professionally acceptable.

Id. at 547; accord Hunter, Maclean, supra.

This Court does not take the issue of disqualification lightly and notes that a motion to disqualify may be misused by litigant to delay or increase expense to an opponent rather than to prevent an attorney from impermissibly representing an opposing litigant due to a conflict of interest. In the present case, however, there exists a bona fide question as to whether the Mohs map was produced to Plaintiffs, and whether it was intentionally withheld or inadvertently omitted from production.[5]

[5] Although at multiple points before trial, the Court expressed its view as to the lack of quantity and quality of fraud evidence against P&M, the Court recognized that a triable question of fact existed. To be clear, the Court does not find that P&M committed fraud.

The Court finds that disqualification of counsel will not cause significant delay in the progress of this lawsuit. This Order issues in the midst of a judicial emergency necessitated by the coronavirus pandemic. Given the delays created by the pandemic, disqualification of Defense counsel is unlikely to create any significant additional delay. Further, the Court finds no evidence that disqualification will cause Defendants enough additional expense to outweigh the significant harm to their defense from continuing with conflicted counsel.

Regarding Defendants' contentions that Plaintiffs lack standing to bring their Motion to Disqualify and that said Motion is untimely, the Court disagrees. As to standing, the Court finds that P&M's conflict in this case calls into question the fair or efficient administration of justice, and that Plaintiffs' Motion is not a technique of harassment. First, Plaintiffs have expressed their interest in protecting the enforceability of a verdict against the Defendants, if the jury does find in favor of Plaintiffs. The Court finds that in the circumstances of this case, Plaintiffs' concern is legitimate and reasonable. Second, Plaintiffs brought their motion to disqualify only after P&M's senior counsel argued strenuously for a mistrial on the ground that P&M needed to withdraw from the case in order to defend its own conduct. Accordingly, the Court concludes that Plaintiffs' counsel have standing to move to disqualify P&M.

As to timeliness, the Court of Appeals instructs trial courts to consider whether a party has waived its right to move to disqualify opposing counsel because of undue delay in bringing the motion. <u>See, e.g.</u>, <u>Zelda Enterprises v. Guarino</u>, 343 Ga App 250 (2017) ("Because the trial court failed to first assess whether the appellees waived the opportunity to move for disqualification of counsel before granting the motion, we vacate the trial court's order and remand for further proceedings consistent with this opinion."). The Court of Appeals holds that "[a] motion to disqualify should be made with reasonable promptness after a party discovers the facts which lead

to the motion." Rescigno v. Vesali, 306 Ga App 610 (2010). The Court identifies the following factors to consider in assessing timeliness or untimeliness: "length of the delay in light of the circumstances of the particular case ..., [including] when the movant learned of the conflict; whether the movant was represented by counsel during the delay; why the delay occurred; and whether disqualification would result in prejudice to the nonmoving party." Plaintiffs' announced their intention to file a motion to disqualify defense counsel after learning that P&M did not intend to withdraw, and subsequently filed this Motion within days of announcing their intent to do so. The Court finds that Plaintiffs did not engage in undue delay, that the timing of Plaintiffs' motion does not result in prejudice to the Defendants, and that disqualification would not result in prejudice to the Defendants. The Court thus concludes that Plaintiffs did not waive their right to move for disqualification.

On the attendant facts of this case, this Court finds that Peters & Monyak's conflict cannot be waived with respect to Dr. Payne. Additionally, although Dr. Payne did receive independent advice with regard to the conflict of interest issue, there is no evidence on the record, nor has defense counsel made this Court aware of, any independent advice provided to the other defendant in this matter, DAA. Nor does it appear that Dr. Payne is authorized to waive the conflict on behalf of DAA. According to the Secretary of State's website, DAA is a corporation. Its CEO is Griffin Edmond. Dr. Payne is the Secretary. None of the public information reviewed by the Court indicates that Dr. Payne has authority to waive the conflict on behalf of DAA. Accordingly, the Court is persuaded by the weight of the factors in favor of disqualification of P&M.

## III. CONCLUSION

For all of the foregoing reasons, the Court hereby **GRANTS** Plaintiffs' Motion to Disqualify Current Defense Counsel.

**SO ORDERED**, this the 18th day of September, 2020.

Judge Eric A. Richardson
State Court of Fulton County

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