

**Diaz v Pastore**

2020 NY Slip Op 32407(U)

May 1, 2020

Supreme Court, Schenectady County

Docket Number: 2017-2484

Judge: Michael R. Cuevas

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STATE OF NEW YORK  
COUNTY OF SCHENECTADY

SUPREME COURT

**PRESENT: HON. MICHAEL R. CUEVAS  
JUSTICE OF THE SUPREME COURT**

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WENDY L. DIAZ, AS ADMINISTRATOR  
OF THE ESTATE OF ELBEE DIAZ,

Plaintiff,

**DECISION AND ORDER  
ON ORDER TO SHOW  
CAUSE**

Index No.: 2017-2484

-against-

KATHLEEN PASTORE, M.D., IVAN SHVACHUK, M.D.,  
MICHAEL B. HOLMES, M.D., CARDIOLOGY  
ASSOCIATES OF SCHENECTADY, P.C.,  
ELLIS HOSPITAL, GEORGE B. HUGHES, M.D.,  
GEORGE B. HUGHES, M.D., FAMILY MEDICINE, PLLC,  
MICHAEL JOSEPH MARTINELLI, M.D.,  
MAMOON DAAS, M.D., ST. PETER'S HOSPITAL OF THE  
CITY OF ALBANY, ST. PETER'S HEALTH CARE  
PARTNERS, ST. PETER'S HEALTH CARE SERVICES,  
ST. PETERS HEALTH PARTNERS MEDICAL  
ASSOCIATES, P.C., PRIME CARE PHYSICIANS, PLLC,  
TRINITY HEALTH CORPORATION, ALBANY MEDICAL  
CENTER, ALBANY MEDICAL CENTER HOSPITAL,  
ALBANY MEDICAL COLLEGE, ALBANY MEDICAL  
COLLEGE FACULTY PRACTICE, MEHUL PRAGNANI, M.D.,  
ADANNA C. AKUJUO, M.D., KRISTINA M. RODDY, M.D.,  
AND UPSTATE INFECTIOUS DISEASES ASSOCIATES, LLP,

Defendants.

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**APPEARANCES:**

Cynthia S. LaFave, Esq., LaFave, Wein & Frament, PLLC on behalf of Movants -  
attorneys seeking to be relieved.

Wendy L. Diaz, Plaintiff

**MICHAEL R. CUEVAS, J.**

## **INTRODUCTION**

Cynthia S. LaFave, Esq. (“LaFave”) of LaFave, Wein & Frament, PLLC and The Law Office of Kathleen M. Toombs (“Movants”) request relief as legal counsel to Plaintiff Wendy L. Diaz, as Administrator of the Estate of Elbee Diaz (“Diaz”) pursuant to CPLR §321 (b)(2). Movants specifically request: (1) relief from the legal representation from the date of the Order granting relief; (2) that Movants have no liability from the date of the Order granting relief; (3) that all pending or imminent actions in the above-captioned matter be stayed from the date of the Order to Show Cause until further Order of the Court; (4) that Movants have a statutory charging lien and a retaining lien for work performed and for disbursements paid; (5) that disbursements shall be paid to LaFave, Wein & Frament, PLLC upon releasing its file to incoming counsel.

## **FACTUAL AND PROCEDURAL BACKGROUND**

This action was referred to LaFave, Wein & Frament, PLLC, by the Law Office of Kathleen M. Toombs and both offices assumed representation of Diaz. *LaFave* ¶3. The underlying action is one of medical malpractice/negligence brought by Diaz against Kathleen Pastore, M.D. and twenty-two (22) other Defendants (“Defendants”) for the wrongful death of Elbee Diaz. *LaFave* ¶4. Diaz commenced suit by filing a Summons and Complaint on November 20, 2017. *Id.* An Answer on behalf of Defendants Albany Medical Center, Albany Medical Center Hospital, Albany Medical College Faculty Practice, Mehul Pragnani, M.D., and Adanna C. Akujo, M.D. was filed on December 13, 2017, with an Amended Answer filed on, or after December 22, 2017. *LaFave* ¶¶5, 12. Defendants Kathleen Pastore, M.D., Ivan Shvachuk, M.D., and Ellis Hospital filed an Answer on December 19, 2017. *LaFave* ¶6. Defendants Michael B. Holmes, M.D., and Cardiology Associates of Schenectady, P.C. filed an answer on December 22, 2017. *LaFave* ¶7. Defendants Michael Joseph Martinelli, M.D., Mamoon Daas, M.D., St. Peter’s Hospital of the City of Albany, St. Peter’s Health Partners, St. Peter’s Health Care Services, St.

Peters Health Partners Medical Associates, O.C., Prime Care Physicians, PLLC, Trinity Health Corporation filed an Answer on December 22, 2017. *LaFave* ¶8. A second Answer was filed on behalf of Defendant Michael Joseph Martinell, M.D. on January 24, 2018. *LaFave* ¶3. Defendants Kristina M. Roddy and Upstate Infectious Diseases, Associates, LLP filed an Answer on December 27, 2017. Defendants George B. Hughes, M.D., and George B. Hughes, M.D. Family Medicine, P.C., filed an Answer on December 21, 2017. *LaFave* ¶10. Written discovery has been completed. *LaFave* ¶13. The deposition of Diaz was started, but has not been completed. *Id.* No Defendants have been deposed to date. *Id.*

Movants previously applied for leave to withdraw by motion dated October 28, 2019, under facts alleged under confidential seal. The leave to withdraw was granted on December 13, 2019 by an Order of the Hon. Mark D. Powers, J.S.C. Thereafter, Movants informed this Court that after service of the Order to Show Cause and the Order granting Movants the relief sought, that Plaintiff was not properly served. After service, Movants learned that the address to which they mailed the moving papers and resulting Order was not Plaintiff's current address. *Correspondence of Cynthia LaFave, dated February 12, 2020.* Movant LaFave wrote the Court, detailing that she determined Plaintiff's current address and requesting that the Order be vacated, and that Movants be allowed to properly effectuate service of a new Order to Show Cause seeking the same relief. *Id.* On February 18, 2020, the Honorable Michael R. Cuevas, Schenectady County Supreme Court Justice, vacated the December 13, 2019 Order that granted Movants leave to withdraw *nunc pro tunc* without prejudice.

Movants set forth their reasons for withdrawal in a Confidential Attorney's Affirmation dated March 10, 2020, that has been reviewed *in camera* under the seal of the Court. On March 13, 2020, the Chief Administrative Judge for the Unified Court System directed that all motions in civil cases be taken on submission, except in extraordinary cases. Just two days later, the Chief Administrative Judge revised his

directive to require the postponement of all non-essential functions of the Court until further notice. The instant case did not qualify as an essential matter as defined by the Chief Administrative Judge. By Administrative Order 4JD-030-2020, dated April 15, 2020, the Administrative Judge for the Fourth Judicial District authorized judges to implement the district's "Virtual Chambers Plan", which permits the review of pending non-essential cases, the determination of next steps for such cases and the issuance of decisions on fully submitted motions, or issuance of orders on consent. In furtherance of the "Virtual Chambers Plan", a conference was held in this case on the sole issue of Movants' application to be relieved as counsel and Plaintiff's future representation in this matter. Prior to the conference scheduled for Friday, April 24, 2020, all Defendants stipulated that they did not intend to oppose the Motion, or appear at the conference,. While Movants and Plaintiff ultimately reached an agreement as to the main issues needing to be resolved, some discussion of the applicable law is warranted, if for no other reason than to inform the soon to be unrepresented plaintiff; as well as, outgoing and potential incoming counsel as to the basis for the Court's consent to their agreement.

## **THE LAW AND DISCUSSION**

### **A. SEALING OF CONFIDENTIAL AFFIDAVIT**

A Court may seal records, in whole or in part, upon a finding of *good cause* that is specified in writing. *Uniform Rules §216.1 (a)*. The evaluation of whether *good cause* exists should consider the interests of the public, as well as the parties. *Id.*

The Court hereby finds that the relevant information contained in the affidavit sought to be sealed was derived from attorney-client communication and as such, is privileged. *CPLR §4503 (a) (1)*. The Court can therefore conclude as a matter of law that *good cause* exists for the sealing of the affirmation of Cynthia LaFave, Esq., dated March 10, 2020, which was submitted in support of Movants' application. Defendants do not oppose the

sealing of the Affidavit, and as such, have not demonstrated any prejudice for not having direct access to the confidential communications that form the basis for the withdrawal.

**B. WITHDRAWAL OF COUNSEL IN A PERSONAL INJURY/WRONGFUL DEATH MATTER.**

An attorney of record may withdraw or be changed by an order of the court, upon noticed motion to the client and all other parties to the action. *CPLR* §321 (b)(2), New York Rules of Professional Conduct, Rule 1.16<sup>1</sup>; 22 N.Y.C.R.R. 1200.15 (a)(1). An attorney should be permitted to withdraw as attorney of record for good and sufficient reason. *In re Dunn*, 205 N.Y. 398 (1912), *see also*, *Frenchman v. Queller, Fisher, Dienst*,

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<sup>1</sup> Rule 1.16 (b)-A lawyer shall withdraw from the representation of a client when:

- (1) The lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law;
- (2) The lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;
- (3) The lawyer is discharged; or
- (4) The lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.

Rule 1.16 (c) - A lawyer may withdraw from representing a client when:

- (1) Withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) The client has used the lawyer's services to perpetuate a crime or fraud;
- (4) The client insists upon taking action with which the lawyer has a fundamental disagreement;
- (5) The client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;
- (6) The client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;
- (7) The client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively;
- (8) The lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal;
- (9) The lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;
- (10) The client knowingly and freely assents to termination of the employment;
- (11) Withdrawal is permitted under Rule 1.13 (c) or other law;
- (12) The lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal;
- (13) The client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.

*Serrins, Washor & Kool, LLP*, 24 Misc. 3d 486 (Sup. Ct. N.Y. Cty, 2009). The Court of Appeals in *Dunn* explained:

[t]he relationship between an attorney and client is of an unusual character, and the elements of trust and confidence on the part of the client and of undivided loyalty and devotion on the part of the attorney require that the courts by virtue of their inherent power over attorneys compel by summary and rigorous proceedings their fulfillment of obligations springing out of the relationship.

*Dunn, supra*, 205 N.Y., at 398.

The *Dunn* decision further instructs that when a client wants to discharge an attorney, he may for any reason that seems satisfactory to him. *Id.* If the attorney was not guilty of violating the relationship, then the substitution must be made on conditions that are fair to him. *Id.* If the attorney wants to disband the relationship, he may do so at any time for a good and sufficient cause and upon reasonable notice. *Id.* In *Armstrong v. A.C.&S, Inc.*, the Supreme Court, Monroe County, opined that the court should also consider the timing of the change of attorneys and its potential impact on the other parties to the action. *Armstrong v. A.C. & S., Inc. (In re Seventh Dist. Asbestos Litig.)*, 1 Misc. 3d 279 (Sup. Ct. Monroe Co, 2003), *citing to Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B*. The *Armstrong* court stated that the judicial system has an interest in the procedural regularity and fairness to other parties. *Id.*

This Court recognizes that by permitting counsel for the Plaintiff to withdraw at this stage of a complex medical malpractice proceeding will create, at a minimum, a delay in the prosecution of this case, a consequence that works to the prejudice of Plaintiff and Defendants alike. That prejudice could have been mitigated by more timely action by Movants and more attention to the details of properly serving their client with the motion papers on the first application. However, given Plaintiff's consent to Movants' request to withdraw, this Court need not scour the record for the existence of good cause or engage in an exercise of attempting to distinguish the facts of this case from existing precedent.

The Court finds that Plaintiff's consent was knowing in that she understood the nature of the application and understood that the burden of engaging new counsel within a relatively short period of time would fall upon her. Additionally, Plaintiff understood the financial terms attendant to the withdrawal. The Court gave Plaintiff a full and fair opportunity to state her position, to ask questions and to consider each aspect of the application. Plaintiff was attentive, polite, and appropriately responsive in her communication with the Court and Movants. The Court is satisfied that Plaintiff did not exhibit undue stress or anxiety in the course of the thirty-minute telephone conference, nor was there any indication that she was acting under duress. Therefore, the Court finds that the client (plaintiff) knowingly and freely assented to the termination of employment of counsel (Movants) in this proceeding.

**C. WHETHER MOVANTS ARE ENTITLED TO A LIEN ON PLAINTIFF'S FILE.**

When a lawyer's employment with a client ends, the lawyer is required to reliver the client's property back, including the files, which the client is entitled to receive as a matter of law. *Retaining copies of client's file over client's objection; limitation of attorney liability, Committee on Professional Ethics (December 8, 2004, Opinion 780)*. The lawyer's property right to the file is not superior to that of the client. *Sage Realty Corp. v. Proskauer Rose Goetz & Medelsohn*, 91 N.Y. 2d 20, 37 (1997). The Court of Appeals in *Sage* stated:

Under New York law, an attorney has a general possessory retaining lien which allows an attorney to keep a client's file until his/her legal fee is paid. Implied in this is the rule that attorneys have no possessory rights in the client files other than to protect their fee. In other words, the file belongs to the client.

*Id.*, see also, *Bronx Jewish Boys v. Uniglobe, Inc.*, 166 Misc. 2d 347, 350 (Sup. Ct. 1995), *Vargas v. United States*, 469 U.S. 819 (1984). Judiciary law Section 475 governs when that lien attaches, providing:

From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, or the initiation of any means of alternative dispute resolution including, but not limited to, mediation or arbitration, or the provision of services in a settlement negotiation at any stage of the dispute, the attorney who appears for a party has a lien upon his or her client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, award, settlement, judgment or final order in his or her client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

*Judiciary Law §475; see also, Banque Indosuez v. Sopwith Holdings, Corp.*, 98 N.Y. 2d 34 (2002) (finding that no payouts on an attorney's lien are to occur until money is received at the end of the case). In a contingency fee case, where the fee dispute will be between two attorneys, the outgoing attorney can receive immediate compensation on a *quantum meruit* basis at discharge. *Wiggins v. Kopko*, 105 A.D. 3d 1132 (3d Dept. 2013). Or, the outgoing attorney can receive a share of the contingency fee based on a proportionate share of the work performed. *Id.* If the attorney does not elect which fee basis to accept at the time of discharge, the split of the contingency fee is automatic. *Id.*

Plaintiff and Movants stipulated that Movants would immediately turn Plaintiff's complete file over to Plaintiff's incoming attorney without requiring that Movants be paid for services rendered or for disbursement advanced at the time of transfer. Instead, Movants agreed to elect, at the time of transfer of the file, to be paid on a *quantum meruit* basis, as outlined in their moving papers, based upon the number of hours of work and their usual hourly rate or as a percentage of the contingent fee based upon any recovery had by the Plaintiff in this action.

#### **THE COURT'S RULING**

Based upon the foregoing, it is hereby

ORDERED, that the Court's approval of the parties' oral stipulation that Movants' request to be relieved as Counsel is hereby GRANTED,

ORDERED, that Plaintiff Wendy L. Diaz is provided until July 31, 2020 to obtain new counsel, otherwise she shall be deemed to proceed *pro se*; and it is further

ORDERED, that Movants shall elect the method of calculating their fee in this case with incoming counsel; any such fee being dependent upon a recovery in this action; and it is further

ORDERED, that Movant's disbursements are fixed in the amount of \$ 6,015.14 as set forth in their moving papers, with such amount to become due and payable at the conclusion of this case, without interest; and it is further

ORDERED, that should Movants and incoming counsel be unable to resolve the issue of the appropriate fee due Movants, this Court shall retain jurisdiction over the issue to be decided summarily by the Court.



Dated: May 1, 2020  
at Schenectady, New York

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HON. MICHAEL R. CUEVAS  
Supreme Court Justice

**Papers Considered:**

Moving Papers

Order to Show Cause

Attorney Affirmation of Cynthia S. LaFave dated March 10, 2020

- Exhibit A: Summons and Complaint
- Exhibit B: Answer of Defendants Albany Medical Center, Albany Medical Center Hospital, Albany Medical College Faculty Practice, Mehul Pragnani, M.D., and Adanna C. Akujo, M.D.
- Exhibit C: Answer of Defendants Kathleen Pastore, M.D., Ivan Shvachuk, M.D., and Ellis Hospital
- Exhibit D: Answer of Defendants Michael B. Holmes, M.D., and Cardiology Associates of Schenectady, P.C.
- Exhibit E: Answer of Defendants Michael Joseph Martinelli, M.D., Mamoon Daas, M.D., St. Peter's Hospital of the City of Albany, St. Peter's

- Health Partners, St. Peter's Health Care Services, St. Peters Health Partners Medical Associates, O.C., Prime Care Physicians, PLLC, Trinity Health Corporation
- Exhibit F : Answer of Defendants Kristina M. Roddy and Upstate Infectious Diseases, Associates, LLP filed an Answer on December 27, 2017. Defendants George B. Hughes, M.D., and George B. Hughes, M.D. Family Medicine, P.C.,
- Exhibit G : Answer of Defendants George B. Hughes, M.D., and Defendant George B. Hughes, M.D., Family Medicine, PLLC
- Exhibit H : second Answer was filed on behalf of Defendant Michael Joseph Martinell, M.D
- Exhibit I: Amended Answer of Defendants Albany Medical Center, Albany Medical Center Hospital, Albany Medical College Faculty Practice, Mehul Pragnani, M.D., and Adanna C. Akujo, M.D.

Confidential Attorney Affirmation of Cynthia S. LaFave, Esq., dated March 10, 2020

Exhibit A: Invoice of Costs