IN THE SUPERIOR COURT OF PAULDING COUNTY
STATE OF GEORGIA

NAKISHA JONES, *Plaintiff,* v. GREYSON ELKINS, *Defendant.*	Civil Action No.: 21-CV-000429-P2

PLAINTIFF'S RESPONSE TO DEFENDANT'S OBJECTION TO PLAINTIFF'S NOTICE OF INTENT TO INTRODUCE MEDICAL REPORT/ NARRATIVE AT TRIAL AND CROSS-MOTION FOR ATTORNEY'S FEES

Plaintiff respectfully files this *Response to Defendant's Objection to Plaintiff's Notice of Intent to Introduce Medical Report/ Narrative at Trial and Cross-Motion for Attorney's Fees*, showing the Court the following:

Defendant's Objection to Plaintiff's use of the Medical Report prepared by Dr. Elshihabi (hereinafter "Objection") disregards well-established principles of law set forth by the Supreme Court of Georgia and state legislature. Not only does Defendant conveniently take words and phrases out of context to suggest that there are "numerous unexplicated medical terms and uninterpreted scientific test results," but Defendant also misapplies the holdings set forth in *Bell v. Austin*, 278 Ga. 844 (2005). For the reasons set forth below, this Court should overrule Defendant's Objection in its entirety, permit Plaintiff to use the timely-noticed medical narrative at trial, and award Plaintiff her attorney's fees for having to respond to such objections.

I. Plaintiff's Medical Narrative is Written in Lay Terms and Explains All Medical Terminology in Plain Language

Contrary to Defendant's assertions, the Medical Narrative Report of Said Elshihabi, M.D. (hereinafter "Medical Narrative") is written in plain language so that a jury may easily understand

medical terms. Defendant states that the "purported medical narrative report offered by Plaintiff" included terms such as "'fluoroscopy,' 'inserting a three and half inch, 22-gauge spinal needle into Ms. Jones's L3 and L4 facet joints of her lower back,' and 'received a facet joint injection which is very similar to the medial branch block injection…we inject the anesthetic medicine and steroid directly into the facet joint of the spine.'" Objection, Paragraph 4. However, Defendant fails to include the relevant portions of the Medical Narrative by which these procedures and terms are explained in context. On the very first page of the Medical Narrative, Dr. Elshihabi breaks down in simple terms what each level in a person's spine is called to provide a foundational understanding for the jury to appreciate where on the Plaintiff's body she experienced back and neck pain. Immediately on the first page, Dr. Elshihabi writes:

> By way of further explanation, there are three main levels of a person's spine: the cervical (neck), thoracic (middle back), and lumbar (lower back). At each of these three levels, there are several small spinal bones (also known as vertebrae), which support body movement and activity. At the very bottom of your tailbone, there is a small joint that is known as the sacroiliac joint (medically referred to as "SI"). These spinal bones surround the spinal cord, which begins in your brain and continues all the way to the bottom of your spine. The spinal cord contains and is surrounded by millions of nerves that carry incoming and outgoing messages, such as pain, touch, and temperature, between the brain and the rest of the body. Medical professionals commonly refer to a particular level of the vertebrae by referencing both the level of spine (C, T, or L) and the bone number. For example, L4- L5 refers to the space between the fourth vertebrae in the lumbar spine (the lower back), and the fifth vertebrae in the lumbar spine.

Using simplified explanation provided on Page 1 of the Medical Narrative, a jury can easily follow along and understand which levels of Plaintiff's spine Dr. Elshihabi focused his treatment. Dr. Elshihabi then further explained what "facet joints" are, by writing, "The facet joints are small joints located on either side of the spine that connect the vertebrae together." Medical Narrative, P. 3. Regarding "medial branch block injections", Dr. Elshihabi again explained:

> A bilateral medial branch block injection is where an anesthetic is injected around the joints on both sides of your spine to numb nearby nerves that cause pain to the body. Using a special type of x-ray known as a fluoroscopy, Dr. Sureka would insert a needle directly into the joint to administer pain relieving anesthetic drugs.

Medical Narrative, P. 3. Dr. Elshihabi also included several helpful diagrams to show jurors what many of the procedures looked like anatomically, including a diagram that shows "what a lumbar medical branch block injection looks like." Medical Narrative, Exhibit B.

Rather than objecting to medical phrases in context, Defendant mischaracterized and cherry-picked Plaintiff's Medical Narrative to find phrases that *sounded* complex. However, when read as a whole, these "complex" medical terms are provided context for a jury to better understand Plaintiff's injuries and treatment. Cf. *Lott v. Ridley*, 285 Ga. App. 513, 514 (2007) ("While many of the medical terms used are identical to those used by [another doctor], the notes do not attempt to explain the terms or put them in context.") Defendant cannot in good conscience assert that the Medical Narrative is "simply a recitation of Plaintiff's medical records" when Dr. Elshihabi carefully went through each complex medical term, defined it in plain language, and even included diagrams for a jury to visualize certain procedures performed on Plaintiff. As such, Plaintiff respectfully requests that this Court overrule Defendant's Objection and allow Plaintiff's Medical Narrative to be used at trial.

II. Case Law and Statutes Expressly Negate Defendant's Remaining, Boilerplate Objections

While Defendant cited *Bell v. Austin* in his list of objections, Defendant did so in name only and failed to apply the correct standard when a Court rules on medical narrative objections. Many of Defendant's objections are boilerplate, have been expressly overruled by higher courts, and hold no merit in law or fact.

In *Bell*, the Supreme Court of Georgia held that O.C.G.A §24-8-826:

> is such a "specified" exception to the hearsay rule. By its terms, the statute does not address a witness' oral testimony, but relates instead to "any medical report in narrative form which has been signed and dated by [certain enumerated] examining or treating [medical professionals]...." O.C.G.A. § 24–3–18(a)[1]. **The statute is intended to create a hearsay exception** applicable in "the trial of any civil case involving injury or disease," so that a medical report in narrative form authored by one of the designated professionals "shall be admissible and received in evidence insofar as it purports to represent the history, examination, diagnosis, treatment, prognosis, or interpretation of tests or examinations, including the basis therefor, by the person signing the report, the same as if that person were present at trial and testifying as a witness...."O.C.G.A. § 24–3–18(a). **Thus, the very purpose of the statute is to dispense with the necessity of producing the author of the medical report as a sworn witness at trial, by authorizing the admission of the report itself**. In doing so, it extends to civil cases involving injury or disease the same hearsay exception which has long been applicable in the workers' compensation context. See *Commercial Union Ins. Co. v. Crews*, 139 Ga.App. 521, 522(2), 229 S.E.2d 14 (1976). **Because no oral testimony is implicated, the oath specified in OCGA § 24–9–60 is not mandated.**

Id at 844-45. (emphasis added). So long as a medical narrative under O.C.G.A. § 24-8-826 "has been signed and dated by an examining or treating licensed physician," the report would have the same effect "as if that person were present at trial and testifying as a witness." O.C.G.A. §24-8-826(a).

A. "The use of the narrative reports, without an opportunity to cross-examine the physician/author in the presence of the jury violates O.C.G.A §24-6-611(b)."

Defendant's above-referenced objection is moot by law. "Any adverse party shall have the right to cross-examine the person signing the report and provide rebuttal testimony." O.C.G.A. §24-8-826(a). There is no evidence that Plaintiff deprived Defendant of any right to cross-examine

[1] As this Court and the parties are aware, the Georgia Legislature re-codified the Georgia Evidence Code in 2013 to mirror the Federal Rules of Evidence. O.C.G.A. §24-3-18 was repealed and replaced with the current medical narrative statute, O.C.G.A. §24-8-826, using the same language as the previous statute.

Dr. Elshihabi at any point of litigation. Rather, Defendant may choose to depose Dr. Elshihabi should he wish, as is his right by law.

B. "A statement of a party, whether oral or written, which is of self-serving nature is not admissible in his favor."

In Paragraph 8, Defendant claims that Plaintiff herself prepared a "self-serving" declaration in her own interest. Plaintiff is thoroughly confused by Defendant's logic, given that Plaintiff's medical provider is the declarant in the Medical Narrative, not her. There is no self-serving testimony or self-made evidence where a party's medical provider details the type of injuries Plaintiff received in the Collision and the types of treatment used to relieve Plaintiff's pain. *Bell*, supra, at 844. *See also* O.C.G.A. § 24-8-826.

C. "These statements are not admissible under any exception to the hearsay rule."

The Supreme Court in *Bell* expressly held, "By its terms, [O.C.G.A.§ 24-8-826] is intended to create a hearsay exception." *Bell*, supra at 845. "The very purpose of the statute is to dispense with the necessity of producing the author of the medical report as a sworn witness at trial, by authorizing the admission of the report itself." *Id*. Defendant's objection that there is not a hearsay exception flies in the face of the statute and case law.

D. "The testimony contained in the narrative report is not authenticated under O.C.G.A. § 24-9-902."

O.C.G.A. §24-8-826 states exactly what is needed for such medical narratives to be admissible to a jury. "The medical narrative shall be presented to the jury as **depositions are presented to the jury and shall not go out with the jury as documentary evidence."** O.C.G.A. § 24-8-826(b) (emphasis added). However, depositions are not documents. O.C.G.A. § 24-9-902 provides the requirements for evidentiary **documents** to be self-authenticated to go back with a

jury for deliberation. As such, O.C.G.A. §24-9-902 does not apply to medical narratives, by law, and therefore, it is a moot objection.

E. "Plaintiff's offer of evidence lacks entirety of the parts, and therefore, violates the rules of completeness"

Plaintiff is also confused by Defendant's objection that the Medical Narrative "violates the rules of completeness." Plaintiff timely submitted her Notice of Intent on January 11, 2022, along with the full 5-page Medical Narrative and four exhibit images. The Medical Narrative itself does not contain any of Plaintiff's medical records, but rather is just that: a narrative from Dr. Elshihabi of Plaintiff's treatment and injuries, as permitted by law. Defendant's objection follows no logic and is moot.

F. "The subject report…is a mere copy."

Defendant cannot in good conscience claim that the Medical Narrative "is a mere copy" of Plaintiff's voluminous medical records. Plaintiff provided 1251 pages of medical records in her possession to the Defendant on May 19, 2021. These records were from eight separate providers and billing institutions, including Legacy Brain & Spine where Dr. Elshihabi treated Ms. Jones. The Medical Narrative is a summary **only** of Dr. Elshihabi's experience, knowledge, and actions taken to treat the Plaintiff at his facility, not the seven other providers. Despite Defendant's equal access to Plaintiff's medical records, Defendant cannot point to one piece of evidence to support his claim that the "report is a mere copy."

G. "The narrative of Dr. Elshihabi merely states additional treatment in the future for her pain is needed, but it does not state with any certainty whatsoever what the probability is for the necessity of that recommended treatment."

In support of this enumerated objection, Defendant cites *Womack v. Burgess,* 200 Ga. App. 347 (1991). However, by the reasoning provided in *Womack,* Plaintiff's claim for future medical expenses is further supported. In *Womack,* the plaintiff's treating medical provider testified at trial

that the plaintiff ***would be*** required to pay for pain medication as part of her future medical expenses arising from the motor vehicle collision. *Womack,* supra at 347. The doctor also testified that the plaintiff ***might*** be required to undergo a surgical procedure in the future. *Id*. The defendant objected to the testimony **only** concerning future surgery expenses on the ground that it was insufficient to support a finding of such damage, but the objection was overruled. *Id*. **In other words, the defendant did not object to any evidence of future pain medication as part of plaintiff's claim for future medical expenses.** *Id.* On appeal, the Court of Appeals determined that there was sufficient evidence presented to submit to the jury plaintiff's claim for future expenses of medication, but not surgery. *Id*. citing *Clayton County Bd. Of Ed. V. Hooper,* 128 Ga. App. 817, 818(1)(1973). The doctor's testimony that the plaintiff ***might*** require a surgery itself was too speculative to award future medical damages on that basis alone.

Here, Dr. Elshihabi states "to a reasonable degree of medical certainty," that Ms. Jones ***will*** require future "prolonged therapy with medication" for her lower back pain that she sustained from the Collision. (emphasis added). Contrary to Defendant's statement that Dr. Elshihabi does "not state with any certainty whatsoever what the probability is for the necessity of that recommended treatment," Dr. Elshihabi directly stated **with a reasonable degree of medical certainty** that future treatment will be required. There is no speculation or probability; it is a definitive statement supported by Dr. Elshihabi's signature and years of experience. Plaintiff's Medical Narrative is evidentiarily sound in both case law and statute, and Defendant's objection is misplaced, at best.

III. Defendant's Frivolous Positions Require the Court to Award Plaintiff's Attorneys Fees

Defendant's many enumerated objections filed with this Court are clearly and unambiguously inconsistent with the law in this state, and Defendant should be sanctioned for wasting the Court's time and the Plaintiff's time.

O.C.G.A. § 9-15-14 states that:

> (a) In any civil action in any Court of record of this state, reasonable and necessary attorney's fees and expenses of litigation **shall** be awarded to any party against whom another party has asserted **a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a Court would accept the asserted claim, defense, or other position**. Attorney's fees and expenses so awarded shall be assessed against the party asserting such claim, defense, or other position, or against that party's attorney, or against both in such manner as is just. (Emphasis added.)
>
> AND
>
> (b) The Court may assess reasonable and necessary attorney's fees and expenses of litigation in any civil action in any Court of record if, upon the motion of any party or the Court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under Chapter 11 of this title, the "Georgia Civil Practice Act." As used in this Code section, "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

A. Defendant's Asserted Objections Are Devoid of Any Justiciable Issue of Law

The Court is required to award reasonable and necessary fees when there is any evidence that a party has asserted any frivolous position. O.C.G.A. § 9-15-14(a). See also *Slone v. Myers*, 288 Ga. App. 8 (2007); *Shiv Aban, Inc. v. Georgia Dept. of Transp.*, 336. Ga. App. 804, 814-15 (2016). In Georgia, where a claim has no provision of law that permits a legal argument or claim to be brought, then fees **must** be awarded. Cf. *Shoenthal v. Dekalb County Employees Retirement System Pension Board*, 343 Ga. App. 27, 30 (2017). This Court should grant attorney's fees to Plaintiff under O.C.G.A.§ 9-15-14(a). For each of the following reasons outlined above in Section

II(A) – (G), a proper study of the state of the law would have revealed that the law plainly contradicts Defendant's proposed objections regarding Plaintiff's use of the Medical Narrative at trial. As such, fees are justified and must be awarded.

B. Defendant's Asserted Objections Are Substantially Groundless and Vexatious

The standard for awarding fees under O.C.G.A. § 9-15-14(b) is under the discretion of the court. However, such discretion is limited. *Felker v. Fenlason*, 201 Ga. App. 207 (1991). O.C.G.A. § 9-15-14(b) permits a trial court to award attorney fees if it finds: (1) that an attorney or party brought or defended an action, or part of an action, that lacked substantial justification; (2) that the action, or part of it, was interposed for delay or harassment; or (3) that an attorney or party unnecessarily expanded the proceedings by other improper conduct. O.C.G.A. § 9-15-14(b) defines "lacked substantial justification" as substantially frivolous, substantially groundless, or substantially vexatious. An appellate court reviews an award of fees and costs under O.C.G.A. § 9-15- 14(b) for abuse of discretion. *DeKalb County v. Adams*, 263 Ga. App. 201 (2003). In a case where there is a lack of merit as to the position of one of the parties, it is within the sound discretion of the court to award fees. Moreover, where there has been an expansion of the litigation by the defense by their improper conduct, attorney's fees are likewise appropriately awarded. O.C.G.A. § 9-15-14(b).

For the reasons cited in Section II, *supra*, Defendant presented objections which lacked substantial justification, were substantially frivolous, substantially groundless, or substantially vexatious. A cursory review of the record and the law prior to filing the Objection was all Defendant would have needed to do before filing objections that defy both reason and law. As such, this court should award attorney's fees under O.C.G.A. § 9-15-14(b).

C. Plaintiff Incurred $4,200.00 in Attorney's Fees to Respond to Defendant's Objections

A trial court is required to make express findings of fact and conclusions of law as to the statutory basis for an award of attorney fees under statute authorizing such fees with respect to a claim or defense lacking a justiciable issue of law or fact. *Gilchrist v. Gilchrist*, 287 Ga. App. 133 (2007); See also *Bailey v. Maner Builders Supply Company, LLC*, 348 Ga. App.882 (2019). A party seeking attorney's fees pursuant to O.C.G.A. § 9-15-14 must present evidence from which the trial court can also determine what portion of the total amount of attorney's time and litigation expenses were attributed to the pursuit or defense of claim. *Reynolds v. Clark*, 322 Ga. App. 788 (2013). Fortunately, an affidavit which separates billable time, enumerates specific tasks worked, and includes the hourly rate billed is sufficient proof of reasonability and necessity for the Court to determine attorney's fees. *Id*. at 791.

In support of Plaintiff's cross-motion for attorney's fees, undersigned counsel has executed an affidavit compliant with the requirements of *Reynolds*, supra. A true and correct Affidavit of Caroline H. Monsewicz is attached hereto as Exhibit A. To date, counsel exerted 10.5 hours of time to review, research, and prepare Plaintiff's response at a billable hourly rate of $400.00 per hour, which is customary for her years of experience and the metro Atlanta market. Ultimately, Plaintiff's fees are warranted and should be awarded by this Court.

CONCLUSION

The Medical Narrative prepared by Dr. Elshihabi checks each of the boxes required by O.C.G.A. § 24-8-826 and the holdings of *Bell.* It is: 1) an original narrative that summarizes Ms. Jones' history, examinations, diagnoses, treatment, and future treatment with a degree of certainty; 2) signed by a medical provider who treated Ms. Jones; and 3) written in plain language with explanations and helpful images for a jury to understand. However, the Defendant's filed

Objection seeks to mischaracterize Dr. Elshihabi's testimony out of context. Replete with boilerplate objections that show a complete absence of any justiciable issue of law or fact, the Objection is directly rebutted by the language of O.C.G.A § 24-8-826 and well-established case law. Given that such objections fly in the face of reason and law, Plaintiff respectfully requests that this Court overrule Defendant's Objection in its entirety.

Furthermore, Defendant's Objection is yet another example of Defendant's stubborn litigiousness and bad faith, which have caused Plaintiff unnecessary trouble and expense in litigation. Plaintiff's attorney spent unnecessary time analyzing Defendant's numerous objections; time researching supporting case law; and time spent responding to each of Defendant's objections. Each objection raised lacked substantial justification such that no party could reasonably believe that a court would accept those arguments. As such, Plaintiff also respectfully requests that this Court award her attorney's fees in the amount of $4,200.00 pursuant to O.C.G.A. §9-15-14(a) and O.C.G.A. §9-15-14(b).

Respectfully submitted this 11th day of February, 2022.

TOBIN INJURY LAW

BY: */s/ Caroline H. Monsewicz*
DARREN M. TOBIN
Georgia Bar No. 200383
CAROLINE H. MONSEWICZ
Georgia Bar No. 160963
CAMPBELL M. WALKER
Georgia Bar No. 797559

49B Lenox Pointe
Atlanta, Georgia 30324
darren@tobininjurylaw.com
caroline@tobininjurylaw.com
campbell@tobininjurylaw.com
(t) 404 587 8423
(f) 404 581 5877

ATTORNEYS FOR PLAINTIFF

IN THE SUPERIOR COURT OF PAULDING COUNTY
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served on all parties via statutory electronic service addressed to the following attorneys of record:

Aaron Smith
James C. McLaughlin
Law Offices of McLaughlin & Ream
Mclaughlinelectronicmail@libertymutual.com
Aaron.smith01@libertymutual.com
Jamesc.mclaughlin@libertymutual.com

Jonathan M. Adelman
Waldon, Adelman, Castilla, Hiestand & Prout
jadelman@wachp.com

Respectfully submitted this 11th day of February, 2022.

TOBIN INJURY LAW

BY: */s/ Caroline H. Monsewicz*
DARREN M. TOBIN
Georgia Bar No. 200383
CAROLINE H. MONSEWICZ
Georgia Bar No. 160963
CAMPBELL M. WALKER
Georgia Bar No. 797559

49B Lenox Pointe
Atlanta, Georgia 30324
darren@tobininjurylaw.com
caroline@tobininjurylaw.com
campbell@tobininjurylaw.com
(t) 404 587 8423
(f) 404 581 5877

ATTORNEYS FOR PLAINTIFF