

**IN THE CIRCUIT COURT  
OF THE NINTH JUDICIAL CIRCUIT  
IN AND FOR ORANGE COUNTY, FLORIDA**

**CASE NO: 2013-CA-009469-O**

**COMPLEX BUSINESS LITIGATION**

**MARY E. SHEFFIELD, AS PERSONAL  
REPRESENTATIVE OF THE ESTATE OF  
VALTON SHEFFIELD,**

**Plaintiff,**

**vs.**

**R.J. REYNOLDS TOBACCO COMPANY,  
PHILIP MORRIS-USA INC., LORILLARD  
TOBACCO COMPANY, LORILLARD,  
INC., LIGGETT GROUP LLC, F/K/A  
LIGGETT GROUP, INC., F/K/A LIGGETT  
& MYERS TOBACCO COMPANY,  
VECTOR GROUP, LTD., INC., F/K/A  
BROOKE GROUP, LTD.,**

**Defendants.**

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**PLAINTIFF'S MOTION IN LIMINE TO PRECLUDE ANY EVIDENCE OR  
ARGUMENT THAT PLAINTIFF FAILED TO CALL TREATING  
PHYSICIANS AS WITNESSES**

Pursuant to Rules 5.2 and 10.2, BCP, Plaintiff respectfully moves this Honorable Court for an Order In Limine to Preclude Any Evidence or Argument That Plaintiff Failed To Call Treating Physicians as Wintesses and states:

1. This Court limited the number of expert witnesses permitted to testify by way of expert opinion testimony at trial, including treating physicians.

2. No treating physicians have been deposed by any party, therefore, their opinion testimony, if any, on any material issues is not of record and unknown.

3. It would be impermissible for Defendants to argue or imply that the failure to call any treating physician as a witness is because that witness's testimony would have been unfavorable to Plaintiff or to imply Plaintiff is "hiding" something by not calling treating physicians as witnesses.

4. When witnesses are available to both parties, no inferences should be drawn or comments made on the failure of either party to call the witness. *Haliburton v. State*, 561 So. 2d 248, 1990 Fla. LEXIS 476, 15 Fla. L. Weekly S 193 (Fla. 1990); *Lowder v. Economic Opportunity Family Health Ctr.*, 680 So. 2d 1133, 1996 Fla. App. LEXIS 10760, 21 Fla. L. Weekly D 2217 (Fla. Dist. Ct. App. 3d Dist. 1996); *Barkett v. Gomez*, 908 So. 2d 1084, 2005 Fla. App. LEXIS 9204, 30 Fla. L. Weekly D 1501 (Fla. Dist. Ct. App. 3d Dist. 2005); and *Lasprilla v. State*, 826 So. 2d 396, 2002 Fla. App. LEXIS 10324, 27 Fla. L. Weekly D 1668 (Fla. Dist. Ct. App. 3d Dist. 2002). Any treating physicians in this case are not

peculiarly within the control of Plaintiff and have been equally available to both parties to subpoena, depose, and/or be called to trial.

5. An inference adverse to a party based on the party's failure to call a witness is permissible when it is shown that the witness is peculiarly within the party's power to produce and the testimony of the witness would elucidate the transaction. *Martinez v. State*, 478 So. 2d 871, 1985 Fla. App. LEXIS 6134, 10 Fla. L. Weekly 2611 (Fla. Dist. Ct. App. 3d Dist. 1985).

6. The general rule is that an inference adverse to a party based on the party's failure to call a witness is permissible when it is shown that the witness is peculiarly within the party's power to produce and the testimony of the witness would elucidate the transaction. *Kindell v. State*, 413 So.2d 1283, 1288 (Fla. 3d DCA 1982) (Daniel S. Pearson, J., specially concurring) (citing *Graves v. United States*, 150 U.S. 118, 14 S. Ct. 40, 37 L. Ed. 1021 (1893), and other authorities). "Availability' of a witness to a party must take into account both practical and physical considerations. [cite omitted]. Thus whether a person is to be regarded as peculiarly within the control of one party may depend as much on his relationship to that party as on his physical availability." *United States v. Blakemore*, 489 F.2d 193, 195 (6th Cir. 1973). Such special relationships have been found where (1) the witness was defendant's daughter, *State v. Michaels*, 454 So.2d 560 (Fla. 1984), (2)

there was a friendship between the party and witness, *Simmons v. State*, 463 So.2d 423 (Fla. 3d DCA 1985), (3) the witness was the employer of the defendant, *Milton v. United States*, 71 App. D.C. 394, 110 F.2d 556 (D.C. Cir. 1940), (4) the witness was a police officer closely associated with the government in developing its case and had an interest in seeing his police work vindicated by defendant's conviction, *United States v. Mahone*, 537 F.2d 922 (7th Cir.), *cert. denied*, 429 U.S. 1025, 97 S. Ct. 646, 50 L. Ed. 2d 627 (1976), (5) the witnesses were state employees who were present at alleged suggestive pretrial line-up and were still in state's employ at time of trial, *United States ex rel. Cannon v. Smith*, 527 F.2d 702 (2d Cir. 1975), and (6) the witness was an informer associated with government in development of case against defendant and there was no indication at trial of any break in the association, *Burgess v. United States*, 142 U.S. App. D.C. 198, 440 F.2d 226 (D.C. Cir. 1970).

7. Defendants cannot show that the mere relationship of treating physician and patient is the type of relationship that puts the treating physicians and their testimony within the peculiar control of Plaintiff. Any insinuation, argument, or testimony that such witnesses would have testified unfavorably for Plaintiff or that Plaintiff is “hiding” their opinion testimony would be improper, particularly where, as here, Plaintiff was required to make trial strategy decisions

on whether to utilize treating physicians as expert witnesses due to orders and rules limiting the number of experts.

WHEREFORE, Plaintiff respectfully requests that this Court enter an order prohibiting Defendant from introducing any evidence or argument regarding when Plaintiff decided to file a lawsuit or insinuation that Plaintiff delayed in filing this lawsuit.

### **CERTIFICATE OF GOOD FAITH CONFERENCE**

In accordance with BCP 5.3, counsel for the Plaintiff, Melvin Wright, conferred with Benjamin J. Hill, IV, counsel for the defense, on by telephone on December 2, 2015 in a good faith effort to resolve the issues raised by the motion. Plaintiff certifies that counsel have been unable to agree on the resolution of the motion.

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by e-filing portal, Electronic Mail, this \_\_\_\_\_ day of January, 2019, to: Dawn I. Giebler-Millner, Esq., [gieblerd@gtlaw.com](mailto:gieblerd@gtlaw.com), [DGMAssistant@gtlaw.com](mailto:DGMAssistant@gtlaw.com), [FLService@gtlaw.com](mailto:FLService@gtlaw.com), 450 S. Orange Avenue, Ste. 650, Orlando, FL 32801, Mark J. Heise, Esq., Lawrence V. Ashe, Esq., Boies, Schiller & Flexner LLP, [PMUSA@bsfllp.com](mailto:PMUSA@bsfllp.com), [lashe@bsfllp.com](mailto:lashe@bsfllp.com), [ecruz@bsfllp.com](mailto:ecruz@bsfllp.com), [mheise@bsfllp.com](mailto:mheise@bsfllp.com),

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