

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

ANDRE L. GIBBONS, JR., AN INFANT, ET AL., Plaintiffs,

v.

NO. CL10-2326T-01

JURY TRIAL DEMANDED

RIVERSIDE MEDICAL GROUP, ET AL., Defendants.

PLAINTIFFS' REPLY MEMORANDUM  
RE PLAINTIFFS' MOTION FOR RECONSIDERATION AND TO AMEND  
RE DISMISSAL OF DEFENDANT, RIVERSIDE MEDICAL GROUP

FILED  
2014 APR -7 AM 10:31  
NEWSPRINT  
RIVERSIDE  
DAVIS, COURT  
NEWS CIRCUIT COURT  
DATE

MAY IT PLEASE THE COURT:

Plaintiffs disagree with Defendant, Riverside Medical Group, re its claimed entitlement to dismissal with prejudice, as follows:

1. On February 18, 2014, Plaintiffs asserted: "Under the circumstances, Plaintiff hereby move to correct that **misnomer** by amending to insert the 'right name,' RPSI, for RMG. That is pursuant to *Va. Code §8.01-6 and §8.01-6.2*". See, Plaintiff's Memorandum in Opposition to Motions to Quash Service and Motions to Dismiss at 2 (emphasis added).
2. At hearing on February 26, 2014, Plaintiffs admittedly expressed only concern that "a dismissal with prejudice, if and to the extent it would have any impact on us with respect to Riverside Physician Services, Inc., which was properly served". See, Transcript of Proceedings at 12.
3. Plaintiffs still genuinely have that same serious concern - such that Plaintiffs will have to notice an appeal of a dismissal of Riverside Medical Group, if this Court follows through instead of reconsidering.
4. Hence, Plaintiffs' Motion for Reconsideration and to Amend re Dismissal of Defendant, Riverside Medical Group, embodies that same concern and attempts to stave off the inconsistency and issue from arising at all.
5. Plaintiffs' Motion for Reconsideration also reflects the legitimate related secondary concern that in ordering the undesired dismissal with prejudice - instead of ordering amendment and substitution as Plaintiff now has moved twice - the Court is misapplying the law (which naturally heightens Plaintiffs' primary concern about the inconsistent contradictory result).
6. Plaintiffs' concerns are substantially increased since coming across two (2) decisions on point against opposing counsel that are diametrically opposed to this Court's tentative ruling. *McCarty v. Allen*, No. CL-09-12407 (Fairfax Jan. 7, 2011) and *Nikes v. Abidin*, No. CL-2013-13799 (Fairfax Mar. 14, 2014).

7. Riverside Medical Group's purported distinctions of *McCarty* and *Nikes* with the matter *sub judice* make no material difference in fact and law:
  - A. The underlying corporate Defendant at bar receiving timely notice of suit (contrary to *McCarty* and *Nikes*) actually strengthens the motion to amend of Plaintiff at bar.
  - B. Analytically, Plaintiffs in *McCarty* and *Nikes* having "no viable corporate defendant" without amendment (contrary supposedly to Plaintiffs at bar) is not the legal touchstone of §8.01-6: Plaintiffs either qualify for §8.01-6 amendment, or they do not; §8.01-6 is not simply a discretionary "get-out-of-jail" card for judges to bestow on Plaintiffs simply when there is "no viable corporate defendant".
  - C. More fundamentally, Riverside Medical Group presupposes Plaintiffs at bar have a "viable corporate defendant," while again Plaintiffs at bar still are concerned that is dubious if Riverside Medical Group gratuitously is dismissed with prejudice.
  - D. *McCarty, Nikes, and the matter sub judice* are identical on the sole core operative fact re §8.01-6: all named as Defendant the fictitious name of a corporate entity.
8. Because the decisions in *McCarty* and *Nikes* personally involving defense counsel and directly adverse to Defendant are on-point and not distinguishable, Plaintiffs do believe it was improper of defense counsel not to bring *McCarty* and *Nikes* to the attention of this Court before, during, and/or after hearing, particularly while deriding undersigned counsel for supposed "legal vomit," "nonsense," "wasting time," and otherwise.
9. Plaintiffs respectfully reiterate their entitlement to amend and substitute pursuant to §8.01-6, and incorporate *McCarty, Nikes* and all legal authority cited therein by the similarly situated Plaintiffs.
10. Even if *arguendo* the gratuitous dismissal with prejudice of Riverside Medical Group proves not to prejudice Plaintiffs re RPSI - and the defense has not adduced any authority for the same - that is not warrant for this Court misapplying the law and creating bad unfair precedent for future Plaintiffs.
11. The focus of this Court is justice, doing the right thing, determining and applying the law correctly.
12. This Court should not be swayed by the defense to rule incorrectly on the irrelevant grounds that ostensibly Plaintiffs already have a viable corporate Defendant.
13. Whatever the speculation about potential impact on Plaintiffs by gratuitous dismissal with prejudice of Riverside Medical Group, there is one thing for sure: this Court not dismissing Riverside Medical Group will have absolutely no impact on Riverside

Medical Group and RPSI (since they are one-and-the-same, and RPSI is in the suit).

14. As evinced by their Motion for Reconsideration, Plaintiffs have good cause for not endorsing the draft Order of Defendant; and if Plaintiffs had signed and this Court entered weeks ago, the Court would be without jurisdiction to reconsider such a final dismissal.

WHEREFORE Plaintiffs pray the Court grant their Motion for Reconsideration, vacate its prior Bench ruling re dismissal of Riverside Medical Group, deny its Motion, and grant Plaintiffs' amendment and substitution of Riverside Physician Services, Inc. forthwith at Defendants' expense.

Respectfully submitted,

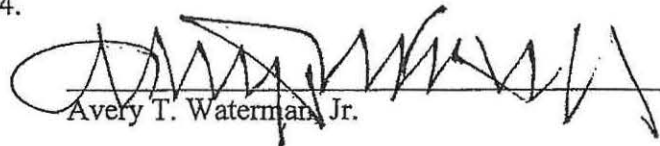
ANDRE L. GIBBONS, JR., AN INFANT, ET AL.

By:   
Of counsel

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#### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiffs' Reply Memorandum re Plaintiff's Motion for Reconsideration and to Amend re Dismissal of Defendant, Riverside Medical Group was mailed to Richard L. Nagle, Esq./Heather E. Zaug, Esq., Hancock, Daniel, Johnson & Nagle, P.C., 3975 Fair Ridge Drive, Suite 475 South, Fairfax, VA 22033, on this 4<sup>th</sup> day of April, 2014.

  
Avery T. Waterman, Jr.