

STATE OF NEW YORK  
SUPREME COURT COUNTY OF WESTCHESTER

SHANIA-GAY FFRENCH,

Plaintiff,

-against-

GUIRLANE AGNANT, M.D., MOUNT VERNON  
OB/GYN ASSOCIATES, KEITH S. EDWARDS, M.D.,  
GARRY GUERRINO, M.D., THE MOUNT VERNON  
HOSPITAL and CRAIG BAUER, D.C., MONTEFIORE  
MEDICAL CENTER and STEPHEN T. ONESTI, M.D.,

Defendants.

**AFFIDAVIT IN SUPPORT OF  
MOTION**

Index No.: 14401/02

Assigned Judge:

Hon. Nicholas Colabella, J.S.C.

RECEIVED

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CHIEF CLERK  
WESTCHESTER SUPREME  
AND COUNTY COURTS

STATE OF NEW YORK )  
 )s.s.:  
COUNTY OF WESTCHESTER )

Shania-Gay Ffrench being duly sworn deposes and says:

1. I am the Plaintiff in the above captioned action.
2. This affidavit is made in support of a motion made under and pursuant to CPLR § 2221 entitled "Motion affecting prior order."
3. This motion is made for leave to renew and to reargue a prior motion, for leave to appeal from, and to stay, vacate and/or modify an Order made in the above captioned case by Hon. Nicholas Colabella, Supreme Court Justice, dated October 22, 2009. A copy of the said Decision/Order is annexed hereto as Exhibit "A".
4. A copy of the motion papers which led to the said order are annexed hereto as Exhibit "B". The subject motion was made by Merryl F. Weiner, Esq., of Quaranta & Associates. The motion papers consist of a notice of motion dated August 3, 2009, an attorney's affirmation by Merryl F. Weiner, Esq., dated August 3, 2009, and my affidavit

sworn to on the 3rd day of August, 2009.

5. That motion sought an Order pursuant to Judiciary Law § 474-a 4 “granting Quaranta & Associates greater compensations than the sliding scale set forth in subdivision 2, specifically granting Quaranta & Associates a 33.3% attorney fee”. The notice of motion does not recite that an existing retainer agreement fixes the fee by contractual arrangement.
6. This action was tried to verdict resulting in a jury verdict in my favor on July 20, 2009 in the total amount of \$47,950,000.00.

#### **MOTION TO RENEW**

7. Previously I had entered into a retainer agreement based upon the sliding scale proscribed by the Judiciary Law. (*See*, Exhibit “B” paragraph 3 of my affidavit made in connection with the motion).
8. Ms. Weiner, in her affidavit made in connection with the motion to increase her fee, does not mention the retainer agreement. Rather in paragraph 13 of her affidavit, she states that she is asking the court that the “statutorily proscribed fee be amended.”
9. On November 18, 2009, I retained the law firm of Tabner, Ryan and Keniry, LLP.
10. Herein, I will set forth such facts concerning the making of the motion by Quaranta & Associates, as I know them to be of my personal knowledge.
11. During the week prior to August 3, 2009, attorney Meryll F. Weiner, Esq., called me on the telephone. She stated to me that based upon the verdict the law allows a raise to the attorneys. She stated that the law is that they could get a raise based on the verdict. She asked me to sign an affidavit in connection with the motion. I told her that I was operating under the incorrect assumption that Quaranta & Associates my attorneys were entitled to

33.3%.

12. On August 3, 2009, attorney Weiner came to my house. She was there for a brief period of time. She repeated again what she said in her telephone call concerning a raise. She summarized to me what she stated was contained in the motion papers.
13. I had no other conversation with attorney Weiner or anyone else from her office concerning their motion and/or their request for my signature.
14. On November 11, 2009, I received a letter from attorney Weiner dated, October 23, 2009, and postmarked, October 26, 2009. The letter advises me of the order of Justice Colabella dated, October 22, 2009. Enclosed with that letter was a copy of the order dated, October 22, 2009. Thereupon, I took immediate steps to consult with other counsel concerning this matter. A copy of the letter dated October 23, 2009 is attached hereto and made a part hereof as Exhibit "C". It states that it was being sent to me "for my reference."
15. On November 18, 2009, I spoke on the telephone with attorneys, William J. Keniry, Esq., and William H. Keniry, Esq., of the law firm of Tabner, Ryan and Keniry, LLP, in Albany, New York.
16. The reason so much of the facts set forth in this motion to renew were not presented on the prior motion is that the prior motion was made by my attorneys seeking an order increasing their fees in a medical malpractice case and the instant motion is made to vacate such order after it was granted.
17. The law firm of Tabner, Ryan and Keniry, LLP has advised me of the language of § 474-a  
4 of

the Judiciary Law which is as follows:

In the event that claimant's or plaintiff's attorney believes in good faith that the fee schedule set forth in subdivision two of this section, because of extraordinary circumstances, will not give him adequate compensation, application for greater

compensation may be made upon affidavit with written notice and an opportunity to be heard to the claimant or plaintiff and other persons holding liens or assignments on the recovery. Such application shall be made to the justice of the trial part to which the action had been sent for trial; or, if it had not been sent to a part for trial, then to the justice presiding at the trial term calendar part of the court in which the action had been instituted; or, if no action had been instituted, then to the justice presiding at the trial term calendar part of the Supreme Court for the county in the judicial department in which the attorney has an office. Upon such application, the justice, in his discretion, if extraordinary circumstances are found to be present, and without regard to the claimant's or plaintiff's consent, may fix as reasonable compensation for legal services rendered an amount greater than that specified in the schedule set forth in subdivision two of this section, provided, however, that such greater amount shall not exceed the fee fixed pursuant to the contractual arrangement, if any, between the claimant or plaintiff and the attorney. If the application is granted, the justice shall make a written order accordingly, briefly stating the reasons for granting the greater compensation; and a copy of such order shall be served on all persons entitled to receive notice of the application.

18. At the time I signed the affidavit, made in connection with the motion, I was not aware of the above quoted provision of law and neither the law firm of Quaranta & Associates nor attorney Merryl F. Weiner, Esq. apprised me of what it states.

Particularly, I did not know and I was not apprised of the language which states therein that:

“provided, however, that such greater amount shall not exceed the fee fixed pursuant to the contractual arrangement, if any, between the claimant or plaintiff and the attorney.”

or the language which states therein that:

“because of extraordinary circumstances, will not give him adequate compensation.”

19. I would not have signed the affidavit or consented to the motion if I knew of or was apprised of such statutory language, among other things.

20. At the time I signed the affidavit, made in connection with the motion, I was not aware of any case law on the pertinent subject and neither the law firm of Quaranta & Associates nor attorney Merryl F. Weiner, Esq., apprised me of any case law on the subject.

21. The law firm of Tabner, Ryan and Keniry, LLP has advised me, among other things, of the opinion of the Court of Appeals in the case of *Yalango v. Popp*, 84 NY2d 601 (1994).
22. I would not have signed the affidavit or consented to the motion if I knew or was apprised of the opinion in the case of *Yalango v. Popp*.
23. I am now aware that the Judiciary Law required the attorneys to give me “written notice and opportunity to be heard.” (*See*, Section 474-a 4). I was not given written notice and opportunity to be heard.
24. The law firm of Quaranta & Associates drafted the affidavit signed by me and made in connection with their motion to increase their fee. In my affidavit they set forth that I had a misconception that their fee was one-third. This was what they set forth in my affidavit as the basis for my consent. I submit that this was not proper. The request for my consent should have been preceded by full disclosure. They should have first explained to me that there was a written contractual arrangement made pursuant to § 474-a 4 of the Judiciary Law and that they were foreclosed from asking for or receiving a fee greater than that set forth in the contractual agreement. My misconception should not be a basis for an increase in their fee. The amount of the award should not be the basis for them to receive a raise.
25. I submit that my attorneys were under a severe and absolute obligation, under the circumstances, to explain everything in great detail to me and advise me completely of the law and the facts. This they did not do.
26. One of the things my attorneys should have explained to me was the difference in dollars between the amount of the fee computed pursuant to contractual arrangement and the amount of the fee that they were requesting in their application to the Court for an increase. They did not do this.
27. The attorneys failed to set forth a copy of the contractual arrangement in their motion to

increase their fee. However, they were aware of its existence and its content. In drafting the affidavit in their motion for me to sign, they state (at paragraph 4), that “ I am aware that the fee agreement I previously signed was for fees to be distributed under the sliding scale proscribed by the Judiciary Law, as explained to me by my attorneys.” I have repeatedly asked attorney Weiner for a copy of it and she has not provided a copy to me.

### **MOTION TO REARGUE**

28. I do not know what, if any, presentation Quaranta & Associates made to the Court in seeking approval of their motion to increase their fees. Thus, I assume here that the Court had before it just the motion papers. Based upon the motion papers and upon the Court’s Decision/Order, I submit this motion for leave to reargue.
29. First, I submit that the motion should have been denied based upon the prohibitive language of Judiciary Law § 474-a 4 and the information supplied to the Court in my affidavit dated August 3, 2009, that a contractual agreement was in existence. Manifestly, the motion papers did not contain a copy of that contractual agreement.
30. Second, the decision of the court dated October 22, 2009, states, “Motion is granted without opposition.”. The motion papers contain no waiver or purported waiver by me of the prohibition contained in Judiciary Law § 474-a 4. I did not even know of it.
31. Third, the notice of motion gives no notice to me of the motion or any opportunity to be heard (*See* Judiciary Law § 474-a 4).

### **LEGAL REPRESENTATION**

32. I have retained the law firm of Tabner, Ryan and Keniry, LLP on a limited basis for purposes relating to payment and division of legal fees arising out of this action. This includes the taking of an appeal and moving to renew and reargue.

33. I continue to be represented by Quaranta & Associates in connection with the underlying action.
34. I have been advised by my attorneys that it may not have been appropriate for the law firm of Quaranta & Associates to have represented me on the motion to increase their fee due to a conflict of interest. I should have been advised by Quaranta & Associates of the right to separate representation on the motion. I was never so advised.
35. I am entitled to be represented by counsel on the within motion so as to not further prejudice my interests.
36. The within motion must be filed no later than Friday, November 27, 2009, in the event the letter of October 23, 2009 has any validity to commence my time to appeal and move.
37. In order to properly defend my interests on the motion by Quaranta & Associates I am entitled to separate counsel.

**WHEREFORE**, it is respectfully requested that plaintiff's motion be granted and that the order dated October 22, 2009 be vacated, together with such other and further relief as the Court deems just and proper.

  
Shania-Gay French

Sworn to before me this  
27<sup>th</sup> day of November, 2009.

  
Notary Public

DAVID M. BOUCHARD  
Notary Public, State of New York  
Qualified in Rensselaer Co., No. 01B06186410  
Commission Expires: 04-28-2012