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

ENOCK PLANCHER, as Personal
Representative of the ESTATE OF
ERECK MICHAEL PLANCHER, II,
Deceased,

Plaintiff,

Case No.: 2009-CA-007444-0

v.

UNIVERSITY OF CENTRAL FLORIDA
BOARD OF TRUSTEES and UCF
ATHLETICS ASSOCIATION,
INC., a Florida corporation,

Defendants.
_______________________________________/

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR CONTINUANCE

Plaintiff ENOCK PLANCHER, as Personal Representative of the ESTATE OF ERECK MICHAEL PLANCHER, II, Deceased, responds as follows to Defendants UNIVERSITY OF CENTRAL FLORIDA BOARD OF TRUSTEES' ("UCF") and UCF ATHLETICS ASSOCIATION, INC.'s ("UCFAA") Motion to Continue the trial of this cause that has been specially set for June 13, 2011 and states:

1. Defendants' motion for a continuance on procedural grounds, which can be cured as discussed below, is actually an attempt to delay the case so that Defendant can inject a new issue into the case that requires new experts and a never before requested pathological examination of the heart of Plaintiff's son that will inflict unnecessary emotional distress based upon at best a mere "possibility." See Defendants' Motion to Compel Examination of Heart served on April 8, 2011 and Defendants' Motion for Leave to Designate a New Expert (Dr. Morales – cardiac pathologist) served on April 19, 2011. For the reasons set forth below, the

Court should deny Defendants' motion to continue and related untimely expert discovery and additional expert witness.

2. On April 16, 2011, Defendants moved to continue the June 13, 2011 trial on the sole grounds that because the Court had granted Plaintiff's motion to amend to add a claim for punitive damages against UCFAA, the case was no longer at issue and a new order setting trial was required under Rule 1.440, citing *Precision Constructors, Inc. v. Valtec Construction Corp.*, 825 So.2d 1062 (Fla. 3rd DCA 2002).

3. On April 19, 2011, Plaintiff filed a Rule 1.440 Notice that Action is at Issue and Motion to Reset Jury Trial. Plaintiff disagrees that *Valtec* applies to the circumstances in this case when Plaintiff complied with § 768.72, *Florida Statutes* and Rule 1.190(f), *Florida Rules of Civil Procedure*, to assert a claim for punitive damages. Neither the underlying negligence cause of action against UCFAA changed nor did the claims against UCF, which remained at issue. Nevertheless, Plaintiff acted out of an abundance of caution to avoid any argument that UCFAA was not afford due process under the Rule 1.440 to ensure the case is at issue. As a result, the Court can reset the trial for June 13, 2011, as long as the order is issued more than 30 days from the trial date eliminating any procedural issues. See Rule 1.440(c). Accordingly, all procedural defects for which Defendants sought a continuance will be cured.

4. During the April 20, 2011 pretrial conference, Defendants raised the issue of continuance and were given extra time by the Court to decide whether Defendants truly wanted a continuance because if moved, the next available trial date would not be until September 12-30, 2011. On April 21, 2011, Defendants responded by letter to the Court asserting that discovery issues were the basis for the continuance and wrongly asserted its new expert cardiac pathologist was in response to Plaintiff's expert pathologist who was disclosed on February 9, 2011. See

April 21, 2001 letter from counsel for Defendants to the Honorable Robert Evans, attached hereto as Exhibit "A".

5. In the April 21st letter to the Court, defense counsel states that the June 2011 trial date is "impractical based on the recent, late, addition of two medical experts" which "has now necessitated Defendants' motion to add an additional expert." These statements are misleading, out of context, and simply wrong. As to the additional "late" experts, Plaintiffs first served notice of those experts, Dr. Spitz (pathologist) and Dr. Moran (cardiologist), on February 9, 2011. Because the trial date had recently been moved from May to June, Plaintiff's counsel likewise anticipated the expert disclosure dates would be pushed back accordingly. Moving all dates consistent with the new June trial date, would make the disclosures timely, not late. Plaintiff also provided defense counsel with dates for their depositions to be completed well before the April 20th discovery cut-off in effect at that time.

6. As to type of experts, Plaintiff did not retain or disclose a pathologist in the case until January 2011 until after the defense deposition of the Orange County medical examiner indicated that the examiner's opinions and processes that he followed to conclude the cause of Ereck Plancher's death would be challenged. Plaintiff's cardiologist was retained out of an abundance of caution to have one available to respond to then unknown opinions of the cardiologist listed by Defendants. Accordingly, these experts were retained and prepared to respond to issues that the defense injected into the case. Despite full knowledge that Plaintiff intended to have an expert pathologist testify in the case, Defendants never sought to add a pathologist until April 19, 2011, over two months after Plaintiff's disclosure. In fact, Defendants' expert disclosure was served on February 17, 2011, nearly month after Dr. Spitz

was added, and that did not include a responsive pathologist. On March 7, 2011, Defendants served their witness list that included the previous experts but again no new pathologist.

7. The intent of Defendants is not "procedural." Instead, the defense seeks a continuance in order to potentially provide an opportunity to perform further dissection of Ereck Planchers heart by a new expert cardiac pathologist (Dr. Morales). Defendants' motion to examine and conduct further dissection on Ereck Plancher's heart failed to properly follow the rules, was untimely, and does not demonstrate "good cause". (See Plaintiff's Response to Defendants' Motion to Compel Examination of Ereck Plancher's Heart served on April 19, 2011.)

8. Despite defense counsel's assurances to the Court that Dr. Morales was being added to respond to Dr. Spitz as stated in his April 21st letter to the Court and Motion to Add Experts, Defendants actually seek to add this brand new expert to conduct testing at the eleventh hour and for the sole purpose of injecting entirely new issues into the case that now enters the third year of litigation.. Defendants' expert cardiologist, Dr. Myerburg, testified at his deposition on April 11, 2011 that despite his retention in November 2010, it was <u>not until March 30, 2011</u> when he first discussed further examination and dissection of the conduction system of Ereck Plancher's heart could be done. (Myerburg Deposition April 11, 2011 at pages 67-68.) Dr. Myerburg also stated that he has <u>never</u> done this type of work and that Dr. Morales at the same institute Myerburg works would be the person with the appropriate skills and knowledge that he would trust to do the dissection and examination. (Myerburg Deposition April 11, 2011 at pages 85-86.) Accordingly, Dr. Morales was only recently injected into this case by Dr. Myerburg for the specific purpose of conducting further pathological dissection, not to respond to Dr. Spitz. Moreover, Dr. Myerburg admitted that deaths attributed to first time cardiac events are rare and

even rarer for young athletes. Dr. Myerburg affirmed that from what is currently known Ereck Plancher did not die from the leading cause of cardiac sudden deaths in athletes, hypertrophic cardiomyopathy. (Myerburg Deposition April 11, 2011 at pages 75-76.) Further, Ereck Plancher's behavior after completing the intensive physical exertions, the observations of witnesses, his vital signs, and information recorded by the defibulator, all are admittedly against a sudden cardiac cause of death. Thus, Dr. Myerburg could only give some remote "possibility" that was not recognized by the medical examiner or the cardiac pathologist retained by the medical examiner to examine Ereck Plancher's heart. Both of the unbiased experts opined in their reports and at subsequent discovery depositions that the cause of Ereck Plancher's death had nothing to do with any cardiac abnormality but was due to metabolic and ischemic issues as a result of his sickle cell trait and the intensive exercise he completed. Again, it must be emphasized these are not retained experts or "hired guns" but medical examiners fulfilling an obligation imposed under Florida law to determine the cause of Ereck Plancher's death.

9. This Court is well aware of the basic proposition that all litigants should be afforded a level playing field and has done its best to protect that scenario. Ereck Plancher's cause of death has been known to the defense since his autopsy results were made public in July 2008. Never before during the entire course of this litigation, did the defense raise this recently minted theory that some undiscovered developmental disorder caused Ereck Plancher's death. Nor was this issue raised by any Plaintiff expert. Should the Defendants succeed in creating this expert fishing expedition, Plaintiff will be obligated obtain a responsive expert (Dr. Spitz is a general pathologist, not a cardiac pathologist) and start discovery in this regard, all over again. Plaintiff will not only be obliged to have a similar expert as Dr. Morales, but this additional expert will need to be present at the examination in order to make the same observations as Dr.

Morales. In effect, Defendants now seek to take advantage of their own shortcomings to continue the case in order to place this new issue concerning a remote "possibility" into the case at the last minute so as to create an unfair advantage because Plaintiff has no similar situated expert, most of Plaintiff's experts have been deposed and have now rendered their final opinions. Probably most importantly, to allow such an intrusive dissection for a remote "possible" cause will impermissibly and unnecessarily invade the sanctity of the Plancher family, cause undue emotional distress and should not be allowed. The heart of Ereck Plancher has already been cut apart and all sides had had equal access to the medical and pathological information necessary to try this case. Maintaining a level playing field is the proper way to proceed.

10. Defendants' reference to "multiple items of discovery are owed by the Plaintiff" is misleading and will not cause any delay in this case being ready for the June 13th trial. The discovery referenced by defense counsel seeks *Boucher* (Plaintiff's experts) and *Northrup* (impeachment materials for defendants' experts) responses. As to the *Boucher* discovery, these requests were not propounded until January 2011 and were not due until after the depositions of two of Plaintiff's experts (Casa and Mitchell) had already been taken and the day before the third expert (Eichner). Consequently, the defense obtained all *Boucher* information at the depositions. The deposition of Plaintiff's two other experts have not been noticed despite multiple dates having been provided by counsel for Plaintiff. Regardless, Plaintiff will serve responses before the April 28, 2011 hearing. As to *Northrup* discovery answers, these were not served until March 4, 2011 and Plaintiffs will likewise serve responses. Accordingly, Defendants will have suffered no prejudice and receive the responses well before the discovery cut-off.

WHEREFORE, Plaintiff respectfully requests that this Court deny Defendants' Motion for Continuance and such further relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 26, 2011, I electronically filed the foregoing with the Clerk by using the CM/ECF System, which will send a notice of electronic filing to the following: Daniel A. Shapiro, Esq. at *Daniel.Shapiro@csklegal.com*, Attorneys for UCF Athletics Association, Inc. and University of Central Florida Board of Trustees.

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