

# **CIRCUIT COURT OF FAIRFAX COUNTY CALENDAR CONTROL ORDER**

## **PART ONE - TO BE COMPLETED BY THE PARTIES**

Case number(s): 2017-11588

Karen Feltz v. Selfway, Inc.

Jeffrey Downey Mark Westerfield

Counsel for Plaintiff ☐ Pro Se

Counsel for Defendant ☐ Pro Se

[Signature] 131992

Mark W 125391

Signature ☐ By telephone VSB No. 703

Signature ☐ By telephone VSB No

Jeffrey@Selfway.com/6192400  
Email Address / Telephone Number

mark.westerfield@westerfield.us  
Email Address / Telephone Number 703 633 366

Action Requested by. ☐ Plaintiff ☒ Defendant

Notice of Calendar Control Appearance provided to opposing party on 5/25 (date)  
by oral (method). **Attach copy of notice if opposing party is not present.**

Action Requested. Quash Plaintiff's cross motion  
of the deposition of Plaintiff's treating  
physician

Has a substantially similar request previously been made? ☒ No ☐ Yes, on \_\_\_\_\_

How did the Court rule on the previous request? \_\_\_\_\_

## **PART TWO - TO BE COMPLETED BY THE CALENDAR CONTROL JUDGE**

The action requested is ☒ DENIED ☐ GRANTED, as follows that the deposition  
of Selfway's deposition can take place tomorrow.

☐ The hearing presently set for \_\_\_\_\_ (date) is removed from the docket

Existing Date	New Hearing Date	Hearing Time	Judge Assigned	Hearing Length
Jury Trial? <input type="checkbox"/> No <input type="checkbox"/> Yes, by request of <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant				
<input type="checkbox"/> Two-week motion <input type="checkbox"/> One-week motion <input type="checkbox"/> with a judge <input type="checkbox"/> without a judge				
Long briefs approved: <input type="checkbox"/> No <input type="checkbox"/> Yes (attach Long Brief Form)				
Is a necessary party incarcerated? <input type="checkbox"/> No <input type="checkbox"/> Yes, in _____				
Interpreter Needed? <input type="checkbox"/> No <input type="checkbox"/> Yes _____ (language)				
The Scheduling Order deadlines <input type="checkbox"/> are MODIFIED and calculated from the new trial date				
<input type="checkbox"/> are NOT MODIFIED by this Order <input type="checkbox"/> shall be addressed by motion to be heard on _____				
Entered	<u>5/29/18</u>	<u>[Signature]</u>	Calendar Control Judge	

ACCOMPLISHED BY:

JOHN T. FREY, CLERK

BY: [Signature]

Deputy Clerk

Date: 06/18/2018  
Original retained in the office of  
the Clerk of the Circuit Court of  
Fairfax County, Virginia

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR FAIRFAX COUNTY**

**KAREN T. FETTIG,**

**Plaintiff,**

**v.**

**Case No.: 2017-11588**

**SAFEWAY, INC., et al**

**Defendants.**

**DEFENDANTS' MOTION FOR A PROTECTIVE ORDER**

COME NOW the Defendants, NAI Saturn Eastern, LLC (NAI), Safeway, Inc., and Safeway Stores, Inc., by and through counsel, and pursuant to Rule 4:1(c), file this motion seeking a protective order to prevent Plaintiff from conducting a de bene esse deposition of her medical expert on May 30, 2018, the same date and immediately following a scheduled discovery deposition of the same doctor by defense counsel.

Respectfully submitted,  
Defendants by Counsel



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Counsel for Defendants NAI Saturn Eastern, LLC, Safeway, Inc.,  
and Safeway Stores, Inc.

FILED  
COURT SERVICES  
2018 MAY 23 PM 2:25  
JEFFREY DOWNE  
CIRCUIT CLERK  
FAIRFAX, VA

**VIRGINIA:****IN THE CIRCUIT COURT FOR FAIRFAX COUNTY****KAREN T. FETTIG,****Plaintiff,****v.****Case No.: 2017-11588****SAFEWAY, INC., et al****Defendants.****DEFENDANTS' MEMORANDUM IN SUPPORT OF DEFENDANTS'**  
**MOTION FOR A PROTECTIVE ORDER**

COME NOW the Defendants, NAI Saturn Eastern, LLC (NAI), Safeway, Inc., and Safeway Stores, Inc., by and through counsel, and pursuant to Rule 4:1(c), file this motion seeking a protective order to prevent Plaintiff from conducting a de bene esse deposition of her medical expert on May 30, 2018, the same date and immediately following a scheduled discovery deposition of the same doctor by defense counsel.

**STATEMENT OF THE CASE**

This case is an otherwise routine personal injury action, in which the Plaintiff alleges that, on September 12, 2015, she slipped on water while shopping in a Safeway Store located at Hunters Woods Plaza in Reston, Virginia and injured herself. Liability is contested, and Plaintiff has admitted that she had a pre-existing condition, so Plaintiff's claims of injury and causation are also disputed.

Under the Scheduling Order, Plaintiff was required to disclose her medical expert witness on or before May 16, 2018. Because defense counsel knew that Plaintiff's claim of injury was contested, and in anticipation of a less than full expert witness disclosure, on April 18, 2018, in a telephone conference with Plaintiff's counsel regarding various discovery issues, defense counsel stated his intention to take the

deposition of the Plaintiff's primary treating orthopaedist, Dr. George Aguiar. Plaintiff's counsel confirmed that Dr. Aguiar would serve as Plaintiff's expert.

In that same conversation, Plaintiff's counsel mentioned the possibility of taking both the discovery deposition of Dr. Aguiar and the de bene esse deposition of the doctor on the same date. Defendants' counsel strongly objected stating that he required time between hearing what Dr. Aguiar's opinions were and any de bene esse deposition, so that defense counsel could confer with his client, confer with the defense expert, obtain the deposition transcript and then prepare an outline of questions and appropriate exhibits for the de bene esse deposition. In that conversation, Plaintiff's counsel agreed to schedule the de bene esse deposition for a different date.

Plaintiff's expert witness designation is, as anticipated, of almost no value and fails to comport with the applicable rules. See attached **Exhibit 2**. The summary of opinions is based on "anticipated testimony," not actual opinions held by Dr. Aguiar and confirmed in advance of filing the expert witness designation. The expert witness summary merely recites the content of office notes and MRI studies. Plaintiff's counsel has admitted in conversations and in writing that he needs to discuss the case with Dr. Aguiar and insisted that he be allowed to schedule a prep session in the 30 minutes prior to the scheduled discovery deposition, presumably because defense counsel had not yet discussed Plaintiff's case with Dr. Aguiar directly. On the critical issue of causation, Plaintiff's summary states that, "It is anticipated that Dr. Aguiar will opine ...," and many opinions are not expressed at all but instead Plaintiff's expert designation states that Dr. Aguiar "reserves the right to address ..." a particular issue. (Text highlighted on all copies.)

Because the standard scheduling order does not allow sufficient time to receive the expert designation, file and then argue a motion to strike the expert witness and then also take the deposition if required, Defense counsel began his efforts to schedule Dr. Aguiar's deposition far in advance. Dr. Aguiar's discovery deposition is scheduled for May 30, 2018 at 5:00 PM. A non-refundable minimum payment of \$1,500 was required upfront before scheduling would be confirmed.

Despite many emails exchanged between counsel regarding the scheduling of Dr. Aguiar's discovery deposition, Plaintiff's counsel never again mentioned the possibility of taking the de bene esse deposition of Plaintiff's expert. On May 17, 2018, without making any effort to confer with Defendants' counsel, and contrary to what was stated in the initial discussion in April, and timed in such a way that it is impossible to bring this matter to the Court on a normal motions day, Mr. Downey sent a "Cross Motion of Deposition" to be conducted "upon completion of the deposition noted by Defendant." This notice was only sent by US Mail, even though Mr. Downey's practice is to serve everything by email, and most of the time email plus US Mail. **Exhibit 1.**

A draft version of this motion and memorandum was sent to Mr. Downey in advance by email asking him to withdraw the deposition notice but he did not respond. **Exhibit 4.**

### **ARGUMENT**

It is unfair and unreasonable to have Plaintiff's de bene esse deposition of Dr. Aguiar on the same date and immediately following the discovery deposition.

First, Plaintiff's counsel made no effort to obtain consent for this deposition in advance and, in fact, had agreed not to do so in the April 18, 2018 discovery conference call between counsel.

Second, the causation issues in this case are complicated. Plaintiff admits that she had a pre-existing condition. "I would note that I have a huge calcium deposit in the area of my left shoulder causing all the pain." Email from Plaintiff to a claims investigator on December 14, 2015 used as an exhibit in Plaintiff's deposition and acknowledged by her. **Exhibit 3**. Plaintiff claims that a rotator cuff tear was caused by the incident at Safeway but the post-incident MRI specifically states that "No full-thickness rotator cuff tear is identified." The entire point of the discovery deposition of a treating doctor is to learn in advance exactly what his opinions are, after which counsel needs to confer with the defense medical expert.

Third, in addition to the need to confer, Defendants' counsel needs sufficient time to prepare an outline for cross-examination of Dr. Aguiar, determine what exhibits may be required or helpful, and needs the transcript of Dr. Aguiar's discovery deposition testimony for use during cross-examination.


Finally, the trial in this case is set for August 14, 2018. The Scheduling Order cut off for de bene esse depositions is July 30, 2018. That allows plenty of time for Plaintiff's counsel to schedule Dr. Aguiar's testimony in mid to late July with no prejudice whatsoever to the Plaintiff.

This tactic by Plaintiff's counsel is gamesmanship and should not be tolerated by the Court. Defendants are entitled to take a discovery deposition of the treating orthopaedist and then have sufficient time before the de bene esse deposition to permit

Defendants' counsel to prepare for the de bene esse deposition and to properly represent his clients' interests.

**WHEREFORE**, Defendants' motion for a protective order should be granted and Plaintiff's notice of deposition for Dr. Aguiar on May 30, 2018 should be stricken. In the event that Plaintiff's counsel continued with the de bene esse deposition despite this motion for a protective order having been filed and before a ruling could be obtained, Plaintiff should be barred from using any aspect of Dr. Aguiar's deposition for any purpose.

Respectfully submitted,  
Defendants by Counsel



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