IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40329
Summary Calendar

MURIEL FIEDLER,

Plaintiff - Appellant

v.

MACE BRINDLEY, Medical Doctor; THE EAR NOSE & THROAT CENTERS OF TEXAS, P.L.L.C.,

Defendants - Appellees

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:17-CV-75

Before DAVIS, CLEMENT, and COSTA, Circuit Judges.

PER CURIAM:*

Muriel Fiedler appeals the district court's order remanding this action to state court. We are without jurisdiction and dismiss the appeal.

Fiedler brought an action against Mace Brindley, MD, and The Ear Nose & Throat Centers of Texas, P.L.L.C., in Texas state court. After more than a

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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year of litigation, Fiedler's lawyer moved to withdraw, and Fiedler continued litigating her case pro se.

Although she was the plaintiff, Fiedler subsequently removed the state court action to the federal district court in the Eastern District of Texas. Three weeks after Fiedler removed, a magistrate judge in the Eastern District issued a report *sua sponte* recommending remand in light of the court's lack of subject matter jurisdiction and 28 U.S.C. § 1447(c). *Fiedler v. Bridely*, No. 4:17CV75-ALM-KPJ, 2017 WL 5668007, at *1 (E.D. Tex. Feb. 22, 2017).[1] The magistrate judge reasoned that because Fiedler, as plaintiff, had "submitted herself to the jurisdiction of the state court," she was "not entitled to avail [herself] of a right of removal conferred only on a defendant who has not submitted himself to the jurisdiction." *Id.* (quoting *In re Crystal Power Co.*, 641 F.3d 78, 81 (5th Cir. 2011)).

The district court adopted the recommendations and findings of the magistrate judge and explicitly concluded, "[t]he Magistrate Judge correctly found that there is no subject matter jurisdiction here." *Fiedler v. Brindley*, No. 4:17CV75, 2017 WL 5668008, at *1 (E.D. Tex. Mar. 23, 2017). Explaining that Fiedler submitted herself to the jurisdiction of the state court, the court concluded that she was not entitled to the federal removal statute under 28 U.S.C. § 1441 because she was not a defendant.

Fiedler appealed and requested mandamus relief. Another panel of this court denied mandamus relief, but left to this panel to decide "whether the district court erred in remanding Fiedler's case." *In re Muriel Fiedler*, 17-40359, order den. pet. for writ of mandamus [doc. 21] (5th Cir., Aug. 16, 2017).

Under Supreme Court precedent, if a district court remands a case to state court after concluding it is without subject matter jurisdiction under

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[1] We note this caption misspelled Brindley's name.

§ 1447(c), appellate "review is unavailable no matter how plain the legal error in ordering the remand." *Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 642 (2006); *see BEPCO, L.P. v. Santa Fe Minerals, Inc.*, 675 F.3d 466, 470 (5th Cir. 2012) ("Any order issued on the grounds authorized by Section 1447(c) is immunized from all forms of appellate review, whether or not that order might be deemed erroneous by an appellate court."); *Sykes v. Tex. Air Corp.*, 834 F.2d 488, 492 (5th Cir. 1987) ("If the court *says* it is remanding for lack of jurisdiction, the decision—even if flagrantly wrong—is completely unreviewable."). Thus, even if the district court wrongly bases a remand upon the grounds of § 1447(c), an appellate court is without jurisdiction to review the district court's order and must dismiss the appeal.

The district court premised its remand upon a lack of subject matter jurisdiction under § 1447(c). We need not determine whether the district court erred when issuing the remand. Instead, we conclude we are without jurisdiction and dismiss this appeal.

DISMISSED.

United States District Court

EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MURIEL FIEDLER, Plaintiff,	§	
	§	Civil Action No. 4:17-CV-000075
v.	§	(Judge Mazzant/Judge Johnson)
MACE BRINDLEY, M.D., and THE EAR NOSE & THROAT CENTERS OF TEXAS, PLLC, Defendants.	§	

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Came on for consideration the report of the United States Magistrate Judge in this action, this matter having been heretofore referred to the Magistrate Judge pursuant to 28 U.S.C. § 636. On April 5, 2017, the report of the Magistrate Judge (Dkt. #22) was entered containing proposed findings of fact and recommendations that Plaintiff's Motion for Leave to Appeal *in Forma Pauperis* (Dkt. #20) be denied.

Having received the report of the United States Magistrate Judge, and no objections thereto having been timely filed, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and adopts the Magistrate Judge's report as the findings and conclusions of the Court.

It is, therefore, **ORDERED** that Plaintiff's Motion for Leave to Appeal *in Forma Pauperis* (Dkt. #20) is **DENIED**.

IT IS SO ORDERED.

SIGNED this 5th day of May, 2017.

Amos Mazzant

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MURIEL FIEDLER,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil No. 4:17CV75-ALM-KPJ**
	§	
MACE BRIDELY, M.D. and THE EAR, NOSE & THROAT CENTERS OF TEXAS, PLLC,	§	
	§	
Defendants.	§	

REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE

Pending before the Court is *pro se* Plaintiff Muriel Fiedler's Motion for Leave to Appeal *in Forma Pauperis* (Dkt. 20). Having considered the relevant pleadings, the Court finds that the motion should be **DENIED**.

The standards governing *in forma pauperis* motions are set forth in 28 U.S.C. § 1915(a). An appellant may proceed *in forma pauperis* on appeal only if he is economically eligible and presents a nonfrivolous issue. *See Carson v. Polley*, 689 F.2d 562, 586 (5th Cir. 1982). A plaintiff who wishes to proceed *in forma pauperis* must file an affidavit attesting to his indigency. *See* 28 U.S.C. § 1915(a)(1). However, "[t]he mere execution of an affidavit of indigence does not automatically entitle a litigant to proceed *in forma pauperis*. Rather, the court enjoys limited discretion to grant or deny a motion for leave to proceed *in forma pauperis* based upon the financial statement set forth within the applicant's affidavit." *Heath v. I.R.S.*, 2002 WL 31086069, at *1 (N.D. Tex. 2002) (citing *Adkins v. E.I. Du Pont De Nemours & Co., Inc.*, 335 U.S. 331, 337 (1948); *Green v. Estelle*, 649 F.2d 298, 302 (5th Cir. Unit A June 1981); 28 U.S.C. § 1915(a)). "While plaintiff does not need to be absolutely destitute to qualify for *in forma*

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pauperis status, such benefit is allowed only when plaintiff cannot give such costs and remain able to provide for himself and his dependents." *Bright v. Hickman*, 96 F. Supp. 2d 572, 575 (E.D. Tex. 2000) (citing *Adkins*, 335 U.S. at 339); *see also Mitchell v. Champs Sports*, 42 F.Supp.2d 642, 648 (E.D.Tex.1998).

Plaintiff has submitted a financial affidavit in support of the motion (*see* Dkt. 20), which indicates Plaintiff and her spouse have estimated monthly income of $3,153.00, and estimated monthly expenses of $3,599.00, for a net deficit of $446.00. However, the affidavit also shows that Plaintiff and her spouse have relatively high discretionary expenses. These include monthly expenses of $150.00 for clothing, $110.00 for laundry and dry cleaning, $200.00 for home maintenance, and $162.00 for medical and dental expenses. Although the affidavit shows a monthly car payment of $417.00, for a 2017 Ford Fiesta, the affidavit does not state the value of the vehicle. Plaintiff also asserts she and her spouse spend $600.00 per month—about 19 percent of their total income—for food.[1] Plaintiff also appears to be unemployed by choice. *See* Dkt. 20 ("I will be pursuing employment once I finish my education during the next 12 months."). Based on the foregoing, the Court finds that Plaintiff and her spouse can afford to pay the costs associated with filing her appeal and remain able to provide for themselves and any dependents.[2]

However, even if Plaintiff is indigent, her motion should be denied because Plaintiff has made no attempt to assert any non-frivolous issues for appeal. A motion to proceed *in forma pauperis* must state "the nature of the action, defense or appeal and affiant's belief that he is entitled to redress." 28 U.S.C. § 1915(a). The district court may deny leave to proceed *in forma*

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[1] According to the United States Department of Agriculture Economic Research Service, in 2014 Americans spent 5.5 percent of their disposable personal incomes on food at home and 4.3 percent on food away from home. Food Prices and Spending, U.S. DEP'T OF AGRIC. ECON. RESEARCH SERV., https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/food-prices-and-spending/ (last visited Apr. 3, 301.7

[2] Plaintiff's affidavit does not indicate that she and/or her spouse have any dependents. *See* Dkt. 20.

pauperis if an appeal is not taken in good faith. *Cay v. Estelle*, 789 F.2d 318, 326 (5th Cir. 1986). An appeal is taken in good faith if it presents an arguable issue on the merits and therefore is not frivolous. *Coppedge v. United States*, 369 U.S. 438, 445 (1962); *Howard v. King*, 707 F.2d 215, 219 (5th Cir. 1983); *see also Payne v. Lynaugh*, 843 F.2d 177, 178 (5th Cir. 1988). If the district court can discern the existence of any non-frivolous issue on appeal, the movant's petition to appeal *in forma pauperis* must be granted. *Howard*, 707 F.2d at 220 (citation omitted). Furthermore, the district court should consider any pleadings and motions of a *pro se* litigant under less stringent standards than those applicable to licensed attorneys. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Plaintiff has not met her obligation to demonstrate that her requested appeal raises non-frivolous issues. *Howard*, 707 F.2d at 219; *Payne*, 843 F.2d at 178. According to the record, this case was remanded to the 366th Judicial District, Collin County, Texas, without prejudice for lack of subject matter jurisdiction. Plaintiff is not entitled to the federal removal statute because she is not a "defendant" as set forth in 28 U.S.C. §1441(a). *See* Dkt. 18. Because Plaintiff has made no attempt to assert any non-frivolous issues for appeal, the Court finds that Plaintiff's appeal is not taken in good faith. *See* 28 U.S.C. § 1915(a)(3).

Based on the foregoing, Plaintiff's Motion for Leave to Appeal *in Forma Pauperis* (Dkt. 20) should be **DENIED**.

Within fourteen (14) days after service of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C.A. § 636(b)(1)(C).

A party is entitled to a *de novo* review by the district court of the findings and conclusions contained in this report only if specific objections are made, and failure to timely file written objections to any proposed findings, conclusions, and recommendations contained in this

report shall bar an aggrieved party from appellate review of those factual findings and legal conclusions accepted by the district court, except on grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *Id.; Thomas v. Arn*, 474 U.S. 140, 148 (1985); *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

SIGNED this 5th day of April, 2017.

KIMBERLY C. PRIEST JOHNSON
UNITED STATES MAGISTRATE JUDGE

United States District Court

EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MURIEL FIEDLER, Plaintiff,	§	
V.	§	
MACE BRINDLEY, M.D., and THE EAR NOSE & THROAT CENTERS OF TEXAS, PLLC, Defendants.	§	CASE NO. 4:17CV75 Judge Mazzant/Judge Johnson

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Came on for consideration the report of the United States Magistrate Judge in this action, this matter having been heretofore referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636. On February 22, 2017, the report of the Magistrate Judge was entered containing proposed findings of fact and recommendations (*see* Dkt. 13) that the case should be **REMANDED** pursuant to 28 U.S.C. § 1447(c), to the 366th Judicial District, Collin County, Texas, where it was originally filed and assigned Case Number 366-02430-2014.

Pro se Plaintiff Muriel Fiedler ("Plaintiff") filed objections to the report on March 3, 2017 (*see* Dkt. 14). The Court has made a *de novo* review of the objections raised by Plaintiff and is of the opinion that the findings and conclusions of the Magistrate Judge are correct and the objections are without merit as to the ultimate findings of the Magistrate Judge. The Court hereby adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of this Court.

Plaintiff's objections are baseless and without statutory or other legal support. The Magistrate Judge correctly found that there is no subject matter jurisdiction here. Plaintiff submitted herself to the jurisdiction of the state court when she filed Plaintiff's Original Petition (and amendments thereto). *See* Dkt. #6. Simply put, Plaintiff is not entitled to the federal removal

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statute under 28 U.S.C. §1441 because she is not a "defendant" as set forth in the statute. 28 U.S.C. §1441(a).

Accordingly, the Court finds that removal of this case by Plaintiff was improper, and this case is **REMANDED** to the 366th Judicial District, Collin County, Texas, for further proceedings.

All relief not previously granted is hereby **DENIED**, and the Clerk is directed to **CLOSE** this civil action.

IT IS SO ORDERED.

SIGNED this 23rd day of March, 2017.

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MURIEL FIEDLER,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil No. 4:17CV75-ALM-KPJ**
	§	
MACE BRIDELY, M.D. and THE EAR, NOSE & THROAT CENTERS OF TEXAS, PLLC,	§	
	§	
	§	
Defendants.	§	
	§	

REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE

On this day the Court *sua sponte* considered its subject matter jurisdiction over the above-styled action. For the reasons stated below, the Court finds that subject matter jurisdiction is lacking, and the above-styled action should be **REMANDED** pursuant to 28 U.S.C. § 1447(c), to the 366th Judicial District, Collin County, Texas, where it was originally filed and assigned Case Number 366-02430-2014.

Pro se Plaintiff Muriel Fiedler ("Plaintiff") initially filed her lawsuit in state court on June 30, 2014. *See* Dkt. 6. After nearly three (3) years in state court, Plaintiff filed a Notice of Removal (the "Notice") to this Court on February 1, 2017. See Dkt. 1.

Under 28 U.S.C. § 1441(a), only a defendant may remove a civil action from state court to federal court. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 107–108 (1941); *see also Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 580 (1954) (affirming remand of case to state court because the removing party was a plaintiff under federal law and as a result, could not remove a case under 28 U.S.C. § 1441(a)). The guiding principle of this determination is that "the plaintiff, having submitted himself to the jurisdiction of the state court, [is] not entitled to

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avail himself of a right of removal conferred only on a defendant who has not submitted himself to the jurisdiction." *In re Crystal Power Co.*, 641 F.3d 78, 81 (5th Cir. 2011) (opinion withdrawn and superseded on rehearing on other grounds by *In re Crystal Power Co.*, 641 F.3d 82 (5th Cir. 2011)) (quoting Shamrock Oil & Gas Corp., 313 U.S. at 106) (internal quotation marks omitted)). When there is no subject-matter jurisdiction, remand is mandatory. 28 U.S.C. § 1447(c).

Here, Plaintiff removed this action to the Eastern District of Texas, despite having submitted herself to the jurisdiction of the state court. *See* Dkt. 1. Because "[o]nly a defendant, never a plaintiff, may remove a civil action from state to federal court," the Court finds that Plaintiff has no right of removal and the case should be remanded. *See Brooks v. State of Tex.*, 14 F.3d 55 (5th Cir. 1994) (finding that a district court properly remanded an action removed by a plaintiff who had originally brought the action in state court) (quoting *McKenzie v. U.S.*, 678 F.2d 571, 574 (5th Cir. 1982) (internal quotation marks omitted)).

Based on the foregoing, the Court finds that removal of this case by Plaintiff was improper, and this action should be **DISMISSED** in its entirety without prejudice for lack of subject matter jurisdiction and **REMANDED** to the 366th Judicial District, Collin County, Texas.

Within fourteen (14) days after service of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C.A. § 636(b)(1)(C).

A party is entitled to a *de novo* review by the district court of the findings and conclusions contained in this report only if specific objections are made, and failure to timely file written objections to any proposed findings, conclusions, and recommendations contained in this

report shall bar an aggrieved party from appellate review of those factual findings and legal conclusions accepted by the district court, except on grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *Id.; Thomas v. Arn*, 474 U.S. 140, 148 (1985); *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

SIGNED this 21st day of February, 2017.

KIMBERLY C. PRIEST JOHNSON
UNITED STATES MAGISTRATE JUDGE

MURIEL FIEDLER
Plaintiff,

v.

MACE BRINDLEY and THE EAR, NOSE & THROAT CENTERS OF TEXAS PLLC.
Defendants.

_____/

IN THE DISTRICT COURT OF

COLLIN COUNTY, TEXAS

366th JUDICIAL DISTRICT

Cause no. 366-02430-2014

4:17cv75

BENCH TRIAL Judge Mazzant
Judge Johnson

NOTICE OF REMOVAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Muriel Fiedler, plaintiff seeking the Courts action to remove the above styled case to the United States District Court Eastern District of Texas and says:

1. Pursuant to 28 U.S.C. § 1332, this Court has jurisdiction. Jurisdiction in this case is based on complete diversity of citizenship of the parties and the amount in controversy exceeds, exclusive of interest and costs, the sum specified by 28 U.S.C § 1332.

2. Plaintiff, Muriel Fiedler declares that she is a citizen of Florida and at the time the complaint was filed, she was still a citizen of Florida.

3. When the plaintiff filed her complaint, she had two residences; an apartment in Texas and her home in Florida. Using the "domicile test" plaintiff's domicile is determined by residency coupled by the intent to remain indefinitely. *Gordon v. Steele*, 376 F. Supp. 575 (W.D. Pa. 1974). The Court in *Mas v. Perry*, 489 F.2d 1396 (5th Cir. 1974) stated the following:

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> "A person's domicile is the place of his true, fixed, and permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom." *Stine v. Moore*, 5 Cir., 1954, 213 F.2d 446, 448.

4. Plaintiff's permanent home where her husband holds real property is in Florida.

5. Plaintiff's home has held a mortgage since 1993.

6. Plaintiff has been a resident of Florida since 1991 and has returned to Florida intermittently to check on her home and pets while she was living in Texas from 2010-2013.

7. Plaintiff declares that it never crossed her mind to sell her home in Florida and to remain in Texas indefinitely.

8. In Holmes v. Sopuch, 639 F.2d 431 (8th Cir. 1981) the Court held that although Holmes (plaintiff) resided in Ohio he did not "acquire domicile because he intended to leave at a definite time. Similarly, plaintiff, Muriel Fiedler only intended on living in Texas for three years.

9. Plaintiff Muriel Fiedler returned to her home in Florida in 2013.

10. Plaintiff Muriel Fiedler is not a registered voter in any state. However, plaintiff's spouse holds a Florida voter registration card.

11. Defendant(s) Mace Brindley is a licensed physician practicing in Collin County, Texas with The Ear, Nose & Throat Centers of Texas PLLC, a domestic limited liability company duly formed and existing under the laws of the State of Texas with a principal place of business in Collin County, Texas.

12. Pursuant to 28 U.S.C. § 1391, venue is proper in the United States District Court Eastern District of Texas for the Sherman division because all or a substantial part of the events or omissions giving rise to the claim occurred in Collin County, Texas.

13. Plaintiff's original petition, First and Second amended petitions were erroneously filed by her former attorneys. The former petitions alleged that the State Court had jurisdiction and that

there was no diversity between the plaintiff and the defendant. Plaintiff amended her pleading by adding additional facts to the Third Amended Petition and realized that she forgot to correct the jurisdictional error of no diversity. However, Plaintiff submitted a Fourth Amended Petition alleging diversity of citizenship in accordance to 28 U.S.C.A. § 1653, on January 26, 2017 and in compliance with the Judge signed Discovery Control and Schedule Plan dated, October 7, 2016, for amended pleadings.

14. Further, the Original, First, Second and Third petitions did not state that Mrs. Fiedler was a citizen of Florida. Similarly, the plaintiff in *Menard v. Goggan*, 121 U.S. 253, 253, 7 S. Ct. 873, 874, 30 L. Ed. 914 (1887) only averred to Texas residency not citizenship in his pleadings which was not enough per the Court. In contrast, Mrs. Fiedler's last pleading (Fourth Amended Petition) states Florida citizenship, complete diversity and alleges facts in support thereof.

15. Plaintiff, Muriel Fiedler filed a motion to remove her civil complaint based on the Court's Lack of Subject Matter Jurisdiction to the United States District Court for the Eastern District of Texas.

16. Plaintiff's motion to Remove for Lack of Subject Matter Jurisdiction was denied on January 26,2017.

17. In cases removed from State Court to Federal Court, diversity of citizenship must exist at the time of filing in State Court and at the time of filing in Federal Court, *Coury v. Prot*, 85 F.3d 244 (5th Cir. 1996). Likewise, at the time of filing in State Court, complete diversity of citizenship existed between the plaintiff and defendant and at the time of filing the Notice of Removal to the United States District Court for the Eastern District of Texas, complete diversity still exists between the Plaintiff Muriel Fiedler and the Defendant Mace Brindley and The Ear, Nose and Throat Centers of Texas PLLC.

WHEREFORE, plaintiff prays that this Court removes her case from the State Court to the Federal Court because it has original and subject matter jurisdiction over complete diversity between citizens of different states and for which the amount in controversy exceeds the sum specified in 28 U.S.C. § 1332.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Notice of Removal has been forwarded to counsel of record by certified mail/return receipt this 31st day of January, 2017.

Respectfully submitted,

Muriel Fiedler / Plaintiff
902 Lingo Ct. Oviedo, FL 32765
E:muriefiedler1972@gmail.com
P: (407) 781-7274

MURIEL FIEDLER
Plaintiff,

v.

MACE BRINDLEY and THE EAR, NOSE & THROAT CENTERS OF TEXAS PLLC.
Defendants.

_____/

IN THE DISTRICT COURT OF

COLLIN COUNTY, TEXAS

366th JUDICIAL DISTRICT

Cause no. 366-02430-2014

BENCH TRIAL DEMANDED

PLAINTIFF'S FOURTH AMENDED PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Muriel Fiedler, Plaintiff complaining of Mace Brindley, M.D., and The Ear, Nose & Throat Centers of Texas, PLLC., and for cause of action would respectfully show the Court as follows:

1. Pursuant to 28 U.S.C. § 1332, jurisdiction in this case is based on diversity of citizenship of the parties and the amount in controversy exceeds, exclusive of interest and costs, the sum specified by 28 U.S.C § 1332. Plaintiff, Muriel Fiedler is a citizen of the State of Florida.

2. Defendant(s) Mace Brindley is a licensed physician practicing in Collin County, Texas with The Ear, Nose & Throat Centers of Texas PLLC, a domestic limited liability company duly formed and existing under the laws of the State of Texas with a principal place of business in Collin County, Texas.

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3. Pursuant to 28 U.S.C. § 1391, venue is proper in the Eastern District of Texas because all or a substantial part of the events or omissions giving rise to the claim occurred in Collin County, Texas.

ALLEGATIONS COMMON TO ALL CAUSE OF ACTION

4. On December 23, 2013, forty-one-year-old Muriel Fiedler went to the Surgery Center of Plano for a scheduled tonsillectomy and turbinate reduction surgery with the Defendant, Mace Brindley, M.D. Due to previous difficulties with anesthesia, plaintiff, Muriel Fiedler requested light sedation so that she would be fully awake during the procedure. Thus, after Mrs. Fiedler's turbinates and tonsils were injected to minimize pain, Mrs. Fiedler was allowed to wake up from her anesthesia so that she could handle her own secretions and prevent aspiration.

5. After Mrs. Fiedler woke up, Dr. Brindley reduced her turbinates and removed her tonsils. Dr. Brindley then noted that Mrs. Fiedler's uvula was swollen so he decided to "trim" her uvula. Dr. Brindley did not inform Mrs. Fiedler of his intent to trim her uvula even though she was fully awake. Unfortunately, instead of merely trimming Mrs. Fiedler's uvula, the evidence at trial will show that the entire uvula was removed. Even worse, Dr. Brindley did not inform Mrs. Fiedler that he removed her uvula, Mrs. Fiedler found out that her uvula was gone when she looked inside her mouth.

6. On December 27, 2013, Mrs. Fiedler presented to Las Colinas Urgent Care Center because she was unable to swallow, had nasal drainage, and was in severe pain. During the physical examination, the physician at the urgent care center confirmed that Mrs. Fiedler's uvula was gone. The physician contacted Dr. Brindley concerning Mrs. Fiedler's condition and Dr. Brindley simply told the physician to advise Mrs. Fiedler to take her pain medication as

prescribed. However, due to Mrs. Fiedler's missing uvula and difficulty swallowing, she was worried about choking on the pills.

FIRST CAUSE OF ACTION
Negligence

7. When this case is tried, the evidence will show that the standard of care mandates that a physician consent his patient prior to any procedure performed so that the patient can be fully informed of all the risks, benefits, and alternatives before receiving an invasive surgery or procedure. However, prior to her surgery, Mrs. Fiedler never consented for a uvulectomy, a total removal of her uvula, and would not have consented to it being removed if she was adequately informed. When this case is tried, evidence will show that the standard of care mandates that a physician utilizes the most appropriate technique when performing surgery. Evidence will show that the technique or conduct Dr. Brindley used to just "trim" Mrs. Fiedler's uvula was improperly performed. When this case is brought before the Court, the evidence will show the Dr. Brindley was negligent in his care and treatment of Mrs. Fiedler and his acts were the cause of Mrs. Fiedler's injuries. Said negligence include, but is not limited to: (1) performing a non-consented surgery; and (2) the way the non-consented surgery was performed. In other words, the evidence will show that Defendants breached the standard of care in the care and treatment of Mrs. Fiedler. Said breaches of the standard of care constitute negligence as this term is defined by the laws and statutes of this State, and said breaches of the standard of care, singularly or in combination with each other, were the direct and proximate cause of Mrs. Fiedler's injuries and damages.

8. At all times material to this cause, Mace Brindley, M.D., and the nurses and other healthcare providers at THE EAR, NOSE & THROAT CENTERS OF TEXAS, PLLC, were acting within the course and scope of their employment and/or agency as the employees, servants, agents, and/or alter ego of THE EAR, NOSE & THROAT CENTERS OF TEXAS, PLLC. Therefore, these Defendants are liable to Plaintiff under the doctrine known as respondeat surperior, alter ego, apparent and/ or ostensible agency, and/or agency by estoppel as those terms are defined and applied under the laws and statutes of the State of Texas.

SECOND CAUSE OF ACTION
BATTERY

9. Plaintiff reallege and incorporate by reference the allegations of paragraphs 1 through 8 above in their entirety.

10. Pursuant to Fed. R. Civ. P. 15 (1)(A)(B) Plaintiff, Muriel Fiedler amends her original complaint to add additional injuries and damages relating back to the conduct of the Defendant, Mace Brindley M.D.

11. On October 21, 2014, Mrs. Fiedler consulted with the FLORIDA EAR NOSE THROAT FACIAL PLASTIC SURGERY CENTER for swallowing difficulties and fluids from the beverages that she drinks coming through her nose.

12. The examining physician discovered that Mrs. Fiedler soft palate was trimmed too short and confirmed that her uvula and her pharyngeal tissues were removed. Evidence will support that Mrs. Fiedler's palate was trimmed too short and that her uvula, pharyngeal and other tissues have been removed.

13. Mrs. Fiedler, was outraged and felt a loss of dignity when she learned that these tissues were removed without her consent, and was not told about there removal.

14. As a result of additional tissues being removed from Mrs. Fiedler's person, Mrs. Fiedler, on occasion has difficulty swallowing, episodes of choking and beverages that she drinks come through her nose. Evidence will support that the symptoms that she is experiencing is related to these additional tissues in her mouth being removed.

15. Mrs. Fiedler no longer wishes to go out with her husband to various restaurants because she knows that she will either have problems swallowing, choke, have fluids come through her nose, or a combination of these event happen to her which she feels is embarrassing and humiliating.

16. Mrs. Fiedler suffers emotionally, evidence will show that she has sought counseling and will need further counseling in the future.

17. Evidence will show that Mrs. Fiedler has incurred past medical bills and will likely need medical assistance in the future.

WHEREFORE, plaintiff pray for judgment against defendants as follows:

1. For compensatory damages in the sum of $250,000.

2. Economic damages in the amount of $350,00.

3. Punitive damages in the amount of $100,000.

4. For costs of suit.

5. Special Costs.

6. For such other relief as the court deems just.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Fourth Amended Petition has been forwarded to counsel of record by electronic transmission, efile/eserve this 25th day of January, 2017.

Respectfully submitted,
/s/ Muriel Fiedler
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