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IN THE  
COURT OF APPEALS OF INDIANA

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Christy Kenworthy,  
*Appellant-Plaintiff,*

v.

Lyons Insurance & Real Estate,  
Inc., and Michael E. Lyons,  
*Appellee-Defendant.*

March 9, 2022

Court of Appeals Case No.  
21A-CC-811

Appeal from the Wayne Superior  
Court

The Honorable Bob A. Witham,  
Special Judge

Trial Court Cause No. 89D01-  
1411-CC-766

**Riley, Judge.**

## STATEMENT OF THE CASE

- [1] Appellant/Defendant/Counter-Plaintiff, Christy Kenworthy (Kenworthy), appeals following the stipulated voluntary dismissal of the Amended Complaint of Appellee/Plaintiff/Counter-Defendant, Lyons Insurance & Real Estate, Inc. (Lyons Insurance), and the trial court's grant of her motion for the voluntary dismissal of her counterclaims against Lyons Insurance and Appellee/Counter-Defendant, Michael Lyons (Michael) (collectively with Lyons Insurance, Lyons).
- [2] We dismiss the instant appeal.

## ISSUE

- [3] Kenworthy presents this court with four main issues challenging the trial court's summary judgment, evidentiary, and instructional rulings. However, we find that an issue raised by Lyons is dispositive and restate that issue as: Whether Kenworthy may challenge the trial court's rulings following the filing of the parties' stipulation of dismissal of Lyons Insurance's claims and the trial court's grant of her motion to voluntarily dismiss her counterclaims.

## FACTS AND PROCEDURAL HISTORY

- [4] Lyons Insurance is an Indiana corporation having its principal place of business in Richmond, Indiana. Michael is the president of Lyons Insurance. Kenworthy was an employee of Lyons Insurance beginning in 2001. In 2012, Michael and Kenworthy became involved in a dispute regarding the ownership of a \$13,031.76 distribution check from the Wayne County Insurance Service

(WCIS), a partnership of Wayne County insurance agents to which both Michael and Kenworthy belonged. From 2007 to 2012, Kenworthy also served as the secretary and treasurer of WCIS. After the dispute arose concerning the ownership of the \$13,031.76 distribution check, Michael reported to the Richmond Police Department (RPD) that Kenworthy had wrongfully withheld the distribution check from Lyons Insurance. On April 16, 2013, the Wayne County Prosecutor's Office (WCPO) filed a charge of Class D felony theft against Kenworthy. On October 15, 2013, Kenworthy sent Michael a check for \$13,031.76, and on January 27, 2014, the WCPO moved to dismiss the theft charge against Kenworthy.

[5] On November 12, 2014, Lyons Insurance filed a complaint, which it amended on September 14, 2015, claiming that in 2013 Kenworthy had wrongfully withheld additional WCIS distributions, depriving Lyons Insurance of \$7,856.17, and that she had worked for WCIS during time that she had been paid to provide services for Lyons Insurance. Lyons Insurance alleged that Kenworthy's actions constituted criminal theft, conversion, deception, and fraud entitling it to statutory treble damages under the Indiana Crime Victim's Act, attorney's fees, and other relief. Lyons Insurance also raised a claim of defamation against Kenworthy for statements purportedly made to others regarding, among other things, her allegation that Michael had exerted wrongful personal influence with the Wayne County Prosecutor (Prosecutor) to have the theft charge filed against Kenworthy.

[6] On January 30, 2015, Kenworthy answered the Complaint and raised the affirmative defenses of unclean hands and duress, among others. Kenworthy also asserted counterclaims against Lyons for defamation for oral and written statements made to the RPD and the Prosecutor, unjust enrichment, conversion, fraud, malicious prosecution, abuse of process, engaging in frivolous litigation, and intentional infliction of emotional distress. On July 31, 2015, Kenworthy filed an amended answer to the Amended Complaint in which she reasserted her counterclaims, adding, among other things, a more specific allegation that Michael had defamed her to “[Prosecutor], David Carter, Dennis Stirn, Matthew Doss, . . . and others” and adding two counterclaims for unpaid wages, but eliminating her previously-raised conversion claim. (Appellant’s App. Vol. II, p. 66). In 2015, the parties engaged in unsuccessful mediation.

[7] On January 11, 2016, the parties filed cross-motions for summary judgment, along with briefs and designations of evidence in support. Kenworthy sought summary judgment on the entirety of Lyons Insurance’s Amended Complaint, and Lyons sought summary judgment as to all of Kenworthy’s counterclaims apart from her wage claims. On February 10, 2016, Kenworthy filed her opposition to summary judgment on her counterclaims, along with a brief and designation of evidence, including a declaration by WCIS partner Eric VanVleet (VanVleet declaration) in which VanVleet averred that he had spoken to Lyons’ attorney Adam Forrest (Forrest), who had told him that “the theft charges [] Lyons had made against [] Kenworthy did not merit criminal

prosecution.” (Appellant’s App. Vol. VII, p. 7). Appended to the VanVleet declaration as Exhibit 3 was a copy of an email VanVleet averred he had sent to Kenworthy on February 23, 2014, which repeated a similar statement by Forrest. On February 29, 2016, Lyons filed their motion to strike portions of Kenworthy’s designations of evidence on summary judgment, including the references in the VanVleet declaration to Forrest’s statements regarding the viability of the Kenworthy theft charge, which Lyons contended was inadmissible hearsay not properly designated as evidence under Trial Rule 56(E). On May 2, 2016, the trial court held a hearing on the parties’ cross-motions for summary judgment.

[8] On August 10, 2016, the trial court issued its order on summary judgment. As part of its summary judgment rulings, the trial court granted Lyons’ motion to strike the challenged portions of the VanVleet declaration. The trial court concluded that genuine issues of material fact existed precluding summary judgment on all of Lyons Insurance’s Amended Complaint, apart from its claim that Kenworthy’s alleged work for WCIS during time she was being paid to work for Lyons Insurance was conversion supporting a claim for treble damages under the Indiana Crime Victim’s Act. As to Kenworthy’s counterclaims, the trial court granted summary judgment in favor of Lyons on Kenworthy’s counterclaims of defamation as to statements Michael made to the Prosecutor, David Carter, Matthew Doss, and others, concluding that Michael’s statements to those people fell within the qualified privilege extended to reports of suspected criminality to law enforcement and that Kenworthy had

failed to designate evidence to create a factual issue that Michael had abused the privilege. However, it found that Kenworthy had designated evidence creating issues of material facts pertaining to statements made by Michael to Dennis Stirn, and thus ruled that portion of Kenworthy's defamation claim could proceed to the jury. The trial court granted summary judgment in favor of Lyons on Kenworthy's claims of intentional infliction of emotional distress, malicious prosecution, and abuse of process. The trial court allowed Kenworthy's unjust enrichment, fraud, frivolous litigation, and wage claims to go forward.

[9] Kenworthy subsequently filed a motion to correct error seeking reconsideration of the trial court's summary judgment rulings. On August 8, 2016, Lyons filed a motion to exclude expert testimony by Scott Newman (Newman), who Kenworthy proposed would offer opinions pertaining to matters beyond the knowledge of a layperson in criminal law, the exercise of the prosecutorial standard of care, and probable cause determinations, among other topics. On October 13, 2016, the trial court held a hearing on Kenworthy's motion to correct error and on Lyons' motion to exclude Newman's opinions, after which the trial court took both matters under advisement. On November 7, 2016, the trial court issued an order denying Kenworthy's motion to correct error. On November 8, 2016, the trial court denied Lyons' motion to exclude Newman's testimony, but on June 28, 2017, it partially granted Lyons' motion *in limine* to prevent Newman from testifying, without first seeking leave of the court, about numerous matters, including whether the relevant WCIS checks belonged to

Kenworthy, probable cause determinations, whether Kenworthy committed certain crimes, whether a special prosecutor should have been appointed, prosecutorial standards of care and whether the Prosecutor met those standards, whether it is standard prosecutorial practice to dismiss criminal charges for no consideration, and whether certain of Kenworthy's statements were trustworthy.

[10] On May 10, 2017, the trial court ordered the parties to attend further mediation prior to trial. On August 14, 2017, the mediator filed his report to the trial court that mediation had been unsuccessful. On August 28, 2017, Kenworthy filed a motion *in limine* seeking to allow evidence of Lyons' spoliation of evidence, for discovery sanctions, and seeking a jury instruction on spoliation in which Kenworthy asserted various acts of spoliation of evidence by Lyons, including the destruction of a computer hard drive the discovery of which she sought in connection to proving damages on her wage claims and the manipulation of corporate records she sought to support her fraud and unjust enrichment counterclaims and to defend Lyons Insurance's defamation claims. On September 8, 2017, the trial court judge recused himself from the proceedings. On September 14, 2017, the parties agreed to the appointment of a special judge, who accepted jurisdiction on September 26, 2017. On July 31, 2018, the trial court denied Kenworthy's motion to allow evidence of spoliation by Lyons, for discovery violation sanctions, and for a spoliation jury instruction.

[11] Multiple jury trial settings in this matter were continued until trial was finally re-set for April 19, 2021. On March 8, 2021, the trial court appointed a

mediator, and on April 1, 2021, mediation resulted in Lyons Insurance settling all its claims against Kenworthy. On April 6, 2021, the parties filed a Stipulation of Dismissal, With Prejudice, as to the Claims of Lyons Insurance & Real Estate, Inc., Only.<sup>1</sup> Kenworthy also filed a motion for voluntary dismissal of her counterclaims pursuant to Indiana Trial Rule 41(A)(1)(b) in which she averred that the parties had stipulated that her counterclaims should be dismissed without prejudice. Later in the day of April 6, 2021, Lyons filed their objection to the voluntary dismissal of Kenworthy's counterclaims without prejudice, averring that no such stipulation had been reached. Lyons stated in their objection that they would stipulate to the dismissal of Kenworthy's claims with prejudice but would only stipulate to the dismissal of her counterclaims without prejudice if the trial court entered an order for their attorney's fees already incurred in defense of those counterclaims. On April 6, 2021, the trial court held a hearing on the matter, during which Kenworthy clarified that she moved for an order of voluntary dismissal of her counterclaims by the trial court pursuant to Indiana Trial Rule 41(A)(2). On April 6, 2021, the trial court entered its Order Dismissing Counterclaims of [] Kenworthy, dismissing her counterclaims without prejudice but further ordering that, if Kenworthy elected to refile any new case against Lyons based on or including the same claims, she

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<sup>1</sup> Despite the voluminous appellate record before us, it appears that neither party included a copy of the parties' stipulation in their appendices or that a copy was included in the motions filed in this court. We take judicial notice of the Stipulation of Dismissal, With Prejudice, as to the Claims of Lyons Insurance & Real Estate, Inc., Only. See Ind. Evidence Rule 201(b)-(d) (providing that a court may *sua sponte* take judicial notice of the records of a court of this state at any stage of the proceeding).



would first be required to pay Lyons' attorney's fees incurred in this cause of action and retaining limited jurisdiction to determine those fees should Kenworthy elect to refile. On April 6, 2021, the trial court also entered an order dismissing Lyons Insurance's claims against Kenworthy with prejudice, pursuant to the parties' stipulation.

[12] Kenworthy pursued the instant appeal seeking review of the trial court's summary judgment rulings on her defamation and intentional infliction of emotional distress counterclaims and striking portions of the VanVleet declaration, its grant of Lyons' motion *in limine* as to Newman's testimony, and its denial of her demand for a spoliation jury instruction. On June 21, 2021, Lyons filed a motion to dismiss the instant appeal, arguing that Kenworthy's appellate claims were based on interlocutory orders over which this court lacked jurisdiction. Lyons also argued that Kenworthy was precluded from appealing any issues as to her counterclaims due to the trial court's grant of her motion for voluntarily dismissal. On July 6, 2021, Kenworthy filed her response to Lyons' motion to dismiss the instant appeal. On July 23, 2021, the motions panel of this court denied Lyons' motion without setting forth its rationale, (J Crone, Sr.J Darden; Sr.J Shepard dissenting).

[13] Kenworthy now appeals. Additional facts will be provided as necessary.

## **DISCUSSION AND DECISION**

[14] Lyons have responded to the merits of Kenworthy's appellate claims, but they have also reasserted their argument that Kenworthy's appeal is subject to

dismissal. It is well-settled that we may reconsider a ruling by this court’s motions panel. *Kelley v. Kelley*, 158 N.E.3d 396, 399 (Ind. Ct. App. 2020). Although we are reluctant to overrule orders already decided by a motions panel, we nevertheless have “inherent authority to reconsider any decision while an appeal remains *in fieri*.” *Id.*

A. *Indiana Trial Rule 41(A)*

[15] Trial Rule 41(A) governs the voluntary dismissal of actions and provides in relevant part as follows:

(1) *By Plaintiff–By Stipulation*. Subject to contrary provisions of these rules or of any statute, an action may be dismissed by the plaintiff without further order of court:

\* \* \*

(b) by filing a stipulation of dismissal signed by all parties who have appeared in the action.

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice[.]

\* \* \*

(2) *By Order of Court*. Except as provided in subsection (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff’s instance save upon order of the court and upon such terms and conditions as the court deems proper. . . . Unless otherwise specified in the order, a dismissal under this subsection is without prejudice.

B. *Lyons Insurance’s Amended Complaint*

[16] On April 1, 2021, the parties undertook mediation which resulted in the resolution of the claims that Lyons Insurance raised against Kenworthy in its

Amended Complaint. On April 6, 2021, pursuant to Trial Rule 41(A)(1)(b), the parties filed a stipulation dismissing all of Lyons Insurance’s claims with prejudice, and the trial court entered an order of dismissal on the stipulation. Kenworthy now appeals certain rulings by the trial court pertaining to her defense of claims brought by Lyons Insurance, including its grant of the motion *in limine* regarding Newman’s expert opinions and the denial of her motion for a spoliation jury instruction.

[17] In *Sartain v. Trilogy Healthcare of Hamilton II, LLC*, 137 N.E.3d 1050 (Ind. Ct. App. 2019), *trans. denied*, Sartain raised four claims against Trilogy, two of which, Counts I and III, the trial court dismissed upon a motion by Trilogy. *Sartain*, 137 N.E.3d at 1051. The parties litigated the remaining two claims but subsequently filed a stipulation to dismiss the case in its entirety. *Id.* After the trial court accepted the parties’ stipulation and entered an order dismissing the complaint, Sartain appealed the trial court’s grant of Trilogy’s motion to dismiss Counts I and III. *Id.* Trilogy moved to dismiss the appeal, arguing that, in light of the parties’ stipulation dismissing all claims, this court lacked subject-matter jurisdiction because the trial court had never entered a final judgment. *Id.* at 1052. The motions panel of this court denied Trilogy’s motion, but Trilogy reasserted its subject-matter jurisdiction argument in its appellate brief. *Id.* The writing panel of the court reconsidered Trilogy’s argument and held that, because the parties had entered into a Trial Rule 41(A)(1)(b) stipulation as to all of Sartain’s claims, there was no final judgment entered, as “a voluntary dismissal under Trial Rule 41(A)(1) is not a ‘judgment’

because no judicial action is required to accomplish the dismissal.” *Id.* The *Sartain* court observed that the trial court’s entry of an order of dismissal on the parties’ stipulation was essentially unnecessary and a legal nullity. *Id.* Citing Indiana Appellate Rule 5(A), which provides that the Court of Appeals has jurisdiction over final judgments, the *Sartain* court reasoned that, because there was no final judgment entered, it did not have jurisdiction over Sartain’s appeal. *Id.* The *Sartain* court also concluded that, even if the trial court’s entry of an order of dismissal on the parties’ stipulation constituted a final judgment for purposes of conferring jurisdiction, the stipulation and the dismissal order both provided that the case was to be dismissed in its entirety, and that having agreed to the dismissal of the case in its entirety, “Sartain cannot now be heard to argue that the trial court committed any sort of reversible error with regard to Counts I and III.” *Id.* Therefore, the court dismissed Sartain’s appeal. *Id.* at 1053.

[18] Here, the parties’ April 6, 2021, Stipulation of Dismissal, With Prejudice, as to the Claims of Lyons Insurance & Real Estate, Inc., Only provided in relevant part that

1. *Any and all remaining claims and counts of [Lyons Insurance] as alleged against Kenworthy as stated in its Amended Complaint should be dismissed, with prejudice, each party to bear its own costs.*

(Lower Cause No. 89D01-1411-CC-766, filed April 6, 2021) (some emphasis added, some emphasis removed). Neither the parties’ stipulation nor the trial

court's subsequent entry of an order of dismissal on the claims of Lyons Insurance was a final judgment from which appeal could be taken. *See Sartain*, 137 N.E.3d at 1052. As a result, we conclude, as did the *Sartain* court, that, in light of Appellate Rule 5(A), we have no jurisdiction over Kenworthy's appellate claims relating to Lyons Insurance's Amended Complaint, and therefore, we dismiss those portions of her appeal. *See id.* at 1053.

### C. Kenworthy's Counterclaims

[19] Kenworthy also appeals the trial court's summary judgment rulings pertaining to her counterclaims and the trial court's rulings regarding Newman's expert testimony and her demand for a spoliation jury instruction as those matters relate to her counterclaims. On April 6, 2021, Kenworthy moved pursuant to Trial Rule 41(A)(2) for a court order granting the voluntary dismissal of her counterclaims against Lyons without prejudice. After Lyons filed their objection and a hearing was held on the matter, the trial court granted Kenworthy's voluntary dismissal motion, imposing conditions relating to her payment of Lyons' attorney's fees should she elect to refile her claims.

[20] However, we have already held that a trial court's grant of a plaintiff's motion to voluntarily dismiss a suit "dissolves any and all interlocutory orders," puts the parties back into the position of the suit never having been filed, and renders any contested issues as to the dismissed claims moot. *Fair Share Org. v. Kroger Co.*, 132 Ind. App. 160, 170, 176 N.E.2d 205, 211 (Ind. Ct. App. 1961); *see also Highland Realty, Inc. v. Indianapolis Airport Authority*, 551 N.E.2d 1176, 1178 n.1 (Ind. Ct. App. 1990) (finding Highland Realty's appeal of the trial court's

interlocutory orders, including its grant of summary judgment on most of Highland's claims and its grant of the Airport's motion to strike Highland's expert witnesses, to be moot following the trial court's grant of Highland's Trial Rule 41(A)(2) motion for voluntary dismissal), *abrogated on other grounds*, 563 N.E.2d 1271 (Ind. 1990).

[21] We conclude that the trial court's grant of Kenworthy's motion for voluntary dismissal rendered her remaining appellate claims moot. Moot issues are ordinarily dismissed unless the appeal involves a "question of great public importance that is likely to recur." *I.J. v. State*, 178 N.E.3d 798, 799 (Ind. 2022). In the absence of any authority indicating that Kenworthy's appealed issues relevant to her counterclaims are of great public importance which are likely to recur, we also dismiss the portions of her appeal relating to her dismissed counterclaims.

## CONCLUSION

[22] Based on the foregoing, we conclude that Kenworthy has not presented this court with any appealable issues.

[23] Dismissed.

[24] Robb, J. and Molter, J. concur