

IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al

Plaintiffs,

v.

Kisling, Nestico & Redick, LLC, et al

Defendants.

Case No. CV-2016-09-3928

Judge James Brogan

**Dr. Sam Ghoubrial's Memorandum in  
Opposition to Plaintiffs' Motion to Compel  
and Motion to Strike Plaintiffs' Request  
for Sanctions**

Plaintiffs' Motion requests sanctions and asks this Court to order Dr. Ghoubrial to pay outlandish fees for its unwarranted and disingenuous Motion to Compel, despite having already agreed to a new date for Dr. Richard Gunning's deposition a mere two weeks from its previously scheduled date. Plaintiffs' Motion is wholly inappropriate, totally unnecessary, and appears to have been filed for solely for the improper purpose of painting Dr. Ghoubrial and his counsel in a negative light. As such, Plaintiffs' Motion should be denied.

Dr. Ghoubrial is not opposed to a Court Order requiring the Parties to convene on December 12, 2018 for Dr. Gunning's deposition, since, as Attorney Pattakos noted in the first paragraph of Plaintiffs' Motion, the parties have already agreed to do so. Yet, under no circumstances should Dr. Ghoubrial be required to cover the costs for the upwards of six hours that Plaintiffs' spent drafting an unnecessary Motion purporting to compel a previously agreed upon deposition. Instead, Plaintiffs must bear the costs of their own unprofessional filing, which is aimed to accomplish nothing more than deceitfully spinning facts in a fashion that unfairly misrepresents the Defendants and their counsel.



**A. An Order Compelling Discovery Would be Moot Because the Postponement of Dr. Gunning's Deposition was Wholly Appropriate and the Deposition Has Been Re-Scheduled Without Delay**

As stated, an Order compelling the deposition of Dr. Richard Gunning would be moot because the deposition has already been agreed upon and scheduled for December 12, 2018. Nonetheless, in fairness to the Court and all parties, Dr. Ghoumbrial must address Plaintiffs' baseless Motion.

**1. Attorney Brad Barmen's Request to Reschedule Dr. Gunning's November 21, 2018 Deposition was Timely, Valid and Unavoidable.**

As Plaintiffs' Motion notes, Attorney Brad Barmen recently joined this matter on behalf of Dr. Sam Ghoumbrial in early November 2018. Attorney Barmen was recently retained by Dr. Ghoumbrial's insurance carrier to represent him in this matter.<sup>1</sup> Attorney Barmen was and is involved with numerous other pending cases in this state, and several others, that require his time and effort. Accordingly, Attorney Barmen entered this matter with a schedule that included times in which other cases had previously scheduled depositions, hearings, and discovery deadlines. It is undisputed that at the time Attorney Barmen was retained, Plaintiffs had already served a subpoena upon Dr. Richard Gunning, an employee of Defendant Dr. Ghoumbrial, unilaterally scheduling Dr. Gunning's discovery deposition for November 21, 2018 with no prior effort to coordinate the schedules of the other lawyers in the case.

After being retained in this matter and discovering the conflicting deposition dates, Attorney Barmen attempted to reschedule the conflicting depositions in the other case, but was unable to do so, as the previously set depositions were up against a discovery deadline. Attorney Barmen notified Attorney Pattakos of the conflicting schedule and his failed attempts to rectify the conflicts within an

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<sup>1</sup> Attorney Barmen filed his Notice of Appearance as Counsel for Dr. Ghoumbrial on November 2, 2018, one day after being retained by the carrier. (see Docket).



email sent on Friday, November 16, 2018 at 9:08 AM. Attorney Pattakos attached this email to Plaintiffs' Motion as Exhibit 8 and has been aware of the legitimate basis for Attorney Barmen's request to reschedule the deposition since he received this email. While Mr. Pattakos is quick to point out that Mr. Barmen failed to provide supporting documentations regarding the conflict, he fails to note that Mr. Barmen indicated that he would include supporting documentation as an exhibit to a motion for a protective order if it became necessary.

Despite his understanding of Attorney Barmen's legitimate basis for rescheduling the November 21, 2018 deposition, Attorney Pattakos comes now, suggesting that Attorney Barmen was not actually dealing with a scheduling conflict because of his filing of a "Second Notice of Filing Supplemental Authority" and a Notice of Deposition in this case. (Plaintiffs' Motion to Compel and for Sanctions, at p. 3.) Astonishingly, Attorney Pattakos failed to consider that Attorney Barmen's law firm, one of the largest in the country, employs associate attorneys and staff that are able to assist in such filings.<sup>2</sup> Rather than recognizing the obvious, Attorney Pattakos chooses instead to unnecessarily and unprofessionally sling mud at a fellow member of the Bar who is new to the case and with whom he has never worked before.

**2. Attorney Barmen's Request to Reschedule Dr. Gunning's Deposition was Timely, Valid, Necessary and Appropriate**

First, as pointed out in Attorney Barmen's November 28, 2018 email to Attorney Pattakos, legitimate, privileged and documented personal reasons existed that prevented Dr. Gunning from attending the deposition on November 29, 2018. As the Court is surely aware, Attorney Pattakos has no right to know the specifics of Dr. Gunning's personal issues that prevented him from attending the deposition. However, Dr. Gunning's non-availability is demonstrated with a signed Doctors

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<sup>2</sup> For reference, <https://lewisbrisbois.com/about/locations/cleveland>.



letter, dated November 28, 2018 – the date that Attorney Barmen notified Attorney Pattakos of Dr. Gunning’s personal issues. (See Signed Medical Note, attached hereto as Exhibit A.) Consequently, Dr. Gunning’s unfortunately timed, but documented “personal reasons” prevented Attorney Barmen from providing Attorney Pattakos with notice before November 28, 2018. Accordingly, the request to reschedule Dr. Gunning’s deposition was timely and for valid reasons. Again, any suggestion on Plaintiffs’ behalf that Dr. Gunning’s “personal reasons” for being unable to attend the deposition were fabricated is highly offensive and unprofessional.

Second, before the Court issued its November 27, 2018 Order granting Plaintiffs’ Motion for Leave to File Fifth Amended Complaint, Dr. Gunning had only prepared to answer questions regarding the Plaintiffs’ Fourth Amended Complaint.<sup>3</sup> Consistent with Attorney Pattakos’ conduct during the discovery deposition of Plaintiff and former class representative Matthew Johnson, Dr. Gunning had only prepared to answer relevant questions relating the claims properly before the Court at the time.<sup>4</sup> As such, Dr. Gunning had not had the opportunity to properly review and address the additional allegations put forth in Plaintiffs’ Fifth Amended Complaint. Additionally, Plaintiffs’ did not actually file the Fifth Amended Complaint until November 29, 2018 so the allegations in the Fifth Amended Complaint were not in play until the date of the scheduled deposition. Thus, in addition to the personal issues Dr. Gunning was facing, he was also unprepared to answer questions

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<sup>3</sup> Notably, the Court’s November 27, 2018 Order responded to Attorney Pattakos’ improperly instructing a former putative class representative not to answer questions during a previous deposition by stating that after reviewing Matthew Johnson’s testimony, going forward, “counsel may not instruct a witness not to answer questions except when necessary to preserve a privilege or to present a motion under Civ.R. 30(D)[.]” As such, after this Order, the precedent that Attorney Pattakos set during Johnson’s deposition – that whatever counsel deems relevant determines the scope of the deposition – no longer existed, warranting additional preparation.

<sup>4</sup> As the Court is well-aware, Attorney Pattakos instructed his client not to answer numerous questions during his discovery deposition solely because Attorney Pattakos deemed those questions irrelevant to his client’s claims.



pertaining to brand new allegations that had not been officially filed at that point. Mr. Pattakos' baseless belief that questions relating to the allegations in the Fifth Amended Complaint were fair game when only the Fourth Amended Complaint was pending, in addition to his conduct during the deposition of former class representative Matthew Johnson, shows that Mr. Pattakos deems himself the arbiter of what is relevant and what is not when it suits him. Attorney Pattakos cannot be permitted to have it both ways.

Critically, Plaintiffs' current Motion is completely unwarranted because Attorney Pattakos agreed to reschedule Dr. Gunning's deposition for December 12, 2018. No parties are opposing the December 12, 2018 deposition. No parties are suggesting that the December 12, 2018 deposition will not go forward. Nevertheless, Attorney Pattakos decided to spend nearly six hours drafting a Motion asking the Court to Order that the parties appear to an already agreed upon deposition.<sup>5</sup> Attorney Pattakos' questionable decision to spend nearly six hours on meaningless and unnecessary Motion to compel a deposition that was already rescheduled by agreement should not be born by any other party to this action.

In sum, Attorney Barmen learned of legitimate, privileged personal reasons that Dr. Gunning could not attend the November 29, 2018, deposition on November 28, 2018. Attorney Barmen immediately notified Plaintiffs' counsel of the need to change the date upon learning of the issue from Dr. Gunning. Further, Attorney Barmen informed Plaintiffs' counsel of Dr. Gunning's legitimate interest in having the deposition rescheduled in light of the new allegations within Plaintiffs' Fifth Amended Complaint, which was not filed and not properly before the Court at that point. Finally, the parties agreed that Dr. Gunning would appear at his deposition on December 12,

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<sup>5</sup> Spending six hours to draft an eight-page Motion with two total case citations, each of which were previously cited in earlier filings, is simply ridiculous.



2018, just two weeks after the previously scheduled date. Neither Plaintiffs nor their counsel can legitimately claim any prejudice by the two week delay is the deposition of Dr. Gunning considering the discovery deadline is not until March of 2019 and when no other depositions have been or will be conducted in that two week period.

Attorney Barmen took timely and appropriate steps to secure his clients' best interests and a fair and reasonable deposition date, when all necessary parties could be present. Despite Plaintiffs' misleading Motion and Plaintiff's counsel's unnecessary and unwarranted personal attacks, there was no foul play on part of counsel for any of the Defendants. Conversely, Plaintiffs' improper and unfounded allegations within its Motion and continuous unprofessional dealings are the only thing troubling in respect to Dr. Gunning's already scheduled deposition.<sup>6</sup>

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<sup>6</sup>Counsel for Defendants have not been "repeatedly sanctioned by Ohio courts for obstructing discovery" as Plaintiffs' inappropriately state in their filing. Despite Plaintiffs' assertion that "Ghoubrial and his attorneys" have been sanctioned repeatedly, Plaintiffs' cite to two cases involving one attorney, neither of which resulted in discovery sanctions. First, Plaintiffs' cite to the magistrate's language regarding David Best that the Tenth District mentioned in *Ghoubrial v. Herbert*, without informing this Court that the Tenth District ultimately denied the trial court's decision. *Ghoubrial v. Herbert*, 10th Dist. Franklin No. 15AP-470, 2016-Ohio-1085, ¶ 12. Interestingly, the conduct that the trial court took issue with regarding Attorney Best was the precise conduct Attorney Pattakos engaged in during Matthew Johnson's deposition. *Id.* at ¶ 4 ("rather than objecting to a question for the record, and then waiting for the court to rule on the objection at a later date, counsel . . . seemed to make his own rulings and instructing his client accordingly.") Second, Plaintiffs' cite to the lower courts referenced language within *Bowers v. Herron*, despite the fact that the Fifth District reversed the trial court's order sanctioning Attorney Best because there was no opportunity for a hearing prior to awarding attorney's fees. *Bowers v. Herron*, 5th Dist. Fairfield No. 15 CA 34, 2016-Ohio-766, ¶ 29-31. After the Fifth District rendered its decision reversing and remanding the trial court's imposition of sanctions, the lower court never held a subsequent hearing and never issued sanctions against Attorney Best. Therefore, Attorney Pattakos put forth a meritless argument, purposely misconstruing Ohio case law, in an attempt to discredit counsel for Defendants' in a completely unwarranted Motion to Compel. Plaintiffs' counsel's baseless accusations would be no different than if Defense Counsel advised this Court of prior sanctions against Attorney Pattakos knowing those sanctions were later overturned. Unfortunately, this is not the first blatant misrepresentation Attorney Pattakos has made to this Court. Hopefully it will be the last.



**B. Plaintiffs' Request for Sanctions is Meritless and Must be Struck**

Ohio Civ. R. 37(A)(5) addresses discovery sanctions, and states in relevant part:

(a) If the Motion Is Granted. If the motion is granted, the court shall, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court shall not order this payment if:

- (i) The movant filed the motion before attempting in good faith to obtain the discovery without court action;
- (ii) The opposing party's response or objection was substantially justified; or
- (iii) Other circumstances make an award of expenses unjust.

No such basis for issuing sanctions is warranted under the present circumstances. First, under subsection (a)(i), sanctions are wholly inappropriate, since there is no present discovery dispute, as Plaintiffs' are asking the Court to Order something that is already agreed upon. In fact, sanctions are arguably appropriate *against* Plaintiffs' because they filed the present Motion to Compel without any basis, necessitating Defendant Ghoumbrial to incur significant expense in his response. Second, sanctions are inappropriate under subsection (a)(ii), as Dr. Ghoumbrial's aforementioned actions have been entirely justified, and again, there is no outstanding issue, as Dr. Gunning is set to be deposed within the next two weeks. Finally, no "other circumstances" exist to issue sanctions against Dr. Ghoumbrial.



Accordingly, the Court should deny Plaintiffs' moot Motion to Compel and Strike Plaintiffs' Request for Sanctions.

Respectfully Submitted,

/s/ Bradley J. Barmen

Bradley J. Barmen (0076515)

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*Counsel for Defendant Dr. Sam Ghoubril*



**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing was filed electronically with the Court and sent via email to the below parties on this 6th day of December 2018. The parties, through counsel, may also access this document through the Court's electronic docket system:

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/s/ Bradley J. Barmen

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*From the Desk of Michael Bianco, M.D.*

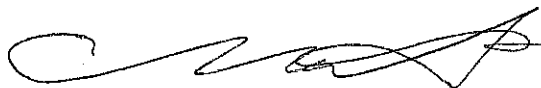
November 28, 2018

**Re: Richard Gunning, M.D.**

To Whom It May Concern:

Dr. Gunning is undergoing medical care and medication treatment. He will not be available for deposition on November 29, 2018. I will let you know when he is cleared.

Sincerely,



Michael Bianco, M.D.

11-28-18

MB/rtd

