

**IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO**

MEMBER WILLIAMS, <i>et al.</i> ,  Plaintiffs,  vs.  KISLING, NESTICO & REDICK, LLC, <i>et al.</i> ,  Defendants.	Case No. 2016-CV-09-3928  Judge James Brogan  <b>Plaintiffs' Motion to Compel the Continued Deposition of Richard Gunning, M.D.</b>
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At Plaintiffs' recent deposition of Defendant Ghoumbrial's employee Richard Gunning, M.D., counsel for Defendant Ghoumbrial—who purports to also represent Dr. Gunning in this litigation—repeatedly interfered with the examination by making improper speaking objections and instructing Gunning not to answer certain questions on subjects that are highly relevant to this lawsuit. Thus, as set forth fully below, the Court should require Dr. Gunning to reappear to answer these questions and any follow-up questions that Plaintiffs deem necessary. The Court should also order Defendant Ghoumbrial and his attorneys to pay Plaintiffs' attorneys' fees necessitated by their unjustified obstruction.

**Factual Background**

- 1. Dr. Gunning calls Plaintiffs' counsel to advise that Defendant Ghoumbrial pressured him into executing an affidavit against his will, spends two hours on the phone discussing Ghoumbrial's fraudulent practices, and states that he fears retaliation from Ghoumbrial.**

On October 2, Defendant Ghoumbrial filed a document captioned "Dr. Ghoumbrial's Supplemental Information in Support of His Motion to Deny Addition of Dr. Ghoumbrial to This Suit," which attached as an exhibit an affidavit from Dr. Gunning, by which Ghoumbrial attempted to misrepresent Gunning's medical practice as independent from his own in an effort to excuse himself

from liability on the claims alleged by Plaintiff Norris in the Fourth Amended Complaint.<sup>1</sup> On the same day, at approximately 6:32 PM, Gunning placed a phone call to the Pattakos Law Firm and asked to speak with Plaintiffs' Attorney Peter Pattakos, stating that he was pressured to sign his affidavit that was attached to Ghoubrial's filing. Gunning Tr. at 10:13–25, 11:24–12:12.<sup>2</sup> Gunning was shortly connected with Pattakos by phone, and a two-hour conversation ensued during which Gunning spoke of Ghoubrial's fraudulent business practices that are at issue in this lawsuit, and stated that he has wanted to leave Ghoubrial's practice for years, but has been unable to do so, in part because he fears retaliation from Ghoubrial. *Id.* at 11:1–11, 11:24–13:10, 55:23–56:14, 60:1–12; 63:7–64:19. Gunning and Pattakos ended the conversation understanding that Dr. Gunning would retain counsel, who would advise Gunning in the process of going on record with the information that he shared on this phone call. 221:25–222:6.

**2. Dr. Gunning retains John Myers, Esq.—an attorney who “specializes” in “labor law,” representing plaintiffs who have “experienced discrimination” or “a hostile work environment” and want to “feel safe at work”—and agrees to appear for a deposition on November 20, 2018.**

On the following day, October 3, Pattakos received a phone call from John Myers, Esq., who confirmed that he represented Dr. Gunning in connection with this lawsuit. *See* Gunning Tr. 65:16–66:5. According to Myers' website, he “specializes” in “labor law,” representing plaintiffs who have “experienced discrimination” or “a hostile work environment” and want to “feel safe at work.” On October 9, Plaintiffs served a subpoena on Dr. Gunning to take his deposition and Mr. Myers confirmed Gunning's availability to be deposed on November 20, which was rescheduled and noticed for Nov. 21 at defense counsel's request, with Gunning's agreement, and to no objection by any party. *See* Notice of Service, filed Oct. 17, 2018.

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<sup>1</sup> Gunning testified that he is Ghoubrial's at-will employee and does not have any ownership interest in Ghoubrial's practice. Gunning Tr. at 13:11–14:4.

<sup>2</sup> The transcript of Gunning's deposition was filed with the Court concurrently with this motion. *See* Notice of Filing, Dec. 20, 2018.

**3. Ghoubrial's attorney asserts himself as counsel for Gunning and postpones Gunning's deposition twice for dubious reasons.**

On November 2, Attorney Brad Barmen entered his appearance on behalf of Defendant Ghoubrial, and on November 7 and November 9, the attorneys from the two law firms that previously represented Ghoubrial filed motions to withdraw. On Nov. 6, Mr. Barmen sent Plaintiffs' counsel a letter in which he purported to represent not only Dr. Ghoubrial, but also "any current or former member of Dr. Ghoubrial's staff," demanded that all communications to any such staff members be made through him, and also demanded to be advised as to whether Plaintiffs' counsel had contacted any such staff members. This letter did not mention Attorney Myers or Myers' previously announced representation of Dr. Gunning. Ten days later, on November 16, Mr. Barmen informed Plaintiffs' counsel that Dr. Gunning's deposition would need to be postponed due to unsubstantiated "conflicts," and late in the afternoon on the day before Dr. Gunning's deposition was rescheduled to take place (Nov. 29), Mr. Barmen demanded a postponement yet again, the dubious circumstances of which are fully set forth and documented in Plaintiffs' Motion to Compel the Deposition of Dr. Gunning (filed Nov. 29, 2018) that the Court granted on Dec. 7, 2018.

In the interim, Mr. Barmen explained that he "represent[s] Dr. Ghoubrial and his practice which includes Dr. Gunning," and "Mr. Myers represents Dr. Gunning in his individual capacity." *See Id.* Ghoubrial's "practice," however, is not a party to this case, and it is doubtful that the conflict of interest between Ghoubrial and Gunning could be waived in this case, particularly given Gunning's testimony that he fears retaliation from Ghoubrial.<sup>3</sup>

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<sup>3</sup> *See, e.g.*, Prof.Cond.R. 1.7, cmt. 38 ("Some conflicts are nonconsentable because a lawyer cannot represent both clients competently and diligently."); Ohio Adv. Op. 2009-3, Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, 2009 WL 1764109 ("Regardless of consent, multiple representations should not be undertaken when two clients' interests are fundamentally antagonistic"); *Columbus Bar Assn. v. Ross*, 107 Ohio St. 3d 354, 359 (2006) (nonconsentable conflict where a single attorney "represents both the defendant and the chief witness for the State in the

4. **When his deposition finally took place, Dr. Gunning displayed a selective memory of his conversation with Pattakos, and Defendants' attorneys repeatedly coached him with speaking objections and instructed him not to answer questions about highly relevant subjects.**

When Dr. Gunning's deposition finally took place on December 12, Dr. Gunning claimed that he could not remember substantial portions of his October 2 conversation with Pattakos, in part because he was on an anti-anxiety medication, Ativan, during the phone call. *See, e.g.*, Gunning Tr. at 32:1–6. Gunning did unambiguously confirm, as noted above, that Ghoubrial “bullied” him into executing an affidavit, that he spent two hours on the phone with Pattakos on October 2 discussing Ghoubrial's practice, and that he has wanted to leave Ghoubrial's practice for years, but has been unable to do so, in part because he fears retaliation from Ghoubrial. *Id.* at 10:13–25, 11:1–11, 11:24–13:10, 55:23–56:14, 60:1–12; 63:7–64:19, 79:4–13. Gunning also provided the following noteworthy testimony as to Plaintiffs' allegations that Ghoubrial and the KNR Defendants are engaged in a scheme to enrich themselves by administering overpriced “trigger-point” injections and medical supplies to KNR clients regardless of the clients' wants or needs for such treatment:

- Since approximately 2011, Dr. Ghoubrial—who runs a family practice based in Wadsworth, Ohio—has maintained a separate business through which he treats car-accident victims in what he calls a “personal injury clinic.” *Id.* at 16:13–17:16, 88:20–89:11, 94:3–16. Ghoubrial spends at least two days a week outside of the Wadsworth office treating these personal injury clients at various locations, such as at the offices of certain chiropractors, including Defendant Floros in Akron, as well as a clinic in Columbus to which Ghoubrial travels by private plane that he co-owns. *Id.* at 94:7–19, 99:21–101:3, 115:20–116:14. According to Gunning's estimates, “the majority” of these personal injury clients, approximately 60% to 70%, are represented by the KNR law firm, and “the majority, 60, 75 percent” were also clients of Defendant Floros's chiropractic clinic. *Id.* at 109:12–110:21. For approximately 5 years, beginning in or around 2011, Dr. Gunning worked one morning a week at the personal injury clinic, where he treated an estimated 8 to 22 patients per morning. 98:18–100:1, 102:15–22, 136:21–25. Gunning could not

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same case.”); *CenTra, Inc. v. Estrin*, 538 F.3d 402 (6th Cir. 2008) (“[A] conflict is nonconsentable when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances.”); *Johnson v. Clark Gin Serv.*, E.D.La. No. 15-3290, 2016 U.S. Dist. LEXIS 166206, at \*11-13 (Dec. 1, 2016) (nonconsentable conflict where plaintiffs' attorneys sought to represent several railroad employees who had an interest in shifting blame onto each other as well as the defendants regarding a train accident).

explain why Ghoubrial runs the personal injury clinic as a separate business from the family practice, and also testified that he had “no idea” how the personal injury clients knew to go to these various facilities to be treated by Ghoubrial and his employees. *Id.* at 108:5–109:11.

- In or around summer of 2017, Ghoubrial excluded Gunning from working at the off-site personal injury clinics. *Id.* 14:5–15; 107:15–21. When asked to confirm that he told Pattakos on Oct. 2 that he was pulled from these clinics because he wasn’t administering enough of the trigger-point injections, Gunning testified, “I don’t know if that was the reason. I assumed that it was the reason ... .” *Id.*
- When asked to confirm that he told Pattakos that Ghoubrial “‘constantly’ told him that the practice didn’t make money if he didn’t administer shots,” Gunning said, “I don’t recall the actual words I said that day. I was very anxious, upset, angry. I had taken some Ativan, prior to [the conversation], and the conversation was months ago. I don’t think I can recall the actual quotations.” *Id.* at 31:18–32:6. *See also Id.* at 26:6–31:16.
- When asked to confirm that he told Pattakos that Dr. Ghoubrial once lost his temper at him because he saw a certain number of personal injury clients in one day and only administered two injections, Gunning said, “I don’t recall those particular words,” and added, when pressed, that “Sam is a volatile person and can lose his temper frequently and has. He feels bad about it afterwards. I don’t recall having said that particular comment.” *Id.* at 32:12–33:13.
- When Gunning was asked to confirm that he told Pattakos that Dr. Ghoubrial instructed him, when treating the personal injury patients, to sneak the injections into the clients’ backs when they weren’t looking, Gunning said, “[H]e has his own way of dealing with these clients, especially people who might be needle-phobic. He would say, ‘Don’t necessarily say the word ‘needle’ to them. Don’t necessarily say, ‘shot.’ Tell them that you want to put the medication right where the pain is.’ And that was his approach to informed consent ... I’ll admit, I’m not as good a salesperson in getting people to take shots ... .” *Id.* at 22:17–23:14. Gunning later confirmed that, “I think I had six patients tell me that they didn’t want shots and the next thing they knew they were getting a shot.” *Id.* at 34:25–35:11.
- When Gunning was asked whether any other employees of Ghoubrial’s office overheard him complaining to Dr. Ghoubrial about his practices in administering the injections, Gunning said, “I don’t know if they overheard anything. I don’t know if they overheard me talk to Ghoubrial about anything. It’s possible. I mean, it’s a big office, but it’s possible, but I don’t particularly recall any particular incident, no, not right now.” *Id.* at 178:6–179:20.
- When Gunning was asked to confirm that he told Pattakos that former Ghoubrial employee Joshua Jones, M.D., who left Ghoubrial’s practice, was not comfortable with the practices that he was instructed to undertake at Ghoubrial’s office, Gunning said, “He wasn’t happy in Wadsworth. You could tell. He used to be a jokester and then the jokes stopped. He became morose. We assumed that it was

family troubles. His wife had two kids and she became a different person after that, but he wasn't happy with the practice." *Id.* at 174:22–175:3.

- Gunning was also asked to recall a time when he was at Defendant Nestico's house for a social event, Nestico's sister had just been in an auto accident, and Ghoubrial and his former employee Frank Lazzerini were joking to Nestico about how they were going to shoot his sister up with a number of injections and send her home with a back brace. *Id.* at 45:10–18. Gunning recalled that this conversation took place ("they were saying about how they would go ahead and give her shots and get her, you know, a back brace that she needed"), but when asked if Ghoubrial and Lazzerini were laughing at the notion that Nestico's sister would receive the same treatment that the KNR clients received, Gunning said, "I don't recall their intent ... As far as whether they were laughing or why they were laughing, I don't recall ever saying anything as to the reason why they would have done that, if they did that. ... I don't remember why I [mentioned this discussion]. I do know that both [Ghoubrial and Lazzerini] were better at convincing their patients to get shots than I was." *Id.* at 47:9–22, 51:15–22, 52:25–53:25.

This testimony was regularly interspersed with improper speaking objections by defense counsel that interfered with Plaintiffs' counsel's questioning and suggested answers to the witness. *See, e.g., Id.* at 27:13–31:25, 34:7–13, 42:7–8, 46:13–15, 51:25–52:15, 53:18–20, 56:11–59:25, 61:8–62:13, 79:20–80:19, 80:24–81:1, 86:3–11, 93:20, 106:13–16, 114:11–12, 140:5–21, 141:19–20, 147:10–11, 149:5–7, 154:1–4, 156:23–157:3, 157:19–22, 169:23–170:7, 175:17–18, 178:6–179:14, 223:22–24, 225:9–10. These improper objections are discussed in detail in Plaintiffs' motion for a protective order filed concurrently with this motion.

Additionally, counsel for Ghoubrial instructed Gunning not to answer questions about the following subjects:

- Whether Gunning told Pattakos on October 2 that Dr. Ghoubrial would refer to the trigger point injections as, "n\*gger point injections," and "afro-puncture," referring to the racist slur for black people and the fact that Ghoubrial's personal injury practice treated a larger proportion of black people than his family practice did. *Id.* at 42:22–45:19.
- Whether Gunning told Pattakos on October 2 that he believed Ghoubrial was intentionally running his medical practice in a way that would cause it not to make money so that he could avoid paying his wife, Julie, in currently pending divorce proceedings; *Id.* at 66:8–66:22.

- Whether Gunning told Pattakos on October 2 that another Ghoumbrial employee overheard Ghoumbrial plotting with someone to “make sure that Julie’s name stays on their home mortgage so her debt-to-asset ratio stays so high that she has to live in an apartment for the rest of her life.” *Id.* at 67:10–70:12.
- Whether Gunning told Pattakos on October 2 that he believed it was possible that Monique Norris’s medical records that Ghoumbrial filed with the Court had been fraudulently altered to falsely portray that Gunning treated Ms. Norris instead of Dr. Ghoumbrial. *Id.* at 81:15–83:14.
- Whether Gunning believes that the currently pending 272-felony-count indictment against former Ghoumbrial employee Frank Lazzerini, pertaining to charges that Lazzerini “overprescribed pain medications for profit,” has merit based on Gunning’s personal experience working with Lazzerini under Ghoumbrial’s supervision. *Id.* at 171:12–174:2.

As explained further below, these questions are all reasonably calculated to lead to the discovery of admissible evidence, and Gunning should be ordered to return to his deposition to answer them.

### **Law and Argument**

Under Civ.R. 26(B)(1), information is discoverable as long as it is “appears reasonably calculated to lead to the discovery of admissible evidence.” Under Civ.R. 30(C)(2), “[a] person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by a court, or to present a motion under Civ.R. 30(D).” Civ.R. 30(D) provides that a court may end or “limit the scope” of a deposition “upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party.” Finally, Local Rule 17.02(5)(B) provides that an attorney may “instruct a witness not to answer a question” if the question is “not relevant; not likely to lead to the discovery of admissible evidence; and counsel has a good faith, reasonable belief that his or her position will be sustained by the judicial officer with jurisdiction over the case and can explain in detail and on the record at the time he or she instructs the witness not to answer the basis or bases for the instruction not to answer.”

Under Evid.R. 401, “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Under Evid.R. 404(3), evidence of a witness’s credibility is admissible,” and under Evid.R. 607(A), and 608, “the credibility of a witness may be attacked by any party,” including “on cross examination” about “specific instances of conduct ... clearly probative of ... untruthfulness.”

These controlling standards require that Gunning be ordered to answer the questions at issue. First, whether Defendant Ghoumbrial used the racial-slurs at issue goes to his contempt for his personal-injury clientele, and, consequently, the likelihood that he would breach his fiduciary duties toward them by subjecting them to the fraudulent scheme at issue. Additionally, the questions relating to Ghoumbrial’s efforts to manipulate the profits earned by his medical practices to avoid paying his wife in divorce proceedings go directly to his lack of credibility and character for untruthfulness, and the fact that he would plot to ensure that his wife is forced to live in an apartment for the rest of her life is relevant to Gunning’s fear that Ghoumbrial would retaliate against him, too. Indeed, the very fact that Gunning confided in Pattakos on these issues goes to show that a primary purpose of his call was to expose Ghoumbrial’s misconduct and explain why he was afraid to speak out against it. And finally, Gunning’s statement about the likelihood that Ghoumbrial altered Ms. Norris’s medical records, and questions about whether Gunning observed Lazzerini engaging in conduct while working for Ghoumbrial that was similar to that for which he was recently indicted (“overprescribing pain medications for profit”) are directly relevant to whether Ghoumbrial engaged in such conduct himself.

### **Conclusion**

Defense counsel’s conduct at Dr. Gunning’s deposition requires a strong deterrent so that similar gamesmanship does not occur at any other depositions in this case. The Court should enter



an order requiring Gunning to reappear to answer the questions that defense counsel instructed him not to answer, and any follow-up questions that Plaintiffs deem necessary. The Court should also sanction Defendants and their counsel in the amount of fees incurred in filing this motion, as well as the appearance fees for the court reporter and videographer necessitated by counsel's obstructive conduct.<sup>4</sup> Civ.R. 37(A)(5)(a) (requiring that Ohio courts "shall ... require the party ... whose conduct necessitated the motion [to compel], the party or attorney advising that conduct, or both to pay movant's reasonable expenses incurred in making the motion, including attorneys' fees," if the opposing party's actions were not "substantially justified.").

Respectfully submitted,

/s/ Peter Pattakos

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<sup>4</sup> The undersigned hereby certifies, under Civ.R.37(A)(1) and (A)(5)(a)(i), as should be apparent from the facts set forth herein and the Gunning deposition transcript itself, that Plaintiffs have made every good faith effort to obtain Dr. Gunning's deposition testimony without the Court's intervention.

### Certificate of Service

The foregoing document was filed on December 20, 2018, using the Court's electronic-filing system, which will serve copies on all necessary parties. Counsel for deponent Gunning, John Myers, Esq. (johnmyerscolpa@gmail.com), was also emailed a copy of this document on this date.

/s/ Peter Pattakos

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