

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

MEMBER WILLIAMS, et al.,

Plaintiffs,

v.

KISLING, NESTICO & REDICK, LLC, et al.,

Defendant.

Case No.: 2016-09-3928

Judge: James Brogan

**DEFENDANT SAM GHOUBRIAL,
M.D.'S BRIEF IN OPPOSITION TO
PLAINTIFF'S MOTION FOR A
PROTECTIVE ORDER BARRING
SPEAKING OBJECTIONS AT
DEPOSITIONS**

Now comes Defendant, Sam Ghoubrial, M.D. ("Dr. Ghoubrial" or "Defendant"), by and through undersigned counsel, and hereby submits this Memorandum in Opposition to Plaintiffs' Motion for a Protective Order Barring Speaking Objections at Depositions. The audacity of Plaintiffs' to come to this Court requesting a protective order to prevent only defense counsel from engaging in speaking objections during depositions is outright offensive given Plaintiffs' Counsel continuous use of such objections. Apparently Plaintiffs' Counsel is operating under the assumption that Rules of Evidence, Civil Procedure and the Local Rules apply to all parties but himself. Plaintiffs' Motion for a Protective Order is hypocritical, misleading, unwarranted, and should be denied.

A cursory review of the Dr. Gunning's deposition transcript reveals that defense counsels objections were proper and a protective order is unnecessary. Plaintiffs' Motion is yet another self-manufactured discovery issue aimed to better posture Plaintiffs' argument for extending class discovery. Accordingly, Dr. Ghoubrial respectfully requests that the Court deny Plaintiffs' Motion. Alternatively, if the Court finds it necessary to issue such an order, Dr. Ghoubrial requests that the order apply equally to all parties, not just to Defendants, given the past conduct of Plaintiffs' Counsel.

A. A Protective Order barring Defendants from engaging in speaking objections is not necessary.

1. Plaintiffs' Motion perverts Attorney Barmen's actions by skewing the testimonial context of the objections.

Although framed as improper and suggestive, defense counsels' objections were valid when taken in context of Attorney Pattakos' harassing and repetitive questions. Plaintiffs' Motion is littered with examples of disingenuous contextual misrepresentations.

Initially, Plaintiffs cite to Dr. Gunning's deposition transcript, bold-fonting and italicizing particular phrases used within objections, to argue that counsels' objections suggested answers to the deponent. However, each of these objections only came after Plaintiffs' Counsel had already asked similar questions multiple times and received testimony answering the question, which Plaintiffs conveniently failed to include. For example, before Plaintiffs' citation to page 31 of Dr. Gunning's transcript, emphasizing Attorney Barmen's objection, Dr. Gunning had previously answered Plaintiffs' counsel's question in significant depth. (See Gunning Dep. at 26-32, attached hereto as Exhibit 1.) Thus, Attorney Barmen's comment, "tell him again", only came about because of Attorney Pattakos' refusal to take a previous answer for what it was. Attorney Pattakos' refusal to accept answers he simply did not like prompted Attorney Barmen's objections. In light of the inappropriate nature of the questioning, attorney Barmen's objections were necessary and proper.

Next, Plaintiffs' cite to page 53 of Dr. Gunning's deposition transcript to disingenuously argue that an objection suggested an answer, when in reality this was just another example of Attorney Pattakos repeating a question multiple times and receiving the same answer that he apparently did not like. An accurate summary of the testimony reads as follows:

Q: Why did you tell me that, when we spoke on the phone? Why was it significant for you to tell that to me?

MR. BARMEN: Objection. Assumes it was. But go ahead.

A: I don't know. I don't recall. . . .

(*Id.* at 46:10-16.)

Q: When you told me about this conversation about Rob Nestico's sister, you told me that they were joking about this. Do you recall that?

MR. BARMEN: Objection. Go ahead.

A: I don't recall their intent.

(*Id.* at 47:9-15.)

Q: Do you remember that they were laughing?

A: I remember they were discussing it. I don't - - I can't say whether they were laughing. And even if they were, it's the normal standard of care treatment that she would have got.

(*Id.* at 53:8-14.) When viewed in context, the objection cited in Plaintiffs' Motion, which reiterated the fact that Dr. Gunning had said that he did not remember, was appropriate because Plaintiffs' had repeatedly asked the same question. The objection was not suggestive and Dr. Gunning's response was consistent with his previous testimony.

This sort of selective citing in Plaintiffs' Motion continuously distorts defense counsels' objections. *Compare* Plaintiffs' Motion for Protective Order, at p. 10 (highlighting Attorney Barmen's objections regarding who was in the office), *with* Gunning Dep. at 79:14-19 (Dr. Gunning testified twice that he did not recall who was in the office).¹

¹ Again, when Plaintiffs' cite to page 153 through 154 of Dr. Gunning's transcript, the citation overlooks that Dr. Gunning had already given lengthy testimony on his practice regarding suggesting TENS Units to patients. *See e.g.* Gunning Dep. at 117:19 – 119:12, 135:14-24, 137:8 – 138:2, 146:4 – 150:14, 152:15-17. Yet again, Attorney Barmen's objection only came after Attorney Pattakos badgered Dr. Gunning by repeatedly asking the same questions.

For sake of brevity, this Brief will not address every objection taken out of context, however, even a hasty review of the deposition transcript demonstrates that defense counsels objections were valid and do not require a court order to prevent further objections of the sort.

2. Plaintiffs' Motion fails to cite any Ohio case law suggesting that Attorney Barmen's objections were inappropriate in context.

Taken together, Civ.R. 30(C) and Summit County Local Rule 17.02 prohibit objections that are argumentative or suggest an answer to the deponent. As stated, defense's objections were brief, non-argumentative and did not suggest any answers to Dr. Gunning. The objections, when viewed in proper context, were merely concise statements pointing out the inappropriateness of the questions or the fact that the question had already been answered, sometimes on numerous occasions. Therefore, under Ohio law, the objections were proper and do not require any court intervention.

Notably, Plaintiffs' Motion includes exclusively out-of-state case law to argue that Ohio law somehow views particular phrases as suggestive and inappropriate speaking objections requiring court-ordered sanctions. The apparent inability to cite to a single Ohio case holding that phrases like "answer if you if you know", "question calls for speculation", or "asked and answered" constitute sanctionable speaking objections demonstrate that Ohio courts do not hold as Plaintiffs suggest. Interestingly enough, Plaintiffs' Counsel has used the same terms when objecting during depositions. *See, e.g.* "Asked and Answered": Thera Reid Dep. at 81:6; Matthew Johnson Dep. at 66:15, 239:3-4. The blatant hypocrisy of Plaintiffs' Counsel cannot be overlooked.

Nevertheless, while currently arguing that use of such phrases and objections are improper and sanctionable under Ohio law, Plaintiffs' Counsel has continuously engaged in such conduct from the outset of the discovery process in this lawsuit. Although a Protective Order is unwarranted, if the Court decides otherwise, any such Order must apply to all parties equally.

B. If the court finds a Protective Order necessary, any such Order must apply to all parties, as Plaintiffs' Counsel has constantly engaged in speaking objections throughout the entirety of this lawsuit.

Plaintiffs' Counsel has continuously engaged in more egregious conduct than the conduct he now seeks protection from. Within the Motion, Plaintiffs argue that defense counsel has engaged in lengthy objections, objections that suggest testimony resulting in answers mirroring the objections, and improperly asking for explanations of relevance. Meanwhile, from the outset of this lawsuit, Plaintiffs' Counsel has engaged in the precise conduct complained of and as the record demonstrates, Plaintiffs' Counsel is unequivocally the worst and most flagrant offender. If this Court decides that a protective order is necessary, the order must impede Attorney Pattakos' mistaken notion that the Rules of Evidence, Civil Procedure and the Local Rules of this Court apply to all parties but himself. The transcripts from previous depositions reveal that any court order on speaking objections must also apply to Plaintiffs.

During the deposition of Matthew Johnson, Plaintiffs' Counsel engaged in multiple lengthy, disruptive speaking objections. For example, see the following testimony:

Q: Why didn't you bring anything responsive to this request?

MR. PATTAKOS: Because I didn't advise him to, Tom. Let's move on.

A: Yeah, I do what my lawyer tells me to, man.

Q: Do you have possession of any documents relating to communications between yourself and KNR?

MR. PATTAKOS: Tom, why don't you review the docket for the pending motions. We know you have a pending motion to compel. We have filed a motion for protective order. It's all pending. I don't know why you're asking the witness about this or why you even served a notice of deposition duces tecum, which isn't even a thing under Ohio law. So, you know, let's move on. Please.

(Matthew Johnson Dep. 129:3-19).

Q: Sure. If you find out that your factual allegation that Mr. Nestico has a financial interest or ownership interest in Liberty Capital is in fact false, will you agree to withdraw that allegation?

A: No.

Q: Why not?

A: Because that's my answer.

...

Q: Okay. And do you think that would be good advice for you to give to the other prospective class members?

A: Absolutely.

Q: Great. Okay.

MR. PATTAKOS: Tom, he's going to rely on the advice of his attorneys and he knows if we don't have evidence for the claims we're not going to pursue them. Okay? If you're worried about that or if you think that's relevant in any way, you know, you can follow up. We have a duty as professionals to not pursue claims where there's no evidence.

...

MR. PATTAKOS: You keep misrepresenting his testimony. He's right. You keep badgering him and you keep misrepresenting his testimony.

MR. MANNION: And you keep trying to testify for him. So let's just move forward and have the witness testify.

(*Id.* at 190:6 – 191:25).

Q: Who were you referring to when you used that expletive earlier?

A: What expletive?

...

MR. PATTAKOS: Tom, you know what, his demeanor at trial's going to be a lot different because there's going to be a judge there that's going to keep you from harassing him, asking him questions about his tax returns, prior convictions, expletives, questions about his son, questions about who lived with him at his house, questions about what his father said to him in a private conversation, all of

this completely harassing lines of questioning, abusive conduct. So his demeanor will probably be a lot different at trial.

Q: Okay. Do you understand, sir --

MR. PATTAKOS: Tom.

Q: -- that this video could be shown at trial?

A: Okay.

MR. PATTAKOS: Only maybe the smallest parts of it, Tom.

(*Id.* at 207:15 – 208:18). *See also Id.* at 18:1-25, 19:2-25, 24:1-14, 56:14 – 57:10, 74:8 – 75:17, 114:2-12, 173:20 – 174:20; Thera Reid Dep. at 8:17-23, 45:1-13, 83:1-8, 244:22-25, 245:2- 246:2.

Moreover, Plaintiffs' Counsel has made suggestive objections that resulted in testimony mirroring his improper objections. For example, Attorney Pattakos improperly instructed Matthew Johnson, a prospective class representative, not to testify about matters he deemed irrelevant. One example being the following exchange:

Q: Do you use illegal drugs?

A: No, sir.

Q: Okay. When did you stop using illegal drugs?

MR. PATTAKOS: Objection. Go on. Tom, move on. We object.

Q: Go ahead.

MR. PATTAKOS: He's not going to answer talking about illegal drugs. It has nothing to do with this case. Go ahead and file a motion to compel on that, and if the Court says you can ask questions about drug use, then we can come back. Okay?

...

Q: So tell me about the trafficking charge. What happened?

A: **That's irrelevant to this.**

MR. PATTAKOS: Yeah. Tom, we're not going to get into this.

A: **I'm not going to answer that.**

(*Id.* at 52:19 – 56:2).

Additionally, Plaintiffs' Counsel continuously inserted speaking objections despite directives from defense counsel to cease such improper objections. *See* Thera Reid Dep. at 96:1-14; Matthew Johnson Dep. at 18:9, 24:3-7. Moreover, Plaintiffs have sought permission to answer questions from Attorney Pattakos before answering and have had testimony cut short by Attorney Pattakos. *See* Thera Reid Dep. 83:1-8, 50:3.

Attorney Pattakos has even gone to the extent of engaging in blatant intimidation tactics during depositions. For example, during the deposition of Brandy Gobrogge, Plaintiffs' Counsel stated, both off and on the record, and at one point, directly to the independent court reporter, that the witness was falsely testifying to protect her employer. (*See* Gobrogge Dep. at 430:7 – 434:1). Counsel's off-hand and unsupported allegations made to a witness and independent court reporter are inappropriate attempts to intimidate a witness. Moreover, while purposely delaying the deposition of Robert Horton, Esq., Plaintiffs' Counsel has inappropriately lodged similar baseless accusations of false testimony to the press, the parties and the Court in regards to Mr. Horton's sworn affidavit in an attempt to improperly intimidate.²

Finally, Plaintiffs hypocritically argue that defense counsels' objections as to the relevancy of particular matters during deposition requires a protective order, when Plaintiffs' Counsel set the course for this sort of objection months prior. *See* Matthew Johnson Dep. at 99:10-11 ("Tom, what's the relevance of this?"), 116:2-4 ("Tom, how is it relevant? . . ."), 116:6-10 ("He'll answer the

² This issue will be more thoroughly articulated in a separate Motion to regarding the Deposition of independent witness Robert Horton.

question. I'll instruct him to answer the question if you can explain a remotely conceivable basis for why it would be relevant to this case."), 190:20 – 191:2; Member Williams Dep. at 115:4-8 (“What are the tax returns relevant to, counsel? . . . You're asking for documents and you can't tell me why they're relevant?”), 115:16-25. Apparently attorney Pattakos believes that he, and he alone, is the arbiter of what is relevant and what is not.

Overall, Plaintiffs' disingenuously come to the Court, asking for protection from the same type of conduct that Plaintiffs' Counsel regularly engages in. The purpose behind this Motion, and others, is clear: the more tenuous discovery issues Plaintiffs' create and bring before the Court, the more tenuous arguments Plaintiffs have for extending the class-discovery deadline in perpetuity. Plaintiffs' Counsel, who regularly engages in inappropriate speaking objections and other improper and unprofessional behavior, is bringing this issue before the Court to posture an argument that defense counsel is delaying and obstructing discovery. Given the aforementioned conduct, it is obvious that Plaintiffs' Motion is tedious, at best. Ultimately, a Protective Order is unnecessary, yet, Plaintiffs' skewed application of the applicable rules of law cannot be ignored.

Accordingly, if the Court finds that a Protective Order is necessary, the Order must apply equally to all parties in this matter. Moreover, given the conduct of Plaintiffs' Counsel and the appropriateness of defense counsel's objections, the Court should not grant any requested sanctions against defendants. Plaintiffs' Counsel should not be rewarded for his hypocrisy and distorted view of the rules governing discovery.

C. Conclusion

For the reasons stated, Defendant Ghoubril respectfully requests that the Court deny Plaintiffs' Motion for a Protective Order. Alternatively, if the Court finds it necessary to enter a

Protective Order, Defendant Ghoubrial requests that the Order apply to all parties in this matter equally, as is warranted given the repeated actions of Plaintiffs' Counsel.

Respectfully Submitted,

By: /s/ Bradley J. Barmen

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CERTIFICATE OF SERVICE

The foregoing Defendant Sam Ghoubrial, M.D.'s Memorandum in Opposition to Plaintiffs' Motion for a Protective Order Barring Speaking Objections at Depositions has been filed on the 7th day of January, 2019 using the Court's electronic filing system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Bradley J. Barmen

Bradley J. Barmen (0076515)

*Counsel for Defendant
Sam N. Ghoubrial, M.D.*

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1 haven't provided.

2 MR. PATTAKOS: I certainly can,
3 Tom.

4 MR. MANNION: No, you can't.

5 BY MR. PATTAKOS:

6 Q. You told me, Dr. Gunning, that
7 Dr. Ghoubrial constantly -- you used the word,
8 "Constantly" -- told you that the practice did
9 not make money if you didn't administer
10 shots --

11 MR. BARMEN: Objection.

12 Q. -- is that correct?

13 MR. MANNION: Objection,
14 argumentative.

15 A. He did mention that, you know, we
16 were being paid to deliver these patients care
17 and that -- that we had a responsibility not to
18 just dispense percocet prescriptions to
19 everybody; in that setting, if I could do
20 something other than just write prescriptions,
21 give them the care they needed, which would
22 include trigger points, which might include
23 TENS units, et cetera, then that would be
24 appropriate. In fact, frankly, if some of the
25 patients had been more willing to accept

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1 trigger points, I suspect their care might have
2 come to a conclusion sooner and in the end
3 charged less.

4 Q. That's great, but I want you to
5 answer the question. Did you or did you not
6 tell me that Ghoubrial constantly -- and you
7 used the word, "Constantly" -- told you that
8 the practice didn't make money if you didn't
9 administer shots --

10 MR. BARMEN: Objection.

11 Q. -- did you or did you not tell me
12 that?

13 MR. BARMEN: Objection. Asked
14 and answered. Now I'm going to join Tom's --
15 if you're going to try and cross-examine him on
16 notes you have on a conversation from two
17 months ago, provide him the notes. Otherwise,
18 accept the answer he gives you and move on.

19 MR. PATTAKOS: Guys, that's not how
20 it works. First of all, he didn't answer the
21 question --

22 MR. BARMEN: He did answer the
23 question.

24 MR. PATTAKOS: -- and I'm not
25 cross-examining him on the notes.

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1 MR. BARMEN: First of all, don't
2 raise your voice.

3 MR. PATTAKOS: I'm
4 cross-examining --

5 MR. BARMEN: Don't raise your
6 voice to me.

7 THE NOTARY: I can't take you
8 guys both at the same time.

9 MR. PATTAKOS: Please don't speak
10 while I'm speaking. I am examining --

11 MR. BARMEN: I was speaking and
12 you started talking over me, Peter, so these
13 things work both ways. If you're going to
14 cross-examine him on notes you have from a
15 conversation when you interrogated him on the
16 phone two months ago then waited until two
17 hours in to tell him he should probably have a
18 lawyer, then give him those notes or accept the
19 answer he gives you, because his answer is not
20 going to change. He told you he doesn't
21 remember the specific language from a
22 conversation --

23 MR. PATTAKOS: Stop testifying for
24 the witness, Brad.

25 MR. BARMEN: I'm reminding you --

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1 MR. MANNION: Let him make his
2 objection, please.

3 MR. PATTAKOS: This is not an
4 appropriate objection. This is in no way an
5 appropriate objection.

6 MR. BARMEN: Your questioning is
7 not appropriate.

8 MR. PATTAKOS: Your behavior is not
9 appropriate.

10 MR. BARMEN: When you ask the
11 question and you don't like the answer, so
12 now --

13 MR. PATTAKOS: Tracy, let's go off
14 the record, if he's going to do this.

15 MR. BARMEN: No, no, no. Stay on
16 the record.

17 MR. BEST: No. We're not going
18 off the record.

19 MR. BARMEN: Stay on the record.
20 He will answer every question that you ask him
21 to the best of his ability. Accept the answer
22 and move on. If you're going to cross-examine
23 him on some notes you have from this
24 conversation, let him see the notes or ask the
25 next question.

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1 MR. PATTAKOS: Two things. Okay.
2 Number one, I'm not cross-examining him on the
3 notes.

4 MR. BARMEN: Clearly you are.

5 MR. PATTAKOS: No, I'm not. I'm
6 asking him to remember our conversation and to
7 remember what he said. That's number one.
8 Number two, he didn't answer the question and
9 I'm entitled to get a straight answer out of
10 him --

11 A. Well, the answer is --

12 MR. PATTAKOS: -- so if you don't
13 like it --

14 MR. BARMEN: Wait.

15 MR. PATTAKOS: -- you can object,
16 but you can't tell him not to answer. And you
17 can't testify for the witness, because it's
18 inappropriate, and we will take this to the
19 Judge, if you keep it up. Okay?

20 MR. BARMEN: First off, I have
21 yet to instruct him not to answer a question.

22 MR. PATTAKOS: Well, you're
23 testifying for him, is what you're doing.
24 You're telling him that you don't -- that you
25 like the answer he gave, the nonanswer that he

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1 gave --

2 MR. BARMEN: Peter --

3 MR. PATTAKOS: -- and you're --

4 MR. BARMEN: Peter --

5 MR. PATTAKOS: -- keeping him from
6 telling the truth.

7 MR. BARMEN: Peter, don't --

8 MR. MANNION: Oh, come on, stop
9 that.

10 MR. BARMEN: Peter, don't tell me
11 not to talk over you and then interrupt me
12 three words in. You asked a question. He gave
13 you his answer. You asked him again and
14 because you didn't like the answer --

15 MR. PATTAKOS: He didn't answer the
16 question. I'm going to ask it one more time.

17 BY MR. PATTAKOS:

18 Q. Dr. Gunning, did you or did you
19 not, when we spoke on October 2, say that
20 Dr. Ghoubrial constantly told you that the
21 practice didn't make money if you didn't
22 administer the shots?

23 MR. BARMEN: Objection. Asked and
24 answered.

25 Tell him again.

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1 A. I don't recall the actual words I
2 said that day. I was very anxious, upset,
3 angry. I had taken some Ativan, prior to
4 talking with you, and the conversation was two
5 months ago. I don't think I can recall the
6 actual quotations.

7 Q. That's an answer to the question,
8 so thank you.

9 MR. BARMEN: That's the second --

10 MR. MANNION: Move to strike the
11 commentary.

12 Q. You also told me, when we spoke on
13 the phone on October 2, that Dr. Ghoubrial lost
14 his temper at you, because you saw a certain
15 number of KNR clients in one day and you only
16 gave two shots --

17 MR. BARMEN: Objection.

18 Q. -- did you not tell me that,
19 Dr. Gunning?

20 A. I don't recall those particular
21 words.

22 Q. Anything you do recall about that?

23 A. Same --

24 MR. BARMEN: Wait a minute.

25 Objection. About what, because, again --