

**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 TO COMPEL
THE CONTINUED DEPOSITION OF
RICHARD GUNNING**

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 to Compel the Continued Deposition of Richard Gunning. Plaintiffs come to the Court, yet again, now asking for a continued deposition of Dr. Richard Gunning to solicit testimony designed solely to embarrass Dr. Ghoubrial personally with allegations that are not even arguably relevant to the issues in the Complaint or issues surrounding class certification whatsoever. Plaintiffs' Motion, riddled with hypocrisy, irrelevant passages, and warped understanding of the applicable rules of civil procedure and evidence, lacks basis in law and fact. Plaintiffs are continuously manufacturing tenuous discovery issues solely to further the argument for extending the class-discovery deadline.

Plaintiffs presently seek a continued deposition of Dr. Gunning to question him on four blatantly irrelevant and/or improper topics, which Defense Counsel properly objected to under Local Rule 17. In a continued deposition, Plaintiffs' seek to assert questions asking Dr. Gunning:

- Whether a third-party in Dr. Gunning's office heard Dr. Ghoubrial making statements about his ongoing unrelated divorce proceedings.
- To give his personal opinion speculating on the merit of ongoing criminal proceedings regarding Frank Lazzerini's solo medical practices after he left Dr. Ghoubrial's practice.

- To speculate about the unfounded *possibility* that someone altered Monique Norris's medical records, despite having received explicit testimony that Dr. Gunning believes that he "definitively" made the records.
- About unsupported and speculative allegations that Dr. Ghoumbrial, himself an African American born in Egypt, used racial slurs.

Dr. Ghoumbrial urges this Court to review the deposition transcript, as it will reveal the impropriety of the questions asked and the validity of Defense Counsel's objections on the record under Local Rule 17. Given the breadth of testimony already provided, Dr. Gunning, a non-party witness, should not be forced to engage in a second deposition to testify on four ancillary topics designed solely to embarrass and harass the witness and/or Dr. Ghoumbrial, which have no rational relation to the lawsuit or class certification. Accordingly, the Court should deny Plaintiffs' Motion to Compel the Continued Deposition. Further, Plaintiffs request for sanctions should be denied, as counsel's objections were proper under Local Rule 17 and Civ.R. 30(D) and therefore, were substantially justified, rendering Civ.R. 37 sanctions inappropriate.

A. Law and Argument

Unfortunately, in what has become the common practice of Plaintiffs in this matter, Plaintiffs filed a Motion, framed as a Motion to Compel the Continued Deposition of Dr. Gunning, in an attempt to get a misleading summary of Dr. Gunning's deposition testimony before the Court, rather than to argue why the continued deposition is legally necessary. A cursory review of Plaintiffs' Motion reveals this dubious motive, the broad extent of testimony given by Dr. Gunning, and the lack of legal basis for a continued deposition. First, in violation of the Stipulated Protective Order in place, Plaintiffs' Counsel filed the Motion and deposition transcript before Defense counsel had been given an opportunity to review and designate parts of the transcript confidential, despite the entirety

of Dr. Gunning's deposition transcript being clearly marked confidential.

Video Deposition of
RICHARD GUNNING, M.D.

CONFIDENTIAL

December 12, 2018
10:07 a.m.

Taken at:
The Pattakos Law Firm, LLC
101 Ghent Road
Akron, Ohio 44333

Tracy Morse, RPR

Therein, Plaintiffs' Motion to Compel spends the first six pages "summarizing" the extensive and confidential testimony given by Dr. Gunning, then spends one mere paragraph arguing why the continued deposition is legally necessary.

Further, Attorney Pattakos' two-hour discussion with Dr. Gunning and his divergent opinion on what the conversation consisted of, demonstrated through the numerous lines of questioning based on what Attorney Pattakos remembers, unquestionably makes Attorney Pattakos a witness in this case.¹ However, to keep in line with what Plaintiffs' Motion seeks to Compel, this Brief in Opposition will focus on the one-paragraph argument regarding the necessity of conducting a second deposition, rather than distinguishing Plaintiffs' skewed summary of the extensive and confidential testimony given.

1. Plaintiff seeks a second deposition to question Dr. Richard Gunning on wholly irrelevant topics solely designed to harass and embarrass.

¹ Defendant Ghoubril will address the issue of Attorney Pattakos making himself a witness in this matter and its impact in his ability to remain an advocate in a separate filing.

Plaintiffs deposed Dr. Richard Gunning, a non-party witness, for over five hours and received testimony on all topics that appeared reasonably—even remotely—calculated to lead to the discovery of admissible evidence under Civ.R. 26(B)(1). Yet, pursuant to Civ.R. 30(D) and Local Rule 17.02(5)(B), counsel for Defendant Ghoubrial properly limited the scope of the deposition via objections when Plaintiffs' counsel began lines of questioning that were in no way relevant or likely to lead to the discovery of admissible evidence. Critically, Defense Counsel only interposed when the questions were intended solely to harass and/or embarrass the witness and/or Dr. Sam Ghoubrial. As demonstrated by Plaintiffs' Motion, Defense counsel only instructed the witness not to answer questions on four wholly irrelevant and inappropriate lines of inquiry dealing with unrelated personal matters meant solely to harass and embarrass the witness and Dr. Ghoubrial.

As the Court is well aware, Plaintiffs have no right to question a non-party witness in a legal malpractice claim about unsubstantiated allegations of racial slurs alleged to have occurred in his office, ongoing unrelated divorce proceedings of a party, and speculation about the merit of ongoing criminal proceedings against a non-party doctor who was not indicted for conduct that occurred while working for or with any party in the case. None of these topics are remotely related or relevant to the allegations of the Complaint or class certification. Instead, each of these highly speculative and personal topics are merely designed to unreasonably harass and embarrass the witness and/or Dr. Ghoubrial. Accordingly, Defense counsels objections and instruction not to answer the completely irrelevant and inflammatory lines of questioning were proper, necessary and grounded in law.

Initially, Plaintiffs' questions asking Dr. Gunning whether a third-party in Dr. Gunning's office heard Dr. Ghoubrial making statements about his ongoing divorce proceedings are in no way, shape, or form relevant to Dr. Ghoubrial's administration of trigger-point injections and/or the sale of TENS units to the Plaintiffs' of putative classes D and E. Plaintiffs' attempt to solicit testimony

from Dr. Gunning about Dr. Ghoubrial's ongoing divorce proceedings are designed to do nothing more than harass and embarrass Dr. Ghoubrial personally. Moreover, Evid.R. 608 cannot stand for a basis to admit testimony regarding Dr. Ghoubrial's unrelated divorce proceedings because the line of questioning is so remotely related to the current proceedings and is not *clearly probative* of untruthfulness. Unquestionably, admission of the testimony Plaintiffs' seek to discover would mislead the jury or cause confusion of the issues at trial. Evid.R. 608. Speculative hearsay evidence about a collateral issue to the current proceedings are inadmissible and were properly objected to during Dr. Gunning's deposition. Accordingly, a second deposition to allow the Plaintiffs to question Dr. Gunning about Dr. Ghoubrial's ongoing divorce proceedings is completely unwarranted in light of the rules of evidence and extensive testimony given on relevant topics.

Second, questions seeking Dr. Gunning to speculate about the merit of ongoing criminal proceedings regarding Frank Lazzerini's solo medical practices after he left Dr. Ghoubrial's practice are also completely irrelevant and inadmissible in this matter. Despite Plaintiffs' one-sentence unsupported statement to the contrary, whether or not Dr. Gunning believes that Lazzerini over-prescribed pain killers while working from his own practice has no imaginable bearing on whether Dr. Ghoubrial may or may not have done so himself. In fact, Plaintiffs' do not even allege anything regarding Dr. Ghoubrial and prescription pain killers in the Fifth Amended Complaint. Moreover, as Plaintiffs' Counsel is well aware, Frank Lazzerini was not indicted for any conduct stemming from his time working with Dr. Ghoubrial. Therefore, this irrelevant line of questioning is designed to do nothing more than improperly harass and embarrass Dr. Ghoubrial.

Additionally, during the deposition, Dr. Gunning repeatedly testified as to Dr. Ghoubrial's practices regarding prescribing personal injury patients narcotics. (*See* Gunning Dep. at 22, 26, 36, 37, 42, 117, 143, 175, 176, 190). Dr. Gunning's extensive testimony unequivocally demonstrates

that Dr. Ghoubrial was *adverse* to prescribing pain killers to his patients. Thus, questioning regarding Dr. Ghoubrial's practice of prescribing narcotics were answered to the extent that the line of questioning was in any way relevant to the current lawsuit. Accordingly, a second deposition to allow Plaintiffs to question Dr. Gunning about his speculative opinion on the merit of non-party Frank Lazzerini's criminal indictment, which does not involve conduct that occurred while he worked with Dr. Ghoubrial, is entirely unwarranted.

Third, a second deposition of Dr. Gunning to allow Plaintiffs to question him about the unfounded possibility that Dr. Ghoubrial altered Monique Norris's medical records is completely unwarranted because the requested questions seek Improper testimony as Dr. Gunning has already extensively testified to the veracity of the medical records. To be clear, Dr. Gunning's testimony that he treated Plaintiff Norris and that the medical records are in fact his records was clear and unequivocal. Defense Counsel allowed Dr. Gunning to answer all questions pertaining to Dr. Gunning's opinion on Monique Norris's medical records. Plaintiffs' now only seek a second deposition to ask Dr. Gunning whether there is a possibility that someone, unbeknownst to him, altered the records. Clearly, this question is improper is wholly unwarranted and highly improper. As such, Defense Counsel's objection to this inappropriate question was completely proper.

Moreover, Plaintiffs are aware that no evidence suggesting that Norris's medical records were altered exists. Dr. Gunning testified that he can "definitively" say that he created the records. Evasively, Plaintiffs' Motion suggests that Defense Counsel instructed Dr. Gunning not to answer questions about the alteration of Ms. Norris's medical records, but fails to mention the ten-page testimony regarding Dr. Gunning's opinion on Ms. Norris's medical records. (*Id.* at 182-192.) Plaintiffs' argument is wholly disingenuous at best. It is undisputed Dr. Gunning testified to his opinion on the veracity of Mr. Norris's medical records, stating:

Q: Do you recall making these notes on August 2, 2013?

A: I don't recall making anybody's notes, but I can attest to the fact that they are definitively my notes. First of all, that's my handwriting. Second of all, Dr. Ghoubrial doesn't write notes. He dictates immediately. That's been his habit - -

Q: With a recorder?

A: With a recorder.

Q: Okay.

A: - - so the fact that there's scribbled notes there, even if I didn't see them, I would have to say, it's my chart. When I look at them, yeah, that's my awful handwriting.

(*Id.* at 185:17 – 186:7.)

Thus, even if Plaintiffs' sought a second deposition to ask Dr. Gunning proper questions, continuation on this topic would be unwarranted because Dr. Gunning has already testified that he created the records contemporaneously with his treatment of Plaintiff Norris. Obviously a second deposition to allow Plaintiffs' to seek inappropriate and offensive testimony on the chance that somehow the records were fabricated is completely unnecessary.²

Finally, allowing a second deposition of Dr. Gunning to allow Plaintiffs to question him about speculative allegations that Dr. Ghoubrial used racial slurs describing African Americans, which Dr. Ghoubrial himself is— as he was born in Egypt, is unwarranted as this line of questioning is made in bad faith solely to embarrass and harass Dr. Ghoubrial. Even if these offensive allegations were true, which they are not, they are in no way related to trigger point injections or TENS units and are wholly irrelevant to any issues in this case. Moreover, Plaintiffs' counsel made precisely the same objection during a previous deposition of then-putative class representative, Matthew Johnson.

² Given Dr. Gunning's testimony and the unambiguous medical records demonstrating that Dr. Gunning, not Dr. Ghoubrial treated Monique Norris, Plaintiffs' Fifth Amended Complaint contains demonstrably false allegations in Paragraphs 18, 92, 93, 95, 97, 98, 100, and 102. These false allegations must be removed or amended accordingly.

(Johnson Dep. 99:18 – 100:19). Accordingly, a second deposition is unwarranted for this line of questioning and all others mentioned in Plaintiffs' Motion.

The inappropriate and unprofessional tactics of Plaintiffs' counsel in dealing with parties and witness alike knows no bounds. After raising his voice at Dr. Gunning simply because his testimony was not what he hoped it would be, Attorney Pattakos went as far as to attempt to read the Ohio perjury statute into the record during Dr. Gunning's testimony. (Gunning Dep. 37-38). This inappropriate grandstanding by attorney Pattakos was designed to intimidate and harass this non-party witness into testifying as attorney Pattakos desired. Even after being admonished by lawyers for three separate parties for his hostile and inappropriate antics towards Dr. Gunning, a non-party witness subpoenaed to appear by Plaintiffs' counsel, attorney Pattakos' inappropriate and offensive treatment of this witness continued unabated. This Court should not submit this witness to further unnecessary abuse at the hands of attorney Pattakos, especially considering none of the four areas of inquiry that are the subject of Plaintiffs' Motion have any rational or remote relation to any issue in this case.

2. Defendant's Counsel made proper objections under Local Rule 17 and Civil Rule 30(D), rendering a continued deposition and sanctions unnecessary.

Plaintiffs' Motion to Compel asks the Court to allow Plaintiffs to continue lines of questioning that were either properly objected to under Local Rule 17 or that were already answered during deposition. Summit County Local Rule 17.02(b)(5)(B) provides that an attorney may "instruct a witness not to answer a question . . . in response to a question that is: not relevant; and, is not likely to lead to the discovery of admissible evidence; and, counsel instructing the witness not to answer 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."

Additionally, Civ.R. 30 (C)(2) and 30(D) provide that an attorney may instruct a deponent not to answer a question, thereby limiting the scope of the 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.” Considering the inappropriate, offensive and irrelevant nature of the questions at issue, Defense Counsel’s instructions not to answer those questions was warranted and proper.

This Brief is not the first instance where Defendant Ghoubrial, through counsel, has noted the sheer impropriety of the lines of questioning Plaintiffs seek to compel in a continued deposition, as Counsel made numerous objections on this subject matter under Local Rule 17.02 during Dr. Gunning’s deposition. (*See* Gunning Dep. at 43:10 – 45:9, 66:21-25, 67:25 – 68:16, 172:1 – 174:2.) Counsel’s objections remain proper under the Local Rules and under Civ.R. 30 (C)(2) and 30(D) as the basis for the objections were stated on the record during the deposition and are reiterated above.

Sanctions against Defendants under Civ.R. 37(A)(5)(a) are entirely improper and unwarranted because counsels objections were substantially justified under the local and civil rules for the reasons stated above. *See* Civ.R. 37(A)(5)(a) (stating that requiring a party to pay the movant’s reasonable expenses is only proper where the opposing party’s actions were not “substantially justified”). Further, as mentioned, Plaintiffs’ ten-page Motion consists of only one paragraph of actual argument for a continuation deposition. Defendants should not be ordered to pay for Plaintiffs’ fees incurred while drafting a skewed summary of the extensive and confidential testimony received instead of arguing the basis of the Motion to Compel.

3. Plaintiffs’ repeated filings are calculated, unwarranted, misleading and hypocritical.

Plaintiffs’ have inundated the Court with repeated unwarranted filings relating to the deposition of Dr. Gunning in an attempt to manufacture issues ultimately aimed at having the class-

discovery deadline extended yet again. Initially, after the parties agreed upon a deposition date of December 12, 2018, Plaintiffs' filed a Motion to Compel Dr. Gunning's attendance at the deposition. (See Docket, 11/29/2018.) As Defendant Ghoubrial stated in his Brief in Opposition, he was not opposed to the requested Court Order, but found the filing completely unnecessary, as the deposition date was already agreed upon by all parties. (See Docket 12/06/2018.) Plaintiffs' most recently engaged the Court, arguing that the Court's Order compelling Dr. Gunning's deposition is evidence of Defendants' attempt to delay discovery. (See Plaintiffs' Motion for a Status Conference Regarding the Scheduling of Depositions and Extension of the Class-Discovery Deadline). Yet, if appearing at an agreed upon date for deposition constitutes delay, what does not? Now, after deposing Dr. Gunning for five hours and receiving testimony on all relevant topics, Plaintiffs come to the Court again, asking for another Order and baselessly requesting sanctions. As with Plaintiffs' first Motion to Compel, the present Motion is meritless and unwarranted, as the Motion itself demonstrates the breadth of testimony provided and the outlandish and inappropriate topics sought in a continued deposition. Plaintiffs decision to file unwarranted discovery motions cannot further their argument for extending the class-discovery deadline.

Additionally, Plaintiffs' summary of Dr. Gunning's confidential testimony is misleading, riddled with ellipses and selective passages and overlooking all details that cannot be twisted in a manner that purportedly fosters Plaintiffs' meritless medical claims against Dr. Ghoubrial. Finally, the Motion to Compel hypocritically mentions Defendants' "improper" speaking objections, but fails to acknowledge Plaintiffs' counsel engagement in numerous flagrant speaking objections during previous depositions. (See Defendant Ghoubrial's Brief in Opposition to Plaintiffs' Motion for a Protective Order Barring Speaking Objections during Deposition).

As such, the Court should deny Plaintiffs' Motion and prevent the continued deposition of

non-party, Dr. Richard Gunning.

B. Conclusion

Ultimately, Plaintiffs' Motion, styled as a Motion to Compel, is nothing more than a cheap trick to get a misleading summary of Dr. Gunning's deposition testimony before the Court, while adding in one paragraph arguing for a continued deposition. Plaintiffs' are continuously manufacturing non-existent issues in an attempt to have an argument to extend the class-discovery deadline once again. As the Motion demonstrates, Dr. Gunning gave extensive testimony on all matters arguably relevant to this lawsuit. The Court should not order a continued deposition that would allow Plaintiffs to engage in lines of questioning that have absolutely no relevance to the allegations in this lawsuit. The requested lines of questioning were properly objected to during deposition and the instructions not to answer were limited to Plaintiffs' Counsel's wholly inappropriate questions. Therefore, the Court should deny Plaintiffs' Motion to Compel Continued Deposition of Richard Gunning and should deny Plaintiffs' baseless request for sanctions.

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 to Compel the Continued Deposition Richard Gunning 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)

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Sam N. Ghoubrial, M.D.*