

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

<p>MEMBER WILLIAMS, <i>et al.</i>,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>KISLING, NESTICO & REDICK, LLC, <i>et al.</i>,</p> <p style="text-align: center;">Defendants.</p>	<p>Case No. 2016-CV-09-3928</p> <p>Judge James Brogan</p> <p>Plaintiffs' Brief in Opposition to Defendant Ghoubrial's Motion for Sanctions and Motion to Strike the Transcript of Dr. Gunning</p>
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In the immediate wake of the Court's ruling that the KNR Defendants' confidentiality designations with respect to Brandy Gobrogge's deposition testimony did not include legitimately confidential information, Defendant Ghoubrial has asked the Court to sanction Plaintiffs for filing the deposition transcript of Dr. Richard Gunning despite that (1) Defendants never designated any portion of the transcript as "confidential," and (2) no part of the transcript could legitimately be so designated by Defendants. Accordingly, as explained further below, Plaintiffs counsel did not violate the protective order and Ghoubrial's motion should be denied.

1. The parties never agreed to designate the entire Gunning transcript as confidential and the Defendants never designated any portion of the transcript as confidential.

The Court entered a Protective Order on September 12, 2017, which expressly states that deposition testimony is not deemed confidential unless "designated as such." Ghoubrial's Motion at 3. Further, any designations "shall be specific as to the portions of the transcript." *Id.* Thus, no party is entitled to unilaterally deem the entire transcript as confidential without agreement from the opposing party.

Defendant Ghoubrial claims that all parties agreed during Dr. Gunning's deposition to mark the entire transcript as confidential. *See* Ghoubrial's Motion at 4 ("the parties agreed to designate the

entire transcript as confidential”); and 7-8 (“All parties present at the deposition designated the transcript confidential to protect each of their respective confidentiality rights.”). But this contention is demonstrably false. At no point did any party designate the entire transcript as confidential, and as shown the by the very (and only) evidence on which Defendant Ghoubril relies in support of his motion (at 4, 7), the only information in the Gunning transcript that the parties contemplated as confidential was Plaintiff Norris’s own medical records:

Mr. Pattakos: That’s fine. The exhibit [containing Plaintiff Norris’s medical records] has already been filed in this lawsuit.

Mr. Best: Under seal.

Mr. Barmen: Under seal.

Mr. Pattakos: -- and [the exhibit] can be marked as confidential subject to filing under seal. Right now we can say that. Okay? And then we can go back and designate portions of the testimony that need to be treated the same way. We don’t need to make this more complicated than it is.

Mr. Mannion: I don’t know that that protects the doctor, though, on privilege issues –

Mr. Barmen: That’s my concern.

Mr. Mannion: -- I don’t know –

Mr. Pattakos: That’s fine. And I haven’t asked him a single question about a privilege issue. So let’s just move on, until we get there. Okay?

Gunning Tr. at 74:18–75:12.

Mr. Barmen: If you’re representing that Monique Norris signed this today and she understands that her medical information is going to be discussed in this deposition and she consents to that, then, yes, I’m okay with that.

Mr. Pattakos: Yes, she does. And we’re going to designate it as confidential subject to the protective order for now. And then we can decide later whether this needs to be filed under seal or not.

Id. at 180:7–16.

Thus, the only discussion of designating the deposition transcript of Dr. Gunning as confidential pertained to documents concerning Plaintiff Norris's medical records. The parties at no time agreed, as Ghoubrial claims, that the entire deposition be marked "confidential," and Defendants can point to no evidence to the contrary.

Of course, the Defendants had no prerogative to designate Plaintiff Norris's information as confidential against her own wishes in any event, and at no point tried to do so. Plaintiff Norris had no obligation to confer with them before filing this information on the docket. Moreover, as shown above, she waived privilege as to her medical information on the record at Dr. Gunning's Deposition. *See Id.* at 180:7–12.

Thus, it is absurd for Defendants to argue that, "Plaintiffs totally disregarded the designation of Dr. Gunning's transcript as confidential," because the only such designation applied to Plaintiff Norris's medical records that was her prerogative to keep confidential. Indeed, Plaintiffs' counsel even called the court reporter before filing the transcript to confirm that Defendants did not make an *ex parte* request that the transcript be so marked, and again, Defendants can present no evidence to the contrary.

2. No part of the Gunning transcript is subject to designation as confidential by Defendants and Defendants do not offer a single example to the contrary.

In addition to requesting sanctions against Plaintiffs for filing the deposition transcript of Dr. Gunning, which was never marked as confidential by Defendants, Ghoubrial has also asked the Court to strike the transcript and "all references to the improperly filed confidential deposition transcript" on the docket. Ghoubrial's Motion at 1; 8-10. But as shown above, the only portions of the transcript that could possibly have been subject to the protective order were Plaintiff Norris's medical records. Defendants do not even attempt to argue to the contrary in their motion, and fail to make any suggestion about what—if any—portion of the transcript could be legitimately designated as confidential. Further, any efforts by Defendants to do so would surely be rendered

void by the Court's January 8, 2019 ruling granting Plaintiffs' motion to strike Defendants' confidentiality designations to Brandy Gobrogge's deposition transcript, which held that the information proclaimed "confidential" by Defendants was "not legitimately designated as 'sensitive or proprietary' or protectable as a 'trade secret.'"

Conclusion

Ghoubrial's motion reflects nothing as much as an effort to burden Plaintiffs' counsel with needless motion practice and to keep them from conducting discovery on the merits of this case.¹ If any conduct is legitimately sanctionable here, it's Ghoubrial's in misrepresenting the record and filing the instant motion, and doing so even after receiving the Court's order invalidating the Gobrogge confidentiality designations. The motion for sanctions and to strike the Gunning transcript should be denied.

Respectfully submitted,

/s/ Peter Pattakos

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¹ Remarkably, Ghoubrial accuses Plaintiffs of filing the Gunning transcript and related motion too quickly (Motion at 5), while simultaneously complaining that Plaintiffs are "delay[ing] discovery" and "manufactur[ing] issues ultimately aimed at having the class-discovery deadline extended." Ghoubrial Opp. to Plaintiffs' Second Motion to Compel Discovery from Dr. Gunning at 9-10.

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Certificate of Service

The foregoing document was filed on January 11, 2019 using the Court's e-filing system, which will serve copies on all necessary parties.

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