

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

MEMBER WILLIAMS, et al.)	CASE NO.: CV-2016-09-3928
)	
Plaintiffs)	JUDGE JAMES A. BROGAN
-vs-)	
)	
KISLING NESTICO & REDICK LLC,)	<u>DECISION</u>
et al.)	
)	
Defendants)	

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On January 9, 2019, Defendant Sam Ghoumbrial, M.D. moved this Court to impose sanctions upon Plaintiffs pursuant to Civ.R. 37 because he alleges that Plaintiffs deliberately filed confidential information in violation of the September 12, 2017 Protection Order.

Ghoumbrial notes that the deposition testimony of Dr. Richard Gunning was explicitly marked as “Confidential,” but was publicly filed by the Plaintiffs. Ghoumbrial claims that the parties agreed that defense counsel would be given an opportunity to review the transcript and designate any portion of it as confidential.

The Defendant refers this Court to Paragraph Three of the Protective Order, which states:

3. **DOCUMENTS WHICH MAY BE DESIGNATED CONFIDENTIAL -SUBJECT TO PROTECTIVE ORDER OR CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER.** Any party may designate documents as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER upon making a good faith determination that the documents contain information protected from disclosure by statute or that should be protected from disclosure as confidential personal information, privileged, medial or psychiatric information, trade secrets, personnel records, or such other sensitive or proprietary commercial information that is not publicly available. Public records and other information or documents that are publicly available may not be designated as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER.

Paragraph Four of the Protective Order permits portions of deposition testimony to be designated confidential, as it states:

4. **DEPOSITIONS.** Deposition testimony shall be deemed CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER only if designated as such. Such designation shall be specific as to the portions of the transcript or any exhibit to be designated as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER. Thereafter, the deposition transcripts and any of those portions so designated shall be protected as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER, pending objection, under the terms of this Order

Moreover, Paragraph Eight of the Protective Order contemplates the filing of confidential documents. It states, in part:

8. **FILING OF CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER DOCUMENTS OR CONFIDENTIAL: ATTORNEY’S EYES ONLY - SUBJECT TO PROTECTIVE ORDER UNDER SEAL.** The Court highly discourages the manual filing of any pleadings or documents under seal. However, to the extent that a brief, memorandum, or pleading references any document marked as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER, then the brief, memorandum, or pleading shall refer the Court to the particular exhibit filed under seal without disclosing the contents of any confidential information.
 - a. Before any document marked as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER is filed under seal with the Clerk, the filing party shall first consult with the party that originally designated the document as CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER to determine whether, with the consent of that party, the document or redacted version of the document may be filed with the Court not under seal.
 - b. Where agreement is not possible or adequate, before a CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER document is filed with the Clerk, it shall be placed in a sealed envelope marked “CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER” or “CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER,” displaying the case name, docket number, a designation of what the document is, the name of the party on whose behalf it

is submitted, and the name of the attorney who has filed the documents on the front of the envelope. A copy of any document filed under seal shall also be delivered to the judicial officer's chambers.

- c. To the extent that it is necessary for a party to discuss the contents of any confidential information or designated document in a written pleading, then such portion of the pleading may be filed under seal with leave of Court. In such circumstances, counsel shall prepare two versions of the pleadings, a public and confidential version. The public version shall contain a redaction of references to CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER documents. The confidential version shall be a full and complete version of the pleading and shall be filed with the Clerk under seal as above.

Ghoubrial argues that when a deposition transcript is marked confidential, the parties must consult before filing the document under seal. Ghoubrial notes that during Dr. Gunning's deposition, issues of confidentiality and privilege arose and the parties agreed to designate the entire deposition as confidential pursuant to the Protective Order until those issues could be resolved. He refers the Court to Gunning's deposition at Pages 74-75 and Page 180.

The Plaintiffs argue that the Defendants never designated any portion of the deposition transcript as "confidential," and (2) in any event no part of the transcript could legitimately be so designated. Plaintiffs also note that the Protective Order, as it applies to depositions, requires that the designation shall be specific as to the portions of the transcript or any exhibit to be designated as confidential. (See Para. 4 of Protective Order)

It is not clear who placed "Confidential" on the front of Dr. Gunning's deposition. On Page 71 of Gunning's deposition, Plaintiffs' counsel marks as an exhibit the affidavit of Dr. Gunning concerning his care of patient Monique Norris, a putative class representative and plaintiff. Attorney Brad Barmen, counsel for Dr. Ghoubrial and the corporation for whom Gunning is employed, interposes or objects that Ms. Norris has not waived her physician-patient privilege. Plaintiffs' counsel, Mr. Pattakos, notes that the exhibit content had already

been filed under seal and can be marked as confidential. Pattakos then suggests “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.” (Dr. Gunning Deposition Transcript 74 and 75) Again, at Page 180, Mr. Pattakos tries to ask Dr. Gunning about his treatment of Norris and he notes he has the required HIPAA authorization. Pattakos then notes that “we’re going to designate it (the affidavit) 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.” Counsel all agreed to that arrangement.

The Court agrees with the Plaintiffs that the only discussion of designating the deposition transcript of Dr. Gunning as “Confidential” pertained to documents concerning Norris’ medical records. The record fails to establish that the parties agreed to designate the entire Gunning deposition as confidential. Also, the Plaintiffs note that the only portions of the deposition transcript that could possibly be subject to the Protection Order were Norris’ medical records for which she provided a signed waiver. (Dr. Gunning Deposition Transcript @ Page 180)

Defendant Ghoubril’s Motion for Sanctions against the Plaintiffs and to Strike Dr. Gunning’s Deposition Transcript is hereby OVERRULED.

IT IS SO ORDERED.



JUDGE JAMES A. BROGAN
Sitting by Assignment #18JA1214
Pursuant to Art. IV, Sec. 6
Ohio Constitution

CC: ALL COUNSEL/PARTIES OF RECORD