

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

**KNR DEFENDANTS' REPLY BRIEF IN
SUPPORT OF ITS MOTION TO
COMPEL DISCOVERY RESPONSES
FROM PLAINTIFFS WILLIAMS,
REID, AND NORRIS RELATING TO
FAILURE TO ANSWER CONTENTION
INTERROGATORIES**

Plaintiffs' response to Defendants' motion blatantly misstates the law. Plaintiffs' contention – that “[c]ourts routinely hold that ‘contention interrogatories’ asking parties to identify ‘all facts and evidence’ supporting particular allegations in a case are unduly burdensome” – is simply wrong. (Opposition, Issues Presented, p. 1)

In an attempt to support this bold assertion, Plaintiffs once again flood their briefing with a litany of non-Ohio federal cases under the guise that such case law should be considered by this Court as *persuasive* authority. On the contrary, Defendants have identified for this Court case law from both Ohio courts and federal courts seated in this state, which hold that contention interrogatories are recognized as a proper form of discovery under Civil Rule 33, whether originating under federal or state law. *See, Nationwide Agribusiness Ins. Co. v. Heidler*, 12th Dist. Clinton No. CA2015-07-013, 2016-Ohio-455, ¶¶ 22-24 (“Parties are entitled to inquire into the factual basis of a legal claim by means of an interrogatory.”); *Starcher v. Correctional Med. Systems, Inc.*, 144 F.3d 418, 421 (6th Cir. 1998), *aff’d sub nom. Cunningham v. Hamilton Cty., Ohio*, 527 U.S. 198, 119 S.Ct. 1915, 144 L.Ed.2d 184 (1999) (“The general view is that contention interrogatories are a perfectly permissible form of discovery, to which a response ordinarily would be required”). Plaintiffs do not even address this case law in their Opposition, nor can they.

Indeed, beyond referencing various non-Ohio cases that have no applicability here, Plaintiffs' Opposition relies on two (2) Ohio federal cases for the proposition that "courts within the Sixth Circuit and elsewhere routinely recognize that a responding party should not be required to provide 'virtually all supporting evidence for each fact' at issue in a case simply because it was requested through a contention interrogatory." (Opposition, p. 3). Again, neither case opines on the Ohio Rules of Civil Procedure, and neither are an appropriate basis to withhold answers to proper contention interrogatories. The Northern District of Ohio in *In re E.I. du Pont de Nemours* Court relied on non-Sixth Circuit federal district court holdings, which have no applicability to this case, and are contrary to the Sixth Circuit's holding in *Starcher*. See, *In re E.I. du Pont de Nemours*, N.D. Ohio No. 2:13-md-2433, 2015 U.S. Dist. LEXIS 178306, **1119-1122 (May 20, 2015). Moreover, Plaintiffs' citation to *Ross v. Abercrombie & Fitch Co.*, S.D. Ohio No. 2:05-cv-0819, 2008 U.S. Dist. LEXIS 125521 (Mar. 24, 2008) does not even mention contention interrogatories or analyze the propriety of such discovery requests under Rule 33.

Simply put, Plaintiffs' claim that contention interrogatories requesting the identity of all facts and evidence supporting allegations – such as those they refuse to answer – are *routinely* found to be unduly burdensome is false and holds no water under Ohio law, and federal courts seated in Ohio are in accord. See, e.g., *Owens v. ACS Hotels, LLC*, 9th Dist. Summit No. 27787, 2016-Ohio-5506, ¶¶ 2-8 (agreeing with the trial court that interrogatories that requested that the defendant "set forth each and every fact upon which you rely" and identify "each and every witness supporting each such fact" could be "answered in a way that not only prevents [plaintiff] from facing an ambush at trial, but without divulging [defendant's] attorney's work product"); *Alpha Benefits Agency v. King Ins. Agency*, 134 Ohio App.3d 673, 680-681, 731 N.E.2d 1209 (8th Dist. 1999) (finding interrogatories requesting "the factual bases for the affirmative defenses raised by [defendant]" were "clearly . . .

relevant to [plaintiff's] claims, is not proprietary or confidential information and is readily ascertainable by [defendant]"); *Fox v. Sowecke*, Erie C.P. No. 2012-CV-0695, 2014 Ohio Misc. LEXIS 11166, **2-6 (finding submission of contention interrogatory a "proper exercise" to "narrow and define the boundaries of [plaintiff's] defamation suit"); *United States SEC v. Blackwell*, S.D.Oh. No. 2:03-cv-63, 2001 U.S. Dist. LEXIS 32209, **10-11 (Jan. 15, 2004) (finding use of contention interrogatories proper and postponement of responses unnecessary where the plaintiff had "already conducted significant discovery and should have . . . adequate information to support the contentions in its Complaint); *Chubb Custom Ins. Co. v. Grange Mut. Cas. Co.*, S.D.Oh. No. 2:07-CV-1285, 2009 U.S. Dist. LEXIS 7049, *22 (Jan. 30, 2009), citing *Starcher, supra* (finding "[C]ontention interrogatories" are indeed permissible); *Hobart Corp. v. Dayton Power & Light Co.*, S.D.Oh. No. 3:13-cv-115, 2017 U.S. Dist. LEXIS 41504, *109 (March 21, 2017) (permitting contention interrogatories "to inquire about the specific facts upon which Plaintiffs' allegations are based" in lieu of questioning corporate designee as "specifically authorized by Fed. R. Civ. P. 22(a)(2)"); *Polombaro v. Emery Fed. Credit Union*, S.D.Oh. No. 1:15-cv-792, 2017 U.S. Dist LEXIS 6365, **17-25, citing *Starcher, supra* (in putative class action case sounding in fraud, recognizing contention interrogatories are proper method of discovery and partially compelling response to interrogatory seeking "factual information concerning the contours of the class the named plaintiffs seek to represent," but finding that interrogatories asking how plaintiffs intend to "establish" their claims "did not seek the factual basis of plaintiffs' claims but information concerning counsel's legal strategy and mental impressions that is protected work product").

Defendants here are seeking the facts Plaintiffs are relying upon to support their claims. Plaintiffs' response that "KNR is in possession of all of the evidence of its own behavior" and that that the factual allegations are "pleaded in great detail" is legally insufficient. This is particularly

true where Plaintiffs themselves have repeatedly admitted that the allegations in the Complaint are untrue, or that they do not know if the allegations are true. See, e.g., Deposition of Plaintiff Harbour at (pp.54-55; 70-71; 75; 86; 89-90; 95; 101; 172; 209-210; 260-261; 273-275) (Ex.A).¹ Defendants are facing an endless circle – (1) the Complaint makes an allegation of fact, (2) the testifying Plaintiff denies knowledge of the fact and states he/she is “relying on his/her attorney” or “the allegations in the Complaint,” (3) Defendants ask the attorney to provide the factual basis for the allegation; and (4) the Plaintiffs’ attorney says “it is in the Complaint.”

This disingenuous shell game is not consistent with good faith discovery. If Plaintiffs have no factual basis for the allegations in their Complaint, they are required to say so. An allegation is not a fact. Defendants are entitled to any facts in the possession of Plaintiffs or their attorneys which support their claims, or an admission that no such facts exist. Plaintiffs’ objections to Defendants’ contention interrogatories are invalid and unsupported, and this Court should issue an Order compelling their response. Either Plaintiffs are aware of facts to support the allegations in the Complaint, or they are not.

Respectfully submitted,

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¹ Mr. Harbour’s testimony is referenced by way of example. All Plaintiffs have testified that they are unaware of specific facts alleged in the Complaint and are “relying on their attorney” and the “allegations in the complaint.”

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Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically with the Court on this 21st day of February, 2019. The parties may access this document through the Court's electronic docket system.

/s/ James M. Popson _____
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HARBOUR, RICHARD A.
02/02/2019

Page 1

1 COMMON PLEAS COURT OF THE STATE OF OHIO

2 IN AND FOR THE COUNTY OF SUMMIT

3

4 MEMBER WILLIAMS, et al.,

5 Plaintiffs,

6 vs.

JUDGE JAMES A. BROGAN

7

CASE NO. CV-2016-09-3928

8

9 KISLING, NESTICO & REDICK

10 LLC, et al.,

11 Defendants.

12

13 VIDEOTAPED DEPOSITION OF RICHARD A. HARBOUR

14 SATURDAY, FEBRUARY 2, 2019

15

9:47 A.M.

16

DoubleTree by Hilton Hotel

17

3150 West Market Street

18

Fairlawn, Ohio

19

20

21 REPORTED BY:

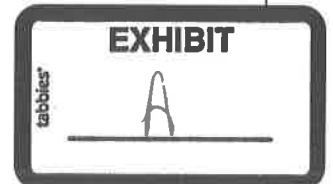
22 Sarah R. Drown

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RPR, Notary Public



HARBOUR, RICHARD A.
02/02/2019

Page 54

1 A Correct.

2 Q Okay.

3 A But that was also the first deposition I had
4 ever given.

5 Q Now, you knew what you were being injected
6 with, the medication, true?

7 A I knew what I was told to be injected in me. I
8 did not see the medication to know that's
9 exactly what was being put in me, correct.

10 Q You're not claiming here that something other
11 than cortisone was in there, are you?

12 A I did not say that, no.

13 Q Okay.

14 A But you asked me if I knew that was cortisone
15 put in me and I'm telling you I only knew what
16 the doctor said he was putting in me.

17 Q Well, you read the fifth amended complaint and
18 saw that there is a claim being made that you
19 were injected with a medication and you weren't
20 even told what the medication was. Do you
21 remember that?

22 A Yes.

23 Q Why would you agree to let that be filed when
24 you knew what the medication was?

25 A Again, I did not know what the medication was.

HARBOUR, RICHARD A.
02/02/2019

Page 55

1 I knew what Dr. Gabriel was telling me that he
2 was putting into my body. I didn't see him
3 draw a syringe and read what the vial said.

4 Q Have you ever checked the vial with any other
5 doctor to see that if what they were injecting
6 you with was what they told you it was?

7 A Not that I can 100 percent call recall, but
8 I've never been asked the question of is that
9 exactly what they put in me.

10 Q Okay.

11 A You asked me if I knew that he put cortisone in
12 me and I'm telling you I don't know 100 percent
13 whether that was --

14 Q That's what he told you he was putting in --

15 A Correct. Yes.

16 Q -- you, true?

17 A Yes.

18 Q So now if you would turn -- go to Exhibit 3,
19 the fifth amended class action complaint. Go
20 to page 30, paragraph 104.

21 A Okay.

22 Q Three line down to the right, do you see after
23 "vital signs" there's a comma and it says "he
24 gave Mr.?" Do you see where I'm at?

25 Three lines from the bottom of paragraph

HARBOUR, RICHARD A.
02/02/2019

Page 70

1 Mr. Redick, you don't recall them saying "Hey,
2 there's going to be injections" either, do you?

3 A No, I do not.

4 Q Explain to me, then, how it is that the
5 defendants induced you to receive injections.

6 A What do you mean by "induced"?

7 Q Well, turn to that complaint again.

8 A Okay.

9 Q Paragraph 292.

10 A What page?

11 Q 70. Paragraph 292.

12 A Okay.

13 Q "Defendants induced Plaintiff Harbour to
14 receive and pay for injections from their KNR
15 settlements."

16 Now, there's more to it, but my question
17 to you was on the receiving the injections.

18 "Defendants induced Plaintiff Harbour to
19 receive injections."

20 They didn't induce you to receive the
21 injections, did they?

22 A What do you mean by "induce"?

23 Q It's your complaint. What do you mean by it?

24 A That they recommended that it was necessary
25 that I get these injections.

HARBOUR, RICHARD A.
02/02/2019

Page 71

1 Q But KNR never told you it was necessary to get
2 the injections, did they?

3 A Not that I can recall, no.

4 Q Do you agree to withdraw that claim?

5 A That would be a question for my attorney.

6 Q Okay. While we're on here, let's look at a
7 couple of these.

8 If you would go to paragraph 113, page
9 32. Tell me when you're there.

10 A Okay.

11 Q "Not only did the KNR Defendants seek to profit
12 from inflated attorneys' fees resulting from
13 Ghoubrial's inflated medical bills" and it goes
14 on, but I want to talk about the first part of
15 that paragraph.

16 So how is it that Goubrial's inflated
17 medical bills, in the way you describe it,
18 inflated KNR's attorneys' fees?

19 A By billing me for injections or any other care
20 that may have not been necessary, that was more
21 profit that KNR and Goubrial could bill the
22 insurance company for.

23 Q Okay. I understand what you're saying, that
24 Goubrial's getting paid for the injections, but
25 how does it inflate the attorneys' fees?

HARBOUR, RICHARD A.
02/02/2019

Page 75

1 Q Okay. It also says "The Defendants paid
2 kickbacks to one another by way of various
3 joint real estate investments."

4 What do you base that on?

5 A That would have to be, you know, documents that
6 my attorney provided.

7 Q Have you seen those?

8 A Like I said, I've seen a lot of documents. I
9 don't recall the exact documents that I've
10 seen.

11 Q Well, what documents have you seen regarding
12 real estate investments?

13 A I have not seen any of those.

14 Q You don't know whether there's any joint real
15 estate investments, fair, yourself?

16 A That is correct. I do not.

17 Q Okay. When you say "Ghoubrial's inflated
18 medical bills," you're talking about the
19 charges for the TENS unit and the injections?

20 A Yes.

21 Q Okay. We're at a good stopping point.

22 MR. PATTAKOS: Great.

23 THE VIDEOGRAPHER: We're off the
24 record. The time is now 10:50.

25 - - - - -

HARBOUR, RICHARD A.
02/02/2019

Page 86

1 concerns and my medical care seriously.

2 Q You're not claiming that Dr. Auck was giving
3 kickbacks to KNR, are you?

4 A No, I'm not.

5 Q Well, didn't KNR refer you to Rolling Acres,
6 where he worked?

7 A Yes, they did.

8 Q The fact that they referred you there, don't
9 you infer from that that they're somehow
10 getting a kickback?

11 A No, I do not.

12 Q That's not a reasonable inference, is it?

13 A A reasonable inference as far as they're
14 getting kickbacks? Is that what you're asking
15 me?

16 Q Yes.

17 A I wouldn't assume that just because an attorney
18 refers you to a doctor that they're getting
19 kickbacks. They may refer you there because
20 other patients had success with that doctor.

21 Q Other patient may have had excellent care from
22 that doctor, true?

23 A Correct. Yes.

24 Q That doctor might be willing to execute a
25 letter of protection on the medical bills,

HARBOUR, RICHARD A.
02/02/2019

Page 89

1 Q Seeking money damages?

2 A I'm seeking -- yes.

3 Q At what time did you start to think that KNR
4 did something wrong or you became dissatisfied
5 with them?

6 A Once I learned of the dishonesty that KNR had
7 done with the relationship with Dr. Goubrial,
8 the Square Chiropractic, and the kickbacks that
9 they were giving to those chiropractors.

10 Q Okay. Those were based on things you saw from
11 Mr. Pattakos, fair?

12 A Yes.

13 Q What if you find out there are no kickbacks?
14 Change your mind?

15 A I would have to discuss it with my attorney.

16 Q Well, you're not going to go in court and
17 allege there's kickbacks if you don't have
18 evidence of it, are you?

19 A No, sir, I'm not.

20 Q If you find that there were no kickbacks
21 between Dr. Ghoubrial and Mr. Nestico, do you
22 agree to drop that allegation?

23 A I would have to discuss it with my attorney.

24 Q Is there some reason why you would still allege
25 something even though it wasn't true?

HARBOUR, RICHARD A.
02/02/2019

Page 90

1 A I never said I would allege it. I said I would
2 discuss it with my attorney.

3 Q Okay. Well, as the class rep, you understand
4 you have some duties to the other class
5 members, right?

6 A Yes, sir, I do.

7 Q So if your attorney tells you, "Hey, I know we
8 don't have evidence of this, but let's pursue
9 it anyway," would you recommend to the rest of
10 the class that you still pursue it?

11 A No.

12 Q What is your understanding of what your claims
13 are against KNR?

14 A That I am part of the class that's going after
15 the trigger point injections from
16 Dr. Ghoubrial, the overcharge of the TENS units
17 from Dr. Goubrial, and the unfair relationship
18 that KNR and Dr. Goubrial had together.

19 Q Anything else?

20 A No.

21 Q Did you know that you were listed as a
22 potential class representative regarding
23 investigator fees?

24 A Yes, I'm sorry. I forgot about that. You're
25 correct.

HARBOUR, RICHARD A.
02/02/2019

Page 95

1 accident, fair?

2 A Yes.

3 Q Do you know whether any of the investigators in
4 your cases ever pulled the police report?

5 A Not specifically, no.

6 Q You don't know whether they did or didn't,
7 true?

8 A Correct.

9 Q So in the complaint when it alleges the
10 investigators did nothing in your case other
11 than have you sign the contingency fee
12 agreement, you don't actually know if that's
13 accurate, do you?

14 A No, I do not.

15 Q Have you read anything other than the complaint
16 that supports your claim against KNR as it
17 relates to the investigators?

18 A No.

19 Q Do you know what the investigators did in
20 Monique Norris' case?

21 A No, I do not.

22 Q How would you find that out?

23 A How would I find that out?

24 Q Yeah. How would one go about finding out what
25 the investigators did on Mr. Norris' case?

HARBOUR, RICHARD A.
02/02/2019

Page 101

1 A No.

2 Q Why?

3 A Because I trusted the documents that I had seen
4 from my attorney and what he told me was
5 correct.

6 Q Okay. What documents does your attorney have
7 that shows the investigators did no work on
8 your case?

9 A I've not seen every document, but, like I said,
10 I believe what my attorney -- the documents
11 that he has, you know, show that what they did
12 in a general basis was overcharge clients for
13 fees they didn't need to charge.

14 Q Okay. On a general basis, not in your
15 particular case?

16 A Correct.

17 Q Okay. Do you know that your attorney hasn't
18 even requested your records from KNR?

19 A No, I do not know that.

20 Q Do you think that maybe it would be a good idea
21 to take a look at what your records are and see
22 what the investigators did in your case before
23 you make allegations against KNR?

24 A One would think that might be a good idea, but
25 I also trust my attorney.

HARBOUR, RICHARD A.
02/02/2019

Page 172

1 Q Where does your information come from?

2 A Discussions with my attorney.

3 Q Have you seen any documents to support that?

4 A No.

5 Q Does all of your evidence in this case come
6 from what Peter's told you?

7 A And also what I've read in the complaint.

8 Q Which was drafted by Peter?

9 A Correct.

10 Q And you haven't seen documents to support those
11 allegations, right?

12 A I trust my attorneys. I've not asked for them.

13 Q Do you know if they even exist?

14 A I believe they do, yes.

15 Q Based on what, him telling you it?

16 A Yes.

17 Q What else?

18 A And the fact that other KNR attorneys have come
19 forward and supplied information.

20 Q Don't you believe as a perspective class
21 representative you have an obligation to ensure
22 that this evidence actually exists?

23 A I do, but I also have -- trust my attorney.

24 Q But you haven't done anything about it, right?

25 A I trust my attorney.

HARBOUR, RICHARD A.
02/02/2019

Page 209

1 medical providers to try and get you a
2 reduction, right?

3 A Yes, sir.

4 Q You've alleged in your complaint that didn't
5 happen relative to Dr. Goubrial. Do you agree
6 with me?

7 A Yes.

8 Q You know that's not true, don't you?

9 A I don't know that's not true because I've never
10 seen Dr. Goubrial's bill in its entirety.

11 Q Okay. That's fair.

12 Your lawyers told you they negotiated
13 Dr. Goubrial's bills, right?

14 A Yes, they did.

15 Q Okay. But you never saw the bills?

16 A Correct, sir.

17 Q If you actually saw the bills and evidence
18 indicating that they were negotiated, would you
19 remove the allegation that they didn't
20 negotiate the bills?

21 A First I would have to talk to my attorney.
22 And, second, I don't know what the bills
23 initially started out with, if they were
24 exorbitant to begin with before they were
25 reduced.

HARBOUR, RICHARD A.
02/02/2019

Page 210

1 Q You said several times to Mr. Mannion when he
2 asked you if you would withdraw claims that
3 were demonstrated to you not to be true that
4 you would have to talk to your lawyer first,
5 right?

6 A Yes, sir.

7 Q You understand these are your allegations, not
8 his?

9 A Correct, sir. But my attorney gives me legal
10 advice and I would discuss it with him first.

11 Q So being an honest man of integrity like you
12 already said you are, you would consider
13 continuing untrue claims unless your attorney
14 told you not to?

15 A That is not what I said, sir. I said I would
16 discuss it with my attorney first. I didn't
17 say I'm going to take what they say and go
18 against what is proper and correct, I said I
19 would discuss it with my attorney first.

20 Q Did I understand you right, that you have since
21 done your own independent research on the
22 effectiveness of trigger point injections?

23 A Yes.

24 Q What caused you to do that?

25 A My own speculation that these weren't always,

HARBOUR, RICHARD A.
02/02/2019

Page 260

1 Q Okay. But did you read this fifth amended
2 complaint before it was filed?

3 A This entire -- this document in its entirety?
4 I don't believe I did, no.

5 Q Did you read the fifth amended complaint as it
6 relates to the paragraphs that referenced you
7 and the classes you represent?

8 A I read the affidavits that were going to be
9 part of this complaint, yes.

10 Q Okay. Which affidavits were those?

11 A The -- I believe it was the initial affidavit
12 and maybe an amended affidavit.

13 Q Of yours?

14 A Yes.

15 Q Okay. But I guess my question to you is: Did
16 you actually review this fifth amended
17 complaint before it got filed?

18 A I don't believe I did, no.

19 Q If you had read this, would you have said to --
20 would you have pointed out the error in 109?

21 A If I would have taken it in the manner in which
22 you're taking it, but I'm not taking it at
23 that. But I could -- you know, each person
24 reads something differently and interprets it
25 differently.

HARBOUR, RICHARD A.
02/02/2019

Page 261

1 Q You really think that the interpretation in
2 here is that, oh, it's just because I didn't
3 know for sure what the medication was? That's
4 what you're thinking this says?

5 A I'm talking about my personal experiences and
6 how this is written. Yes.

7 Q Do you think maybe it ought to be changed?

8 A I have to review that with my attorney and we
9 would have to discuss that.

10 Q But you would agree that there was no
11 medication that Dr. Goubrial failed to tell you
12 about when he gave it to you, fair?

13 A He told me what it was at the time, yes.

14 Q By the way, you don't even recall discussing
15 trigger point injections with KNR, do you?

16 A As to whether they worked or didn't work? Or
17 what do you mean by that?

18 Q When you were treating with Dr. Goubrial, you
19 didn't talk to Mr. Redick or anybody at KNR
20 saying, "Hey, should I keep getting these
21 trigger point injections?"

22 A No. I don't recall having a conversation of
23 that nature, no.

24 Q That's because you and Dr. Goubrial discussed
25 the trigger point injections and decided

HARBOUR, RICHARD A.
02/02/2019

Page 273

1 Q Did he tell you anything else about the
2 relationship?

3 A Other than they've used him, no.

4 Q Okay. Then you mentioned something about a
5 backdoor relationship or so because how else
6 would Dr. Auck know to give it to Dr. Goubrial?

7 A Correct.

8 Q What did you mean by that, "a backdoor
9 relationship"?

10 A Meaning that instead of KNR referring me
11 directly to Dr. Goubrial, they had Dr. Auck do
12 it so they weren't in the direct picture of it.

13 Q Okay. Now, but the fact is, though, you were
14 calling KNR telling them that you and Dr. Auck
15 were deciding on who you were going to see and
16 you would let them know who it was, fair?

17 A Correct.

18 Q So you're saying Dr. Auck was in this
19 conspiracy?

20 A Not 100 percent, but could have been to some
21 degree, yes.

22 Q But you don't know that, do you?

23 A No, I don't know that.

24 Q Well, your primary care doctors referred you to
25 how many different other doctors throughout the

HARBOUR, RICHARD A.
02/02/2019

Page 274

1 course of your life?

2 A Not a whole lot.

3 Q A number of them, correct?

4 A Some, yes.

5 Q Okay. Does he have a backdoor relationship
6 with them?

7 A Probably not.

8 Q Well, why are you inferring there's one here?

9 A Based upon the evidence and everything that
10 I've read, I feel there could be.

11 Q Here we go again. I keep hearing about based
12 on the evidence, but you're not telling me what
13 it was.

14 MR. PATTAKOS: Here we go
15 again.

16 Q Let me --

17 MR. PATTAKOS: It's Groundhog
18 Day. It's perfect.

19 MR. MANNION: It is.

20 Q What evidence are you talking about?

21 A The complaint and what other class members have
22 also alleged. Putting all of that together and
23 what my attorney's advised me of and told me,
24 it all makes sense.

25 There is no reason that I have to believe

HARBOUR, RICHARD A.
02/02/2019

Page 275

1 that my attorney is going to falsify evidence,
2 falsify statements from people that have given
3 depositions, and/or said the information he has
4 he doesn't have.

5 Q I agree that shouldn't be done either, by the
6 way. I'm with you on that. I agree it
7 shouldn't be done.

8 A I'm not saying it is being done. I'm saying I
9 believe he's not doing it.

10 Q Well, I just don't understand why it is that
11 you would now infer that maybe Dr. Auck was
12 involved in this too?

13 A I'm not saying he was inferred 100 percent, but
14 I'm sure there possibility was a way of doing
15 this that kept KNR out of the loop and used
16 another doctor to do it.

17 Q Yet when you didn't want to go to Dr. Goubrial
18 anymore KNR said, "Okay. That's fine"?

19 A Yes, they did.

20 Q I just -- maybe I'm mistaken here. So this
21 is ...

22 April 19, 2011 you had not seen
23 Dr. Goubrial yet, correct? A few days after
24 your accident.

25 A That would probably be correct, yes.