

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>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 A. Brogan</p> <p>Defendant Floros' Brief in Opposition to Plaintiffs' Motion to Compel Discovery on Defendants' Assets and Net Worth; Defendant Floros' Request for Protective Order</p>
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Defendant Minas Floros (Floros) requests that this Court deny Plaintiffs' Motion to Compel Discovery on Floros' Assets and Net Worth because:

- In violation of Loc. R. 17.01, Plaintiffs failed to seek leave for their third set of interrogatory requests.
- Plaintiffs' Motion to Compel is based on false, irrelevant, and highly defamatory statements about Floros.
- Plaintiffs already have information on Floros' financial status and worth.
- Plaintiffs have failed to make a valid claim for punitive damages against Floros.
- Plaintiffs' Motion to Compel is premature.

Floros is also requesting a protective order under Civ. R. 26(C) which: 1) prevents Plaintiffs from seeking unnecessary and irrelevant information about Floros' financial status and assets; and 2) prevents Plaintiffs' counsel from disclosing Floros' private financial information. Floros is also seeking attorney fees and sanctions under Civ. R. 37, Civ. R. 11, and R.C. 2323.51 for the time spent in drafting this reply brief.

Memorandum in Support

A. Plaintiffs violated Local Rule 17.01 and Civ. R. 37(A).

Under Local Rule 17.01, a party can only file second or later sets of interrogatories “only upon leave of Court and for good cause shown”:

17.01 Interrogatories

On the first occasion that interrogatories are submitted to any other party, each party may file a maximum of thirty-five (35) interrogatories. If an interrogatory is identified by one number, but is divided into several parts whereby each part requests a specific item of information, each part shall be counted as a separate interrogatory in determining the limitations under this Rule. Second or subsequent sets of interrogatories can be filed only upon leave of Court and for good cause shown.

On February 15, 2019, Plaintiffs sent a third request for interrogatories to Floros.

Plaintiffs’ interrogatory No. 3 sought information about Floros’ net worth. Floros objected to Plaintiffs’ interrogatory request because they failed to comply with Loc. R. 17.01 and seek leave to file a third set of interrogatory requests:

3. Identify the total amount of your net worth, and provide a summary of the assets that comprise this amount, including by identifying every privately held corporation in which you retain an ownership interest, the purpose of each such corporation, any co-owners of each such corporation, and the percentage of ownership of each owner.

ANSWER: Defendant objections because Plaintiffs failed to comply with Local Rule 17.01, which states: “Second or subsequent sets of interrogatories can be filed only upon leave of Court and for good cause shown.” Defendant objections because this interrogatory is seeking information that is not relevant and not likely to lead to admissible information. Defendant objects because this interrogatory seeks privileged, private, and sensitive information, which is not discoverable under Ohio law unless it is relevant and compelling reasons exist. Without waiving objection, Defendant is a sole owner and member of Universal Reports Plus LLC, an Ohio corporation.

See Exhibit A, Floros’ responses to Plaintiffs’ Third Set of Interrogatories.

After receiving this objection, Plaintiffs should have filed for leave with the Court.

Instead, Plaintiffs ignored Floros’ objection and filed this baseless motion to compel, in violation

of Loc. R. 17.01. This cannot be considered a good-faith effort to resolve a discovery dispute, required under Civ. R. 37(A). A good-faith effort, at bare minimum, requires a party to comply with the local rules.

This Court, therefore, should deny Plaintiffs' motion to compel for failure to comply with Loc. R. 17.01 and Civ. R. 37(A).

B. Plaintiffs' Motion to Compel is based on false, irrelevant, and highly defamatory statements about Floros.

In support of their Motion to Compel, Plaintiffs' counsel has falsely accused Floros of fraudulently transferring assets to avoid potential debts. This accusation is highly defamatory, baseless, and offensive. This Court should not allow Plaintiffs' counsel to accuse Floros of fraudulently transferring assets without any evidence.

This Court should also reject Plaintiffs' counsel attempt at injecting false and unrelated accusations. As a reminder, Plaintiffs' class claims are solely based on allegations that Floros received a kickback payment in the form of narrative fees for referring patients to KNR. Plaintiffs' class claims have nothing to with Plaintiffs' false accusations that he unlawfully solicited patients, coerced his patients into receiving unnecessary care, or overcharged for chiropractor care. Plaintiffs' counsel, however, keeps making these baseless and irrelevant accusations in their motions. The only purpose behind this tactic is to embarrass, insult, and harass Floros and the other Defendants.

This Court should also reject Plaintiffs' counsel continued misrepresentation of the facts. Contrary to what Plaintiffs' counsel suggests, Floros has never conducted any business through Panatha Holdings LLC. Floros explained this in his interrogatory response to Plaintiffs' third request for discovery:

2. Identify the purpose of your affiliation with Panatha Holdings, LLC, including by listing the purpose of each company, all known employees and owners of each entity, the percentage of ownership of each owner identified, and Alberto R. Nestico's role in the company.

ANSWER: Defendant objections because Plaintiffs failed to comply with Local Rule 17.01, which states: "Second or subsequent sets of interrogatories can be filed only upon leave of Court and for good cause shown." Defendant objections because this interrogatory is seeking information that is not relevant and not likely to lead to any admissible information. Without waiving objection, at one time Defendant was interested in buying and/or investing in real estate under a corporation. This never happened and the corporation has been inactive. There are no members, employees, or other parties with ownership interest.

Moreover, Panatha Holdings LLC was formed in Florida on July 7, 2010. Two years after its formation, the Secretary of State administratively dissolved Panatha Holdings for a failure to file annual reports. Plaintiffs' counsel is aware of this fact because KNR has provided a letter to him from the law firm that originally filed incorporation documents. *See* Ex. B, Letter dated 02/19/19.

This Court, therefore, should reject Plaintiffs' accusations that Floros was dishonest about his dealings with Panatha Holdings or that Floros is trying hide assets through Panatha Holdings, which dissolved in 2012. These accusations are demonstrably false and do not support Plaintiffs' motion to compel.

C. Plaintiffs already have information on Floros' financial status and worth.

Plaintiffs already have information on Floros' financial net worth. This includes Floros' W-2s from Akron Square Chiropractor. This also includes information about how many narrative reports Floros prepared for KNR. Thus, even if Floros' financial status were relevant at this stage of litigation, Plaintiffs already have this information. There is no need for Floros to produce more information about his financial worth. Plaintiffs' Motion to Compel, therefore, is unnecessary and was merely filed to harass Floros.

D. Plaintiffs have failed to make a valid claim for punitive damages against Floros.

Plaintiffs claim that they are entitled to discovery on Floros' net worth and assets because they alleged punitive damages in their Complaint. Under R.C. 2315.21, "punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply":

- (1) The actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud, or that defendant as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.
- (2) The trier of fact has returned a verdict or has made a determination pursuant to division (B)(2) or (3) of this section of the total compensatory damages recoverable by the plaintiff from that defendant.

The Ohio Supreme Court has held that "as a threshold matter," plaintiffs are "obligated to present evidence of malice on the part of [defendant] before their claim for punitive damages could proceed to the jury." *Malone v Courtyard by Marriott Marriott* (1996), 74 Ohio St.3d 440, 445-446. Ohio courts have defined "malice" as "(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *Preston v. Murty* (1987), 32 Ohio St. 3d 334, 512 N.E.2d 1174.

Ohio courts have also defined "egregious" as "meaning conspicuously bad: flagrant, or outstandingly bad; blatant; outrageous." *Newkirk v. Precision Automotive, Inc.*, 2d Dist. Montgomery CASE NO. 12498, 1992 Ohio App. LEXIS 967 (Mar. 3, 1992). "A bare case of fraud or constructive fraud does not warrant the assessment of exemplary or punitive damages." *K. Ronald Bailey & Assocs. Co., L.P.A. v. Soltesz*, 6th Dist. Erie No. E-05-077, 2006-Ohio-2489, ¶ 19, citing *Logsdon v. Graham Ford Co.* (1978), 54 Ohio St.2d 336, 339, 376 N.E.2d 1333; *see*

also *H.E. Reichle, Inc. v. Murphy* (Aug. 7, 1998), 6th Dist. No. L-96-067, 1998 Ohio App. LEXIS 3603.

Even if this Court accepts Plaintiffs' complaint allegations as true (which they are not), Plaintiffs have alleged no facts showing that Floros acted with malice or committed egregious fraud. Instead, Plaintiffs have only made bare allegations that they are entitled to punitive damages. This is not enough.

This Court, therefore, should deny Plaintiffs' Motion because they have failed to make a prima facie case as to how Floros allegedly acted with malice or committed egregious fraud against Plaintiffs. *See Tschantz v Ferguson* (1994), 97 Ohio App. 3d 693 (affirming the trial court's denial of a motion to compel discovery of a defendant's financial net worth since plaintiff had not made a prima facie case for punitive damages).

E. Plaintiffs' motion to compel is premature.

Plaintiffs have yet to obtain class certification or overcome dispositive motions on the merits of their claims. Thus, even if Plaintiffs made a valid claim for punitive damages, discovery related to punitive damages would be premature at this time.

Indeed, this Court has already denied Plaintiffs' past attempts at compelling financial information for other defendants because it was premature; "The Defendants' objections to interrogatories 2 and 3 are sustained until this case has been certified as a class action." *See* Court Order, July 30, 2018.

Plaintiffs' reliance on *United States v. Matusoff Rental Co.*, 204 F.R.D. 396 (S.D. Ohio 2001), is also without merit. Ohio courts have recognized that prima facie showing of punitive damages is needed before a party is entitled to discovery on punitive damages. *Tschantz v. Ferguson* (1994), 97 Ohio App.3d 693, 715-76; *Harris v. Browning-Ferris Industries of Ohio*,

Inc. (Mar. 16, 1989), 1989 Ohio App. LEXIS 9. *Matusoff* also limited its holding to when trial is imminent. Plaintiffs have yet to move for class certification and this Court has not set a trial date. As a result, there is no legitimate and current need for Plaintiffs to conduct discovery on Floros' net worth.

Moreover, if this Court does believe that Plaintiffs have made a prima facie case for punitive damages, then Floros also requests leave to file a motion to bifurcate the punitive claim under R.C. § 2315.21. Under this statute, trial courts must bifurcate punitive claims into a second and separate trial from the underlying tort claims.

F. Floros is entitled to a protective order under Civ. R. 26, which 1) prevents Plaintiffs from seeking unnecessary and irrelevant information about Floros' financial status, and 2) prevents Plaintiffs' counsel from disclosing Floros' private financial information.

Civil Rule 26(C) allows a party, with good cause shown, to obtain a protective order to protect a party or person from "annoyance, embarrassment, oppression, or undue burden or expense." *Laubscher v. Branthoover* (1991), 68 Ohio App.3d 375. This rule also allows a party to obtain an order limiting the scope of discovery. *Id.*

Ohio courts have upheld protective orders when a party seeks private and sensitive financial information. *Tschantz v. Ferguson* (1994), 97 Ohio App.3d 693, 715-76; *Harris v. Browning-Ferris Industries of Ohio, Inc.* (Mar. 16, 1989), 1989 Ohio App. LEXIS 9. For instance, in *TSchantz*, the Eighth District upheld the trial court's decision to issue a protective order denying discovery of the defendant's tax returns because the plaintiff failed to make a prima facie case showing a viable claim for punitive damages. *Id.*

Here, Plaintiffs have made no factual showing that they are entitled to punitive damages. Moreover, even if Plaintiffs did make prima facie claim for punitive damages, they already have the necessary information to determine Floros' financial status. This includes his W-2s from

Akron Square Chiropractor. This also includes information about how many narrative reports Floros prepared for KNR.

Plaintiffs' counsel also continues to show that he cannot be trusted with this information. For instance, Plaintiffs' counsel unnecessarily disclosed confidential information from Defendant Ghoumbrial's deposition testimony in his Motion to Compel. *See* Defendant Ghoumbrial's Motion to Strike, for Sanctions and Finding of Contempt, filed 05/03/2019. Plaintiffs' counsel only did this to embarrass and harass Defendant Ghoumbrial. *Id.*

Plaintiffs' counsel is also a competitor of KNR and practices personal injury law in the same area as KNR. Plaintiffs' counsel stands to profit in harming KNR and their business contacts. As a result, Defendants have a greater need to protect confidential information and trade secrets.¹

For these reasons, Floros is requesting a protective order under Civ. R. 26(C), which prevents Plaintiffs from continuing to seek more information on Floros' financial status, tax filings, and unrelated assets. Floros is also entitled to a protective order that prevents Plaintiffs' counsel from disclosing Floros' financial information and income. This includes information

¹ *See* 4 Milgrim on Trade Secrets § 14.02 (2018) (“Where discovery is sought from a third party, and the information sought to be discovered is in the nature of a trade secret and would in the litigation be exposed to competitors of the third party, the situation is fraught with tension that is not necessarily alleviated by the presence of a protective order; a court could exercise its discretion to defer discovery until the discovering party establishes a present need.”) *See also e.g. ACI Worldwide Corp. v. Baldwin Hackett & Meeks, Inc.*, 296 Neb. 818, 860, 896 N.W.2d 156 (2017); *Dow Corning Corp. v. Jie Xiao*, 283 F.R.D. 353, 359, 2012 U.S. Dist. LEXIS 75392 (E.D. Mich. 2012) (in evaluating the harm that may result from a plaintiff's disclosure of its trade secrets in litigation, courts will presume that disclosure to a competitor is more harmful than disclosure to a noncompetitor) (denying defendant competitors' motion to compel discovery of plaintiffs' trade secrets that were related to the trade secret at issue because although the discovery sought was relevant to issues in the case, the discovery was not necessary for defendants to prepare their defense); *RPA Int'l Pty Ltd. v. Compact Int'l, Inc.*, 2007 U.S. Dist. LEXIS 84942, **3–8 (S.D. Cal. Nov. 16, 2007).

about Floros' W-2s, which Plaintiffs obtain from a subpoena request to Floros' employer, Akron Square Chiropractor. As to his W-2s, Floros is also requesting that the information contained within be designated CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER; ATTORNEY'S EYES ONLY. *See* Court's Order, September 12, 2017.

G. Floros is entitled to attorney fees under Civ. R. 37, Civ. R. 11, and R.C. 2323.51.

This Court denied before Plaintiffs' Motion to Compel against Floros for violating Civ. R. 37(A). Once again, Plaintiffs have improperly filed a motion to compel against Floros in violation of the Loc. R. 17.01 and Civil R. 37(A).

In violation of Civ. R. 11, Plaintiffs' Motion to Compel is also based on false, defamatory, and unsupported accusations that Floros has been fraudulently transferring property. It is also obvious that Plaintiffs' Motion to Compel was filed for the improper purpose of harassing Floros and causing unnecessary delay and litigation costs, in violation of R.C. 2323.51.

For these reasons, this Court should award Floros attorney fees under Civ. R. 37, Civ. R. 11, and R.C. 2323.51 for the time his counsel has unnecessarily spent in drafting this reply brief. Otherwise, Plaintiffs' counsel will continue to file frivolous pleadings. Plaintiffs' counsel will continue to ignore the civil rules and this Court's orders. And Plaintiffs' counsel will continue to publish false accusations and misleading statements.

Awarding sanctions against Plaintiffs' counsel will put some order in this case and discourage these "hardball" discovery litigation tactics, which the Ohio Supreme Court has strongly criticized:

The problems brought to lawyers by their clients are difficult enough to resolve in a professional manner without adding to the expense and waste of time necessitated by gamesmanship during discovery * * * [S]uch conduct should never be condoned and * * * courts should * * * exercise sound discretion in curbing it through imposition of sanctions.

Nakoff v. Fairview Gen. Hosp. (1996), 75 Ohio St.3d 254, 261-262, 1996 Ohio 159, 662 N.E.2d 1.(Cook, J., concurring).

Conclusion

For these reasons, this Court should deny Plaintiffs' Motion to Compel, grant Floros' motion for protective order, and award attorney fees for the time spent in replying to Plaintiffs' improper and baseless motion.

Respectfully submitted,

/s/ Shaun H. Kedir
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CERTIFICATE OF SERVICE

Counsel served a copy of Defendant Floros' Brief in Opposition to Plaintiffs' Motion to Compel; Request for Protective Order was electronically filed on this 13th day of May, 2019. The parties will receive notice of this filing Notice of this filing by operation of the Court's electronic filing system.

/s/ Shaun H. Kedir
Shaun H. Kedir (#0082828)

EXHIBIT A

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, *et al.*,

Plaintiffs,

vs.

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

Defendants.

Case No. 2016-CV-09-3928

Judge James A. Brogan

**Defendant Dr. Minas Floros' Objections and Responses to Plaintiff Thera Reid's
Third Set of Interrogatories and Requests for Production**

Defendant Dr. Minas Floros, by and through his attorney, and under Rules 33 and 34 of the Ohio Rules of Civil Procedure, makes the following Objections and Responses to Plaintiffs' Third Set of Interrogatories and Requests for Production of Documents.

Interrogatories

1. For the following former patients of yours—Michael Booker, Chetoiri Beasley, Taijuan Carter, Kimberly Fields, Ronnia Fort, Brittany Justice, Sharde Perkins, Richard Harbour, and Monique Norris—please identify (A) each and every service that you provided, the cost of such service, and the amount billed for such service; (B) the amount that was ultimately collected from the patient in satisfaction of the patient's bill.

ANSWER:

Defendant objections because Plaintiffs failed to comply with Local Rule 17.01, which states: "Second or subsequent sets of interrogatories can be filed only upon leave of Court and for good cause shown." Without waiving objection, see attached documents and answer to RFD 1.

2. Identify the purpose of your affiliation with Panatha Holdings, LLC, including by listing the purpose of each company, all known employees and owners of each entity, the percentage of ownership of each owner identified, and Alberto R. Nestico's role in the company.

ANSWER:

Defendant objections because Plaintiffs failed to comply with Local Rule 17.01, which states: “Second or subsequent sets of interrogatories can be filed only upon leave of Court and for good cause shown.” Defendant objections because this interrogatory is seeking information that is not relevant and not likely to lead to any admissible information. Without waiving objection, at one time Defendant was interested in buying and/or investing in real estate under a corporation. This never happened and the corporation has been inactive. There are no members, employees, or other parties with ownership interest.

3. Identify the total amount of your net worth, and provide a summary of the assets that comprise this amount, including by identifying every privately held corporation in which you retain an ownership interest, the purpose of each such corporation, any co-owners of each such corporation, and the percentage of ownership of each owner.

ANSWER:

Defendant objections because Plaintiffs failed to comply with Local Rule 17.01, which states: “Second or subsequent sets of interrogatories can be filed only upon leave of Court and for good cause shown.” Defendant objections because this interrogatory is seeking information that is not relevant and not likely to lead to admissible information. Defendant objects because this interrogatory seeks privileged, private, and sensitive information, which is not discoverable under Ohio law unless it is relevant and compelling reasons exist. Without waiving objection, Defendant is a sole owner and member of Universal Reports Plus LLC, an Ohio corporation.

Requests for Production

1. Please produce all documents relating to the following former patients of yours— Michael Booker, Chetoiri Beasley, Taijuan Carter, Kimberly Fields, Ronnia Fort, Brittany Justice, Sharde Perkins, and Monique Norris—including all chiropractic records, patient ledgers, and billing records, including records of all hospital or emergency room treatment the patient received in connection with the accident for which you were treating the patient.

See attached documents for Chetoiri Beasley, Taijuan Carter, Kimberly Fields, and Monique Norris. Michael Booker last received treatment from Akron Square Chiropractor in 2009 and those records were destroyed under Akron Square Chiropractor’s records retention policy. Defendant did not provide treatment to other listed parties.

As to objections,

/s/ Shaun H. Kedir
Shaun H. Kedir

Respectfully submitted,

/s/ Shaun H. Kedir

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Certificate of Service

I certify that on March 15, 2019, I served the foregoing discovery responses by email to counsel for Plaintiffs.

/s/ Shaun H. Kedir

Attorney for Dr. Minas Floros

EXHIBIT B

BKM BRENNER KAPROSY
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February 18, 2019

Rob Nestico, Esq.
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Re: Giovant Properties, LLC (Delaware) and Panatha Holdings, LLC (Florida)

Dear Mr. Nestico:

In response to your questions regarding the above captioned LLC's, I reviewed our files and records on these entities. Giovant Properties, LLC was formed in Delaware on 8/16/2007. The sole member of this entity was Saverio Nestico. The Delaware Secretary of State's records reflect that Giovant was formally dissolved in 2015. All taxes and fees were paid in full at that time. Brenner Kaprosy Mitchell, LLP did not handle the dissolution.

Panatha Holdings, LLC was formed in Florida on 7/2/2010. Minas Floros was the sole member/manager. Neither you nor Giovant Properties, LLC were members or owners of Panatha Holdings, LLC at any time. As a courtesy to your client, Giovant Properties, LLC, as manager, filed the 2011 Annual Report for Panatha Holdings, LLC. Subsequently, this entity was administratively dissolved by the Secretary of State for failure to file the required annual report in 2012. The dissolution was effective 9/28/2012.

If you have any further questions, please do not hesitate to contact me.

Very truly yours,



Maria H. Janda
Paralegal

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