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OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

Dina Troiano-Tominello and Anthony Tominello vs. Quest Diagnositic, Inc. and Quest Diagnostics Venture, LLC consolidated with UPMC Community Medicine, Inc., David T. Yuan, M.D. and Kathleen T. Werner, M.D., Ignelzi, J.Page 27

Discovery-Deposition

This Pretrial Discovery Opinion and Order of Court involves the discovery deposition of plaintiff-patient in a medical negligence action and various objections raised, including but not limited to: the scope and breadth of testimony at deposition related to plaintiff's underlying mental health condition; objections to foundation; and application of this Court's prior ruling in Lau v. AHN, GD18-011924, Opinion March 30, 2021, Docket Document 60; 2021 WL 1235495; reported in Pittsburgh Legal Journal, Volume 169, No. 9, April 23, 2021 (Alleg. Co. 2021, Ignelzi, J.).

PLJ

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OPINIONS

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**DINA TROIANO-TOMINELLO and ANTHONY TOMINELLO, a married couple vs.
QUEST DIAGNOSTIC, INC. and QUEST DIAGNOSTICS VENTURE, LLC
consolidated with UPMC COMMUNITY MEDICINE, INC., DAVID T. YUAN, M.D.
and KATHLEEN T. WERNER, M.D.**

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Case No.: GD 20 – 002650, GD 20 – 004986 (consolidated at GD 20-002650). In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Ignelzi, J.

**MEMORANDUM OPINION and ORDER of COURT
Re: Motion to Compel Continued Deposition and Motion for Sanctions per LAU Standards**

This Pretrial Discovery Opinion and Order of Court involves the discovery deposition of plaintiff-patient in a medical negligence action and various objections raised, including but not limited to: the scope and breadth of testimony at deposition related to plaintiff's underlying mental health condition; objections to foundation; and application of this Court's prior ruling in Lau v. AHN, GD18-011924, Opinion March 30, 2021, Docket Document 60; 2021 WL 1235495; reported in Pittsburgh Legal Journal, Volume 169, No. 9, April 23, 2021 (Alleg. Co. 2021, Ignelzi, J.).¹

Before this Court are: UPMC Defendants' Motion to Compel Continued Deposition of Plaintiff Dina Troiano-Tominello and Motion for Sanctions (ECF 31)²; Plaintiffs' Response to UPMC Defendants' Motions (ECF 33); and UPMC Defendants' Reply to Plaintiffs' Response to Defendants' Motions (ECF 34). In essence, Defendants seek to reconvene the suspended deposition to compel the Plaintiff to answer questions related to her mental health and psychological history. Defendants seek sanctions against Plaintiffs' Counsel for speaking objections, refusing to permit the deponent to answer questions, and compelling the suspension of the deposition.

I. Background

On July 7, 2020, Plaintiffs filed their Complaint at GD20-004986 (ECF 4) in medical negligence related to the diagnosis and treatment of Plaintiff Dina Troiano-Tominello ("Plaintiff DT"). Plaintiff DT sued Renaissance Family Practice – UPMC ("RFP-UPMC"), David T. Yuan, M.D. ("Dr. Yuan"), and Kathleen T. Werner, M.D. ("Dr. Werner"). By stipulation on January 13, 2021, the parties agreed to discontinue with prejudice the action as to RFP-UPMC and substitute UPMC Community Medicine, Inc. as a party defendant. (ECF 14). This Court will refer to Defendants collectively as "UPMC Defendants" unless necessary to refer to an individual defendant.

Plaintiffs' Complaint avers that UPMC Defendants' negligence caused Plaintiff DT to suffer injury and damages, including inter alia, invasive endocervical adenocarcinoma and metastatic adenocarcinoma. (ECF 4 at ¶40). Per Court Order dated December 15, 2020 (ECF 13) this case was consolidated for discovery at GD20-002650 (Troiano-Tominello v. Quest Diagnostics).

Plaintiffs allege this case is a delayed diagnosis of cervical cancer. For context, Plaintiffs submit that:

Cervical cancer is a type of cancer that occurs in the cells of the cervix — the lower part of the uterus that connects to the vagina. To screen for cervical cancer, doctors perform pap smears, which is collecting cells from a woman's cervix. The pap smear is then sent for a lab to check for cervical cancer. If the doctor orders it, the lab will also check the same cells for human papillomavirus ("HPV") which is a virus that is a precursor to and cause of cervical cancer. When the pap smear also includes testing for HPV, it is called "cotesting."

(Plaintiffs' Response to Defendants' Motion to Compel Mental Health Records, ECF 44, pp. 2-3).

Plaintiffs further allege that, "[d]octors can reduce their patients' risk of developing cervical cancer with this co-testing" (Pap smear and HPC testing). (Id. at 3).

It is not disputed that Defendant Dr. Kathleen Werner is a primary care physician who, for her female patients, also takes on the role of gynecologist: performing yearly gynecological exams, ordering mammograms for breast cancer screening, ordering and performing Pap smears and HPV testing for cervical cancer screening, etc. Here, Dr. Werner took on this role for Plaintiff DT. (Id.).

Plaintiff DT's history of Pap smears and HPV testing with Dr. Werner is as follows:

2013:	Negative pap smear	Positive HPV
2014:	No testing	
2015:	Negative pap smear	No HPV testing ordered
2016:	Normal pap smear	Positive HPV (nothing done)
2017:	No testing	

(Id. at 4).

On April 30, 2018, Dr. Werner documented that Plaintiff DT's Pap smear was negative, but positive for HPV and that a repeat Pap smear would be done in one year. (Plaintiffs' Complaint, GD20-004986, ECF 4 at ¶29).

On July 9, 2018, Plaintiff DT presented to RFP-UPMC with complaints of abnormal urinary symptoms and changes in her menstrual bleeding. A gynecological examination found an enlarged uterus for which an ultrasound was ordered. On July 10, 2018, an ultrasound found a large complex cystic right adnexal lesion measuring 13.8 cm, which presents as a potential ovarian neoplasm.

On July 11, 2018, a CT scan found a 11.5 cm right ovarian mass suspicious for primary ovarian malignancy or metastatic disease. (Id. at ¶¶30-32).

On July 30, 2018, Plaintiff DT underwent surgery during which she was found to have invasive adenocarcinoma of the endocervix with metastasis to right ovary and uterus. Following the surgery, Plaintiff DT was diagnosed with metastatic stage IV invasive adenocarcinoma of the endocervix. (Id. at ¶¶33-36).

At this juncture, the parties' respective views of the case diverge. On one hand, the Plaintiffs allege the applicable standard of care is delineated in "universally accepted Guidelines" as follows:

Universally accepted "Guidelines" – the standard of care – tell a physician when to perform pap smears, when to include HPV testing, and what the follow-up should be depending on the results of each test. For example, if a woman has a negative pap smear but a positive HPV test, the Guidelines are clear that "co-testing" must be done at a minimum of one year. If the co-testing results in a HPV positive test again (even with a negative pap smear), a referral to a specialist for advanced testing such as a colposcopy or genotype testing must occur. . . .when [Plaintiff DT's] cervical cancer screening tests (pap smears and HPV tests) compelled action, it is undisputed that Dr. Werner did nothing. . . .Dr. Werner has no credible defense nor can she explain away why she did not follow the Guidelines, i.e. Dr. Werner is dead to rights.

(Plaintiffs' Response to Defendants' Motion to Compel Mental Health Records, ECF 44, pp. 4-5) (footnotes omitted).

In short measure, Plaintiffs' Counsel has referred to the Defendants' defense on more than one occasion as "The Hail Mary Defense."³ Plaintiffs' Counsel contends Dr. Werner's deposition became "the theatre of the absurd." (Id. at 5).

On May 18, 2021, Plaintiffs' Counsel deposed Dr. Werner and argues that Dr. Werner manufactured a defense stating:

[S]he tried to manufacture a defense by claiming [paraphrasing] "I didn't act on abnormal cervical cancer screening tests for years, did not follow the Guidelines on what to do about abnormal cervical cancer screening tests, nor did I even tell the patient about test results ... because I knew Dina had anxiety and learning that she might have cancer might have worried Dina too much."

(Plaintiffs' Response to Defendants' Motion to Compel Mental Health Records, ECF 44, p. 5) (italics in original).

This Court has reviewed Dr. Werner's deposition, a 276 page transcript with accompanying exhibits totaling 85 pages. (See Werner Deposition dated May 18, 2021, ECF 47, Ex. A ("Werner Dep.")). At the deposition, Plaintiffs' Counsel questioned Dr. Werner on the universally accepted Guidelines. (See generally Werner Dep., p. 6, l. 16 – p. 38, l. 13). In the first thirty-eight pages of Dr. Werner's deposition, it is evident Counsel could not agree on the alleged "universally accepted Guidelines." Plaintiffs' version was marked as Werner Deposition, Exhibit 1. Exhibit 1 was published in 2013, American Society for Colposcopy and Cervical Pathology ("ASCCP") Journal of Lower Genital Tract Disease, Volume 17, Number 5, 2013, S1-S27 entitled 2012 Updated Consensus Guidelines for the Management of Abnormal Cervical Cancer Screening Tests and Cancer Precursors, 27 pages total. Defendants' version was marked Exhibit 2, published 2012 ASCCP Journal of Lower Genital Tract Disease, Volume 16, Number 3, 2012, 00-00, entitled American Society for Colposcopy and Cervical Pathology and American Society for Clinical Pathology Screening Guidelines for the Detection and Early Detection of Cervical Cancer, 29 pages total.

Plaintiffs and Defense Counsel agree they had two different sets of ASCCP Guidelines. (Werner Dep., p. 38, l. 6-8). Eventually Plaintiffs' Counsel agreed to use Dr. Werner's version -- Exhibit 2 -- to question her at deposition. (Werner Dep., p. 37, l. 14 - p. 38, l. 13). It is clear neither Dr. Werner nor Counsel made any effort to determine if the two ASCCP Guidelines were different. Id. Plaintiffs' Counsel then addressed a Practice Bulletin from the American College of Obstetricians and Gynecologist ("ACOG") marked as Werner Dep. Exhibit 3, Management of Abnormal Cervical Cancer Screening Test Result and Cervical Cancer Precursors, Practice Bulletin, Number 140, December 2013. Dr. Werner acknowledged she would use the ASCCP Guidelines and the ACOG Bulletin as sources of information in making screening decisions for patients. (Werner Dep., p. 6, l. 16 – p. 9, l. 9, Exhibits 2, 3).

Once Dr. Werner acknowledged using the Guidelines to make patient decisions, Plaintiffs' Counsel then sought to use the Guidelines as "setting the standard of care for cervical cancer screening." (Werner Dep., p. 9, l. 10 – 20). At this point, Plaintiffs' Counsel and Dr. Werner diverge. Dr. Werner took exception with Plaintiffs' Counsel's conclusion on "setting the standard of care." Dr. Werner testified, "[s]tandard of care, we didn't have a standard of care at that time. We had guidelines, recommendations, and it was an evolving process, but, yes, they were the two entities that you would look at and say what's the recommendations." (Werner Dep., p. 9, l. 16-20).

Dr. Werner reiterated her position that the Guidelines were not the standard of care:

PLAINTIFFS' COUNSEL: From 2014 to 2018, do you agree that women over 10 age 30 with a positive HPV result and a negative cytology, do you agree the standard of care was repeat co-testing at a minimum of 12 months?

DEFENSE COUNSEL: Object to the form.

DR. WERNER: Once again, you are talking standard of care. I mean, there are guidelines stating that -- but, once again, there are, you know -- so guidelines, yes. That would be the guidelines that were recommended, but it was not standard of care. . . .Well, once again, guidelines are guidelines. That's why they call them guidelines. Standard of care is looking at the guidelines and then looking at your patient and saying here is what is most appropriate for them. That's standard of care.

(Werner Dep., p. 12, l. 9-18 and p. 13, l. 1-5).

Dr. Werner emphasized there was other information aside from the Guidelines she needed to incorporate one of which was whether the patient had a Loop Electrosurgical Excision Procedure ("LEEP") as emphasized in other papers. (Werner Dep., p. 11, l. 17 -23). Plaintiff DT had a LEEP performed eighteen (18) years earlier. (Id. at p. 16, l. 14 -15 and p. 22, l. 18-19). Dr. Werner testified there were several studies identifying that if patients previously had an LEEP, then the risk of recurrent cancer was expected to be less than one (1) percent. (Id. at p. 22, l. 6-17 and p. 145, l. 2 – p. 150, l. 10). Dr. Werner believed these studies, articles, or publications are or would be located in "UpToDate."⁴ (Id. at p. 22, l. 20-23).

Dr. Werner explained why she did not recommend a colposcopy for Plaintiff DT notwithstanding her co-testing was HPV Positive. (Werner Dep., p. 39, l. 5 – p. 43, l. 11). Dr. Werner needed to consider Plaintiff DT's increased anxiety doing a colposcopy potentially causes the patient. (Id.). Since Plaintiff DT had a lot of anxiety in her life and the likelihood of a colposcopy detecting or showing anything was low, and applying a risk-benefit analysis, Dr. Werner decided against a colposcopy. (Id. at p.39, l. 11 – p. 40, l. 20). This included not having a conversation with or discussing this issue with Plaintiff DT. (Id.).

Dr. Werner further testified that while she was contemplating a colposcopy, she weighed various factors including there was nothing abnormal on Plaintiff DT's pap smear except for the positive HPV, she had a prior LEEP which reduced her risk to less than one (1) percent and she was monogamous, all of which allowed Dr. Werner to decide against a colposcopy. (Werner Dep., p. 50, l. 21 – p. 51, l. 11). While a colposcopy is recommended, it is not required and in Plaintiff DT's case, Dr. Werner would not have gained additional information from a colposcopy. (Id. at p. 51, l. 20 – p. 52, l. 4). Dr. Werner was concerned about how her patient's anxiety would be affected by a colposcopy as an abnormal mammogram had caused Plaintiff DT's anxiety to be exacerbated. (Id. at p. 84, l. 13 – p. 85, l. 10). Dr. Werner testified that the physician needs to use their knowledge of the patient and knowledge of everything else that is going on to make the final decision per the Guidelines. (Id. at p. 119, l. 13-23).

During Dr. Werner's deposition, numerous references are made about Plaintiff DT's anxiety and depression, the potential causes for her anxiety and depression, as well as her patient seeking psychiatric and mental health treatment. (Werner Dep., p. 83, l. 15 – p. 85, l. 10; p. 105, l. 17 – p. 106, l. 3; p. 163, l. 15 – p. 165, l. 3; p. 195, l. 4 – 12; p. 206, l. 11 – p. 207, l. 4; and p. 210, l. 16 – p. 211, l. 9). Plaintiff DT was also prescribed various medications for her mental health issues. (Id. at p. 167, l. 7 – 10; p. 206, l. 11 – p. 207, l. 4; and p. 210, l. 16 – p. 211, l. 9).

In light of what transpired at Dr. Werner's deposition; on August 13, 2021, UPMC Defendants filed a Motion to Compel Discovery (ECF 18). UPMC Defendants sought Plaintiff DT's mental health and drug addiction treatment records for 2004 to the present from her treating psychiatrists Michael Franz, D.O. and David T. Anthony, M.D. (Id.). On August 30, 2021, the Court heard argument on the Motion. (See August 30, 2021, Hearing Transcript ("8/30/21 H.T.")). A transcript of the argument was filed on September 29, 2021, with no image available on the electronic docket. (See ECF 22). At the hearing, the Court balanced the Plaintiffs' privacy interest in mental health and drug addiction records with the Defendants' need to secure the records to support the Defendants' defenses. As such, the Court issued the following Order:

AND NOW, to wit, this 30th day of August, 2021, upon consideration of the within Motion to Compel Discovery filed on behalf of three of the defendants, UPMC Community Medicine, Inc., David T. Yuan, M.D., and Kathleen T. Werner, M.D., it is hereby ORDERED, ADJUDGED and DECREED that the within Motion is GRANTED in part and DENIED in part. Defendants will first depose the Plaintiff and are permitted to question the Plaintiff regarding any of the mental health/addiction issues as it relates to what the Plaintiff told or disclosed to Dr. Werner or any other defendant in this case. After the deposition, Defendants may renew this motion dependent upon what discovery through the Plaintiffs deposition reveals.

(ECF 19).

At argument, the Court specifically directed Plaintiff DT's Counsel as follows:

COURT: I'm telling you, she gets to ask these questions, okay? Because it's an issue. I know you disagree whether it's a valid issue, but it's an issue they are raising. Let's see what the plaintiff says, and then I'll make the determination whether you get them [the subject mental health records] at that point. Does that make sense to everybody?

PLAINTIFFS' COUNSEL: Yes, sir.⁵

(8/30/21 H.T. at p. 6, l. 25 to p. 7, l. 11).

Thereafter, on April 29, 2022, the videotape deposition of Plaintiff DT was conducted.

What should have been a straightforward, uneventful proceeding turned out to be anything but. Before the deposition was suspended — after only one hour and six minutes — UPMC Defendants' Counsel sought Court intervention. (See Dina Marie Troiano-Tominello Deposition ("Plaintiff DT Dep.") dated April 29, 2022, ECF 33, Ex. 3 at p. 5, l. 4-8, p. 46, l. 8-21 and p. 52, l. 7-25).

In summary, the UPMC Defendants' Counsel suspended the deposition because they alleged that Plaintiff DT's Counsel engaged in conduct that was abusive and bullying through objections that violated the Lau standards. (Id. at p. 55, l. 24; p. 57, l. 9; and p. 58, l. 14-23). The deposition was suspended with the Court directing the parties to file appropriate motions. (Id. at p. 59, l. 11 to p. 63, l. 19).

On May 9, 2022, the UPMC Defendants filed a Motion to Compel Continued Deposition of Plaintiff Dina Troiano-Tominello and Motion for Sanctions (ECF 31), asserting that most of the deposition was exhausted by Plaintiffs' Counsel's improper arguments, directives, and commentary in direct violation of this Court's Lau Opinion. (Id. at ¶5). UPMC asserts that Plaintiffs' Counsel effectively prevented the deponent from testifying by interjecting frivolous speaking objections, coaching the witness, and instructing opposing counsel on proper questioning. (Id.). As a result of the alleged obstructive conduct of Plaintiffs' Counsel and alleged tainted answers provided, UPMC suspended the deposition. (Id. at ¶6). UPMC requests that Plaintiff DT's deposition be rescheduled with costs and sanctions be imposed upon Plaintiffs' Counsel. (Id. at ¶7).

Plaintiffs' Counsel asserts that this case involves a party seeking to exploit confidential mental health information, a protective order, and a resulting legal disagreement over the fairness of questions and objections made in response. (ECF 33 at pp. 2-3). Plaintiffs claim that UPMC's Counsel "has turned this legal disagreement into a name-calling smear campaign." (Id. at p. 3).⁶

In reply, Defense Counsel asserts that Plaintiffs' Counsel did not adhere to the precepts of Lau, and thereby permitted the suspension of the deposition. (ECF 34 at p. 2).

Each party incorporated excerpts of the deposition in support of their contentions. In conjunction with hearing Oral Argument on May 20, 2022, this Court has reviewed the pertinent pleadings and video deposition, including every page and line of the deposition transcript assessing counsel's objections and interactions. (See May 20, 2022, Hearing Transcript, at p. 4, l. 7-12 ("5/20/22 H.T.")). To be clear, this Court Opinion will not deep-dive into a proverbial, yet literal "he said, she said" analysis⁷ – that is but a waste of Court resources and an invitation to further babysit professionals.⁸

This Court is the assigned Discovery Judge pursuant to Allegheny County Local Rule 208.3(a)(4). To be clear at the outset, the Lau discovery standards⁹ apply in equal measure to all witnesses; including parties, non-parties, laypersons and/or witnesses with specialized knowledge, training, and experience -- such as medical doctors, nurses, or other medical personnel. Application of the Lau standards to discovery depositions does not differentiate on whether it is a plaintiff or defendant witness or whether it is the conduct of the deposing attorney or the deponent's counsel. All parties are held to the same standard. This Court will not permit Lau to be leveraged as a sword or a shield for extraneous litigious purposes further consuming Court resources to evaluate counsel's deposition behavior.

The strictures of Lau apply equally to all counsel, regardless of relative legal experience or professional stature. To partake in a deposition is a de facto representation that counsel has read Lau and understands its application at deposition. A party's failure to abide by Lau at deposition tempts fate before this Court upon review of the deposition transcript. In large measure, the transcript will speak for itself.¹⁰

Scope and Standard of Review

As stated in Lau and reiterated more recently in *Fiduciary Trust*, *infra* (Lacka. Co. 2022):

Pennsylvania has a long history of liberal discovery in order to further the truth-determining process essential to our judicial system, prevent unfair surprises should the matter proceed to trial, enhance an attorney's ability to strongly and effectively advocate for a client, and enable the efficient operation of our judicial system." Office of the District Attorney of Philadelphia v. Bagwell, 155 A.3d 1119, 1138 (Pa. Cmwlth. 2017), app. denied, 643 Pa. 669, 174 A.3d 560 (2017).

Lau at *4 and Fiduciary Trust Company v. Geisinger-Community Medical Center, No. 20 CV 4775, Opinion March 4, 2022, 2022 WL 672386 at *5 re: Standard of Review (Lacka. Co. 2022, Nealon, J.).

As also stated in Lau:

This Court acknowledges there are valid and strategic reasons for counsel to place objections on the record. This Court further acknowledges the prior caselaw on discovery in Allegheny County promoted and encouraged such objections. However, absent privilege or prior court order, an instruction to a deponent not to answer a question without a good faith basis will subject the obstructionist to risk of sanction. To obstruct the answer to a question defeats the purpose of a discovery deposition and disregards the inherent protections afforded by Rule 4016(b) which preserves valid objections for consideration at trial.

Lau at *14 (footnote citations omitted) (emphasis added). See also Fiduciary Trust at *9 (proposed questioning of deponent did not (a) offend an acknowledged privilege, (b) violate an earlier evidentiary ruling, or (c) furnish a basis for the issuance of a protective order).¹¹

In Fiduciary Trust, where plaintiff's counsel sought to explore a nurse's ability to review and comprehend fetal monitoring strips, her counsel objected and instructed the nurse not to answer. See Fiduciary Trust at *1. The Lackawanna Court also noted that "speaking objections by counsel were clearly improper[.]" Id. at *11.¹² Upon review, the court granted plaintiff's motion to re-depose the nurse, noting:

Fiduciary Trust was required to file its motion to compel based upon a meritless objection asserted by [the nurse's] counsel and a corresponding directive to [the nurse] that she not answer proffered inquiries, in direct contravention of Howruth-Gadomski. Hence, pursuant to Pa.R.Civ.P. 4019(a)(1)(viii) and (g)(1), Griffiths will be required to reimburse the Fiduciary Trust for the counsel fees it incurred "in obtaining [this] order of compliance" with its relevant discovery inquiries. See Sun Pipe Company v. TriState Telecommunications, Inc., 440 Pa. Super. 47, 66,655 A.2d 112, 121 (1994) ("Only counsel fees incurred as a direct result of the discovery violation should be imposed as a discovery sanction except in the most egregious cases.") (emphasis in original), app. denied, 542 Pa. 673, 668 A.2d 1136 (1995).

Fiduciary Trust, at 29.

Review of the Deposition

The issues herein first arise when UPMC's Counsel questions Plaintiff DT about her experiencing any postpartum depression in or around September 2003. UPMC's Counsel asked whether anxiety was one of her symptoms from the postpartum depression. At first, Plaintiff DT responded she did not recall specific symptoms then denied anxiety was one of the symptoms. The transcript states:

DEFENSE COUNSEL: When you returned in September of 2003, you are classified as a new patient. You had -- you had two children in the past twelve months, and you had experienced postpartum depression. Do you recall experiencing postpartum depression?

PLAINTIFF DT: A little bit, yes.

DEFENSE COUNSEL: What were your symptoms?

PLAINTIFF DT: I don't recall specific symptoms. I mean --

DEFENSE COUNSEL: Anxiety?

PLAINTIFF DT: I wouldn't say anxiety, no.

(Plaintiff DT Dep., p. 22, l. 20 to p. 23, l. 4; ECF 33, Ex. 3).

After the Plaintiff denies anxiety as a symptom, Plaintiffs' Counsel interjects an objection to the form as follows:

PLAINTIFFS' COUNSEL: I object to the form of the sentence. Anxiety's a medical diagnosis. I don't think this witness is qualified to say what the diagnosis of anxiety is.

DEFENSE COUNSEL: I think the witness is qualified to tell me whether she was anxious after giving birth.

PLAINTIFFS' COUNSEL: I don't think that's what you asked her. You asked her if she experienced a medical diagnosis of anxiety, so I object to the form of that question.

(Id. at p. 23, l. 5-15).

UPMC's Counsel then inquires of the Plaintiff DT and is met with the following objection:

DEFENSE COUNSEL: Prior to the postpartum depression, had you ever experienced anxiety or depression?

PLAINTIFFS' COUNSEL: I object to the form of that question. You're asking her if she ever experiences anxiety and depression are medical diagnoses. There's been no foundation that this witness knows what a medical diagnosis of depression consists of, what a medical diagnosis of anxiety consists of, so she's not going to be answering questions like that when you say -- when you phrase it like that.

DEFENSE COUNSEL: Are you instructing her not to answer?

PLAINTIFFS' COUNSEL: No, I'm saying if you keep asking that way, I am going to tell her not to answer. I'm saying rephrase your questions in a way that -- you lay a foundation and ask her symptoms, ask her how she was feeling. But if you just lay it out saying, "Did you have anxiety," "Did you have depression," those are medical diagnoses. She's not qualified to do this.

(Id. at p. 23, l. 23 to p. 24, l. 16).

At this point, Plaintiffs' Counsel has made three objections. The first is to "form," claiming UPMC's Counsel is asking a layperson about a medical diagnosis of anxiety and depression. Second, asserting that there is no "foundation" to ask a layperson what the medical diagnosis of anxiety and depression involve; and third, objecting by "instructing" UPMC's Counsel how to ask the question.

After the first series of above-described objections, Plaintiffs' Counsel then reads the August 30, 2021, Court Order (ECF 19) into the record transcript with the parties disagreeing on the interpretation of the Order. Plaintiffs' Counsel reads the Order narrowly, i.e., that Plaintiff DT may be questioned only as to mental health/addiction issues that she told or discussed with Dr. Werner or any other Defendant. In contrast, UPMC's Counsel reads the Order more broadly, i.e., that Plaintiff DT may be questioned as to her personal knowledge or understanding of her own mental health/addiction issues. Further, UPMC's Counsel insisted she was asking about Plaintiff DT's symptoms and not seeking a medical diagnosis from a layperson. In opposition, Plaintiff's Counsel insisted that UPMC's Counsel was seeking to obtain a medical diagnosis from a layperson. (Id. at p. 25, l. 2 to p. 28, l. 1). Plaintiffs' Counsel continued to make the same or similar objections, including instructions to his deponent-client not to answer through the remainder of the deposition until its termination. (Id. at p. 28, l. 20 to p. 29, l. 12; p. 30, l. 17 to p. 31, l. 22; p. 34, l. 6-15; p. 36, l. 3 to p. 37, l. 11; p. 38, l. 20 to p. 42, l. 23; p. 43, l. 18-23; and p. 44, l. 18 to p. 45, l. 16).

This Court finds all the objections by Plaintiffs' Counsel were improper and borderline frivolous. Plaintiffs' Counsel's claim there was a lack of foundation for UPMC's Counsel's questioning is meritless.

As stated by this Court on the record at the May 5, 2022, Oral Argument after this Court's review of the subject videotape deposition and transcript:

I wholeheartedly agree with your [Defense Counsel's] conclusion that [Plaintiffs' Counsel] violated Lau. I'm absolutely convinced of that having listened to the deposition and having read the transcript . . . there's no doubt in my mind that -- look, I'm going to make this very clear. . . . if somebody doesn't understand this, then shame on you. I made this clear in the first CLE that I did after I issued Lau, . . . I made it very clear that Lau is Lau. And what is sauce for the goose is going to be sauce for the gander. . . . I've issued Lau, and the lawyers are going to live with the Court's rulings in Lau. . . . And it is the law of the land in Allegheny County.

(5/20/22 H.T. at p. 17, l. 25 to p. 19, l. 2).

Almost all of Plaintiffs' Counsel's objections were "speaking" objections of varying lengths. Plaintiffs' Counsel's concerns would have been simply alleviated and protected by the principal directive set forth in Lau:

As adopted herein, counsel making any objection during an oral deposition shall state the word "objection," and briefly state the legal basis for the objection without argument, nor instruct the witness not to answer. Plainly put, "Objection. Asked and answered," will comply with this Court's standard henceforth.¹³

Lau at *16.

It must be emphasized this is discovery – not the trial. At the time of trial with its inherent pre-trial proceedings, counsel has options to challenge the admissibility of evidence vis-à-vis motions in limine or at trial; and the trial court addresses such issues at that time. See Pa.R.E., Rule 103, "Ruling on Evidence" and Rule 104, "Preliminary Questions." The "lack of foundation" objection is reserved and applicable to the direct examination and questioning of a witness at trial by the proponent seeking to establish admissible facts within the knowledge of the witness. The objection is based in opposing counsel's assertion that the proponent's witness failed to establish the basis for the witness's knowledge of the event or fact being elicited. See Pa.R.E., Rule 602, "Need for Personal Knowledge."¹⁴ The purpose of the objection is to prevent the admission of facts which would otherwise be inadmissible on an evidentiary basis, e.g. hearsay. See Pa.R.E., Rules 801-806, "Hearsay." If the testimony is hearsay as defined by Pa.R.E. 801; then the Court must determine if it is otherwise admissible as defined by Pa.R.E. 802: "Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Pennsylvania Supreme Court, or by statute." The applicable reference "provided by these rules," *infra*, is referencing Pa.R.E. 803, "Exceptions to the Rule Against Hearsay – Regardless of Whether the Declarant Is Available as a Witness;" Pa.R.E. 803.1, "Exceptions to the Rule Against Hearsay – Testimony of Declarant Necessary;" and Pa.R.E. 804, "Exceptions to the Rule Against Hearsay – When the Declarant Is Unavailable as a Witness."

By way of example, if a witness is asked on direct examination, "was the defendant at the Acme Market on April 1, the day the plaintiff fell?" and opposing counsel objects, "lack of foundation" asserting that the proponent has not established the source or basis of the witness's knowledge; then the Court must assess whether there is a basis for the witness's answer. If the witness was present and witnessed the defendant's presence, then said testimony is admissible and the objection overruled. If the witness was not present, then the court must assess the basis for the witness's knowledge regarding the event, whether it is based on hearsay and possibly lacking a foundation. The foundation may be established with an exception to the Hearsay Rule.

Moreover, if the basis of the witness's knowledge comes from a secondary source, e.g., a report of the accident or from a source not defined as an exception to hearsay, then the testimonial evidence may not be admissible under the circumstances for lack of a foundation.

In the matter sub judice, the subject questioning by UPMC Defense Counsel was in a discovery deposition – not in a trial setting. As such, subsequent admissibility is not at issue, but is reserved for the pretrial/trial setting. Plainly stated, the entire purpose of the questioning is to discover knowledge, the lack or limits of that knowledge, and/or the source(s) of that knowledge – the basis for which may be developed through other discovery mechanisms, e.g., other witness depositions, interrogatories, requests for production, requests for admissions; which may have not yet been developed at the time contemporaneous with Plaintiff DT's deposition or the deponent's response may lead to other admissible evidence. See Pa.R.C.P. 4003.1(b), "Scope of Discovery Generally" ("It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."). The entire purpose of the deposition is to discover the breadth of the witness's knowledge in the area of inquiry. It is not unusual that deposing counsel in a discovery deposition seeks to develop facts in conjunction with other discovery mechanisms, and other previous or future depositions; or – actually discovers facts of which counsel was unaware.¹⁵ It may also be the first time counsel defending the deposition learns of the witness's testimony for a variety of reasons including not properly preparing the deponent for the deposition.¹⁶ This Court is unaware of any limitation in the areas of questioning as stated in Lau and Fiduciary Trust that under Pa.R.C.P. 4003.1 "discovery is liberally allowed with respect to any matter not privileged which is relevant to the cause being tried." See *Fiduciary Trust*, 2022 WL 672386 at *5.

Assuming arguendo that a foundation was required, the foundation for the questioning was established in the deposition of Dr. Werner as identified above.¹⁷ As stated *infra*, Plaintiff DT's prior mental health/addiction issues and prior treatment of these conditions were factors considered by Dr. Werner in assessing her treatment plan – including Dr. Werner's consideration of these factors in complying with the standard of care.¹⁸

UPMC's Counsel was not seeking a medical diagnosis from a layperson; rather, UPMC's Counsel was questioning the patient-deponent as to symptoms which she, Plaintiff DT, admitted she experienced. To circumvent the direct inquiry, Plaintiffs' Counsel made speaking objections which in essence amounted to coaching his deponent-client by making statements such as "if you remember or recall" or "you don't have to guess," whereafter the deponent would respond "[o]kay. Yeah, I can't. I can't answer that a hundred percent accurately." (*Id.* at p. 37, l. 10-11). Short of engaging in erudite epistemological inquiry; rarely can any witness testify with a "hundred percent accuracy." Such a deponent's response following their counsel's veiled coaching presents as parroted lexicon seeking to avoid answering a pending question well within the deponent's personal knowledge as noted when the deponent began to mimic counsel's objections. In current common parlance, such linguistic contrivances are counsel's attempt at figurative "dog-whistling"¹⁹ to perk the deponent-client's proverbial ears. The tactic subverts the fact-finding process and further creates confusion – even in the mind of the deponent.

As set forth above, Plaintiffs' Counsel was planting the seed for the witness's responses by interjecting the "medical diagnoses" phraseology and then objecting to the form of the question or lack of foundation. In simple terms, Plaintiffs' Counsel was creating his own self-fulfilling basis for objecting and getting the witness to reiterate counsel's argot.

Thereafter, the record reflects that the witness began adopting her counsel's phrasing and echoed counsel's lexicon: "Yeah. I mean, anxiety's such a broad term that's used. I don't know what the actual medical diagnosis of anxiety is, so I don't know how to answer that." (Id. at p. 44, l. 18 to p. 45, l. 2).

Nevertheless, after additional questioning and despite Plaintiff's Counsel's interjections, the record reflects that the deponent was able to articulate a common understanding in layperson's terms from personal experience that she "felt nervous" and "had a history of being nervous and worry sometimes." (Id. at p. 45, l. 4-25). Upon review, Plaintiffs' Counsel's conduct was unnecessarily obstructive and obtrusive with regard to objecting and coaching the witness.²⁰

The final actions of Plaintiffs' Counsel which the Court is compelled to address were the several occasions when Plaintiffs' Counsel suggested/instructed/told UPMC's Counsel how deposition questions should be asked. (Id. at p.12, l. 24 to p. 13, l. 11; p. 16, l.19 to p. 17, l. 9; p.22, l.1-18; p. 23, l.23 to p. 24, l.16; p. 26, l.11 to p. 28, l. 1; p.28, l.20 to p. 29, l. 20; p. 30, l.17 to p. 31, l. 22; and p. 38, l. 20 to p. 41, l. 3). These excerpts show the manner Plaintiffs' Counsel sought to interject himself as a wedge to create confusion when upon review it is apparent that the deponent was not confused nor misunderstood the question – despite Plaintiffs' Counsel's insistence to "clarify" opposing counsel's questioning. To be clear and in simple response: Plaintiffs' Counsel was not taking the deposition. The lawyer taking the deposition has the right and prerogative to ask questions in the manner and order the lawyer deems appropriate and to obtain a candid response from the deponent.²¹

By way of contrasting example, Plaintiffs' Counsel deposed Defendant Dr. Werner over five hours covering 276 pages of transcript with minimal objections from opposing counsel. The Dr. Werner deposition conduct is a representative example of abiding by this Court's Lau Opinion and its parameters thereby permitting the deposing counsel the prerogative to conduct the deposition in the manner they deem appropriate, which may also include strategic or tactical reasons. This Court has no reservation that Plaintiffs' Counsel in the instant manner disregarded Lau as evidenced by the comments of Defendant Quest Diagnostic's Counsel indicating the witness was influenced by the objections and possibly coloring her testimony. (Id. at p. 41, l. 4 to p. 42, l. 13). The record notes that opposing counsel had directed Plaintiffs' Counsel to this Court's Lau Opinion. (Id.)

Once Defendant UPMC's Counsel suspended the deposition, Plaintiff DT's Counsel was insistent that the deposition proceed. Plaintiff DT's Counsel emphasized on several occasions he was now refraining from objecting as he had previously done. (Plaintiff DT Dep., p. 46, l. 22 to p. 47, l. 2; p. 47, l. 17-20; p.48, l. 14-20; p. 49, l. 12-23; p. 51, l. 11-16; p. 54, l. 24 to p. 55, l. 23; and p. 62, l. 23 – p. 63, l. 16). Unfortunately, Plaintiff DT's Counsel's offer was too little too late. While this matter was pending before this Court, the parties resumed and completed the deposition of Plaintiff DT on September 22, 2022. The resumed deposition started at 10:10 a.m. and ended at 3:15 p.m., slightly over five hours consisting a total of one hundred ninety-five (195) pages of transcription. (Plaintiff DT's Dep. 9/22/22 ("Plaintiff DT Dep. 2"), p. 5, l. 7-9 and p. 195, l. 1-4). There were minimal objections by Plaintiff DT's Counsel. Any testimonial clarifications believed necessary by Plaintiff DT's Counsel were addressed in redirect by questioning his client-deponent. (Id. at p. 174, l. 20 to p. 194, l. 24).²²

Reiteration of the Lau Deposition Standards and Appropriate Sanctions

As set forth in Lau, this Court has adopted the standards applicable to depositions as established by Judge Gawthrop in *Hall v. Clifton Precision, a Div. of Litton Systems, Inc.*, 150 F.R.D. 525, 531, 62 USLW 2103, 27 Fed.R.Serv.3d 10 (E.D. Pa. 1993).

The underlying purpose of a deposition is to find out what a witness saw, heard, or did—what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers.

Lau at *17, quoting Hall at 528.

As set forth in Lau and reiterated here again in plain sight:

1. Any objection shall be stated concisely in a non-argumentative and non-suggestive manner; and

2. Counsel shall not direct or request that a witness not answer a question unless counsel has objected on the ground that the answer is protected by a privilege or a limitation on evidence directed by the Court.

Lau at *17 (bold emphasis also in original).

"In short, depositions are to be limited to what they were and are intended to be: question-and-answer sessions between a lawyer and a witness aimed at uncovering the facts in a lawsuit." Hall at 531.

It is worthy at this juncture to ingeminate Lau at length:

The unilateral termination of a deposition must be supported by a good faith factual or legal basis that, by necessity, could not be addressed by preserving an objection on the record or by submitting a prior motion for protective order. The absence of a good faith factual or legal basis to unilaterally end a deposition shall result in sanction.

This standard does not preclude nor limit counsel from raising or preserving an objection as to admissibility at the time of trial pursuant to the Pennsylvania Rules of Evidence, including the filing of a Motion in Limine. The preservation of the objection should not disrupt the fair examination of the deponent while, at the same time, provide protection on the issue of admissibility for trial.

Finally, this Court does not now, and in the future will not, condone any type of conduct which reduces or denigrates the level of legal professionalism to unnecessary argumentative barbs or other less than professional behavior. Suffice it to say once: Counsel should never forget that even though the deposition may be taking place far from a real courtroom, with no black-robed overseer peering down upon them, as long as the deposition is conducted under the caption of this court and proceeding under the authority of the rules of this court, counsel are operating as officers of this court. They should comport themselves accordingly[.]

Hall v. Clifton Precision, a Div. of Litton Systems, Inc., 150 F.R.D. 525, 531, 62 USLW 2103, 27 Fed.R.Serv.3d 10 (E.D. Pa. 1993). A word to the wise shall be sufficient for all counsel bringing discovery deposition matters before this Court.

Lau at *18.

This Court does not find any of the limits of the scope of discovery as set forth in Pa.R.C.P 4011 applicable here.²³ To the contrary, this Court finds that the conduct of counsel: raising spurious or speaking objections; instructing the deponent not to answer; injecting himself as a witness; de facto causing the suspension of the deposition thereby compelling opposing counsel to expend unnecessary legal effort; and requiring subsequent Court intervention is a violation of Pa.R.C.P. 4011(b).

The authority of the trial court to impose sanctions is summarized by Judge Nealon in *Fiduciary Trust*:

"[T]he purpose of discovery sanctions is to secure compliance with our discovery rules and court orders in order to move the case forward and protect the substantive rights of the parties, while holding those who violate such rules and orders accountable." *Rohm and Haas Co. v. Lin*, 992 A.2d 132, 147 (Pa. Super. 2010), cert. denied, 565 U.S. 1093 (2011). "Generally, courts are afforded great discretion in fashioning remedies or sanctions for violations of discovery rules and orders." *City of Philadelphia v. Fraternal Order of Police Lodge No. 5 (Breacy)*, 604 Pa. 267,284, 985 A.2d 1259, 1269 (2009). But when "exercising judicial discretion in formulating an appropriate sanction order, the court is required to select a punishment which 'fits the crime.'" *St. Luke's Hospital of Bethlehem v. Vivian*, 99 A.3d 534,553 (Pa. Super. 2014) (quoting *Estate of Ghaner v. Bindi*, 779 A.2d 585, 590 (Pa. Super. 2001)), app. denied, 631 Pa. 744, 114 A.3d 417 (2015); *Euceda*, 40 Pa. D. & C. 5th at 331.

Fiduciary Trust at *12.

Plaintiffs' Counsel's deposition conduct has caused unreasonable annoyance, expense, unnecessary dissipation of Court resources to remedy the conduct, and additional burden upon the parties to reschedule the deposition. This Court shall impose sanctions as described herein.

UPMC Defendants argue due to the inappropriate conduct of Plaintiffs' Counsel, that the Court order all costs to be paid by Plaintiffs' Counsel, and any further sanctions as the Court deems appropriate. UPMC Defendants contend the deposition was suspended because Plaintiffs' Counsel engaged in bullying and abusive conduct toward opposing counsel during the deposition. Senior Counsel for UPMC Defendants has alleged this conduct was directed toward his young associate taking the deposition (See ECF 36, p. 3, ¶4 and Plaintiff DT Dep. at p. 55, l. 2 to p. 58, l. 11, ECF 33, Ex. 3). Plaintiffs' Counsel vehemently disagrees he engaged in bullying and abusive conduct directed towards the associate referenced.

At the time UPMC Defendants' Counsel sought Court intervention, the Court noted it would review the videotape deposition to determine if such alleged conduct occurred. At the time the Court intervened, it acknowledged while Senior Counsel for UPMC had the right to suspend the deposition, the Court was reaching no conclusion until review of the videotape deposition. The request for sanctions argues Plaintiffs' Counsel should be charged with all of following attorney fees:

1. Attorney Fees for UPMC's Counsel's that conducted the deposition, as well as her involvement in subsequent motions, briefs, and argument on the issue;
2. UPMC's Senior Counsel's intervention on the day of the deposition, as well as Senior Counsel's involvement in subsequent motions, briefs, and argument on the issue;
3. Two additional UPMC Attorneys' involvement in subsequent motions, briefs, and argument on the issue; and
4. Total Attorney Fees of UPMC's Counsel amounting to \$26,775.00.

As stated in footnote 7 of this Opinion, this Court expressly found upon review of the videotape deposition that Plaintiffs' Counsel did not engage in bullying or abusive conduct. Reiterating however, that Plaintiffs' Counsel did violate the tenets of *Lau*. As such, this Court will only award attorney fees applicable to UPMC's Counsel who conducted the deposition. The Court required UPMC Defendant's Counsel to produce the detailed billing statement for attorney fees rendered as described above. As the detailed billing descriptions entitled "Time Details" may potentially involve privileged materials thereby invoking attorney-client privilege and/or attorney work product privilege; this Court will not disclose any specific description herein. Notwithstanding the exercise of prudence in this regard, the Court has thoroughly evaluated each and every categorized time entry.

To be specific, this Court has reviewed the billing statement in detail, and has excluded awarding fees for all time applicable to interactions with other UPMC attorneys and/or involvement in other matters unrelated to the issues before the Court. The total time expended amounts to \$4,590.00.²⁴ However, the matter does not end here, as "it is better that wisdom come late than never at all."²⁵ As acknowledged in this Court's Opinion, Plaintiffs' Counsel recognized the error of his way – albeit too late. As previously stated, while this matter was pending the deposition was reconvened to conclusion without further incident.

Accordingly, tempering justice with mercy, this Court will require Plaintiffs' Counsel remit \$3,442.50 representing seventy-five percent (75%) of the total time expended as identified herein. Regarding costs for the deposition, as the deposition has occurred and is now concluded, it is apparent the parties were able to resolve this matter without further squabble or incident.

An Order of Court shall follow, this 2nd day of November, 2022.

BY THE COURT:

/s/Judge Philip A. Ignelzi

¹ Commonly referenced by the Allegheny County Bar as the “Lau” Opinion. A more complete caption is I.L., a minor by Lau (“Lau”) vs. AHN, et al. See also Fiduciary Trust Company v. Geisinger-Community Medical Center, No. 20 CV 4775, Opinion March 4, 2022, 2022 WL 672386 (Lackawanna Co. 2022, Nealon, J.) (citing Lau at *8).

² “ECF” means electronic court filing identified on the Department of Court Records docket.

³ In 1975, Dallas Cowboys quarterback Roger Staubach popularized the term “Hail Mary” to describe his miracle-winning touchdown pass to fellow Pro Football Hall of Famer Drew Pearson in a playoff game against the Minnesota Vikings. The “Hail Mary” thus became ingrained in the American sports lexicon, but the term was used decades earlier. See <https://www.history.com/news/hail-mary-pass-roger-staubach-drew-pearson-1975>.

A Hail Mary pass is a very long forward pass in American football, typically made in desperation, with an exceptionally small chance of achieving a completion. Due to the difficulty of a completion with this pass, it makes reference to the Catholic “Hail Mary” prayer for supernatural help. . . . The term became widespread after an NFL playoff game between the Dallas Cowboys and the Minnesota Vikings on December 28, 1975 . . . when Cowboys quarterback Roger Staubach said about his game-winning touchdown pass to wide receiver Drew Pearson, “I closed my eyes and said a Hail Mary.”

See: https://en.wikipedia.org/wiki/Hail_Mary_pass#:~:text=Roger%20Staubach%2C%20the%20thrower%20of%20the,made%20in%20desperation%2C%20with%20great%20difficulty&text=Roger%20Staubach%2C%20the%20thrower,desperation%2C%20with%20great%20difficulty&text=the%20thrower%20of%20the,made%20in%20desperation%2C%20with

Albeit a perceived small chance of succeeding, the “Hail Mary” does not preclude success. In fact, sports hagiography reveres a litany of heroic “Hail Mary miracles” with a most recent example occurring on September 17, 2022, when Appalachian quarterback Chase Brice threw a 53-yard touchdown on a final play and pulled out a 32-28 victory over Troy University.

Additional noteworthy examples in chronology include:

- December 19, 1980: BYU quarterback Jim McMahon 41-yard touchdown pass.
- September 24, 1994: Colorado quarterback Kordell Stewart 64-yard touchdown pass.
- October 31, 1999: Cleveland Browns quarterback Tim Couch 56-yard touchdown pass.
- November 9, 2002: LSU quarterback Marcus Randall 74-yard touchdown pass.
- December 8, 2002: Cleveland Browns quarterback Tim Couch 50-yard touchdown pass.
- October 22, 2011: Michigan State quarterback Kirk Cousins 44-yard touchdown pass.
- November 16, 2013: Auburn quarterback Nick Marshall 73-yard touchdown pass.
- November 10, 2013: Cincinnati Bengals quarterback Andy Dalton 51-yard touchdown pass.
- September 5, 2015: BYU quarterback Tanner Mangum 42-yard touchdown pass
- December 3, 2015: Green Bay Packers quarterback Aaron Rodgers 61-yard touchdown pass.
- January 16, 2016: Green Bay Packers quarterback Aaron Rodgers 41-yard touchdown pass.
- September 10, 2016: Central Michigan Univ. quarterback Cooper Rush 49-yard touchdown pass.
- October 1, 2016: Tennessee quarterback Joshua Dobbs 43-yard touchdown pass.
- January 8, 2017: Green Bay Packers quarterback Aaron Rodgers 42-yard touchdown pass.
- September 16, 2017: Florida quarterback Feleipe Franks 63-yard touchdown pass.
- November 15, 2020: Buffalo Bills quarterback Kyler Murray 43-yard touchdown pass.

Id. In litigation, characterizing an opponent’s position with creative hyperbolic lexicon does not change the governing rules of the game. A team is permitted to determine and execute its own strategy for success. An opposing team has no right to preclude a “Hail Mary” defense nor does such characterization constrain a party from seeking facts and opinions in discovery to support its end-game strategy. To perpetuate the sports analogy, the game clock has not run out – the instant matter remains in the discovery phase of litigation with issues of admissibility reserved for the time of trial. See Lau, *infra*.

⁴ “UpToDate” is publicly identified at <https://www.wolterskluwer.com/en/solutions/uptodate/how-we-help>. “UpToDate is the most trusted evidence-based clinical decision support resource at the point of care. More than 100 studies concur: patients receive better care when clinicians use UpToDate. Healthcare professionals around the world turn to UpToDate to answer even the most complex questions.” See <https://www.wolterskluwer.com/en/solutions/uptodate/about>

⁵ This reference to the August 30, 2021 transcript from a discovery motion hearing held on the record is an example of where in the absence of a transcript (as was the informal protocol under the now dead “Happy Hour” protocol) counsel might have forgotten, failed to recall, or heaven-forbid – ignored the context of the hearing that led to the issuance of the discovery order. Under the current protocol, discovery motion hearings are on the record, transcripts are available to the parties, and the parties will be held accountable for the context of hearings and their representations made on the record.

⁶ Plaintiffs’ Response (ECF 33 at p. 3) specifically identifies Defense Counsel by name. This Court takes note that the identified UPMC Attorney alleged to have engaged in a “name-calling smear campaign” was not present at the deposition. This Court does not look kindly upon hyperbolic assertions or unprofessional conduct from any party - including overdramatized assertions in legal pleadings - and violations will be sanctioned. To be clear, and yet again as set forth in Lau, and reiterated here in most common parlance: this Discovery Motions Court does not and will not “babysit” lawyer’s conduct. Violations of professionalism or inflated

claims of violations will be met with sanction. This Court, if required to assess the nuances of counsel's behavior by expending valuable Court resources to monitor professionals' discovery/deposition behavior, including review of deposition transcripts and various exhibits in Motions practice shall subject the offending party to imposition of costs. Counsel shall be held accountable and are hereby forewarned. Whether to act professionally or in accord with the parameters of Lau is not an option. See also Lau at *15, n.15 (underlined emphasis added):

Protestations including counsel's unnecessary instructions for a witness not to answer (absent privilege or other reason by court order as set forth herein) are counterproductive to the discovery process. Moreover, the unjustified refusal to answer and subsequent compelled intervention of the Special Motions Court is a strain on judicial economy. In effect, counsel's overzealous conduct would have the Special Motions Court engage in prognostic folly to determine admissible evidence before the conclusion of discovery. Moreover, the additional expenditure of counsel's time and court resources to provide an unnecessary prognostic ruling far outweighs the witness simply answering the question at deposition and preserving the objection for the time of trial, after all discovery has concluded. To conclude otherwise would flip judicial economy on its head and place the Court in an obligatory position to babysit legal professionals over myriad nuanced discovery disputes. Special Motions Court or "Happy Hour" is not the judicial mechanism for presupposing the materiality of one's claim or defense and/or is not the forum for a party seeking premature admissibility determinations. See n.2, *infra*. The Rules of Evidence provide recourse for the parties at the time of trial.

As of January 11, 2022, the Allegheny County Civil Court Rules were amended to eliminate the "Special Motions" Judge. This function is now designated as the "Discovery Motions" Judge pursuant to Local Rule 208.3(a)(4).

⁷ At Oral Argument, this Court addressed the tit-for-tat allegations regarding bullying or abusive behavior by counsel at the deposition:

I'm going to make this finding on the record. The Court finds that the Plaintiffs' Counsel did not engage in what may be referred to as bullying or abusive conduct as to how he treated opposing Counsel. I watched the video. It's absolutely clear that it was more conversational. While I disagree with what you did, I don't think you did it in an improper tone. I don't think there was any hint that you were trying to be abusive as to opposing Counsel and regardless of what opposing Counsel's gender is or what have you. That I clearly don't find in the videotape.

(5/20/22 H.T. at p. 30, l. 8-22).

⁸ This Court expressed its straight-forward standard on the record at the May 20, 2022, Oral Argument: "I'm not going to micromanage depositions. Let's make sure we all understand that. That's not my job as the discovery judge." (5/20/22 H.T. at p. 36, ll. 5-9) (See also 5/20/22 H.T. at pp. 36-40).

⁹ As noted herein, the Lau Opinion was issued March 30, 2021. On April 23, 2021, the Opinion was published in the Pittsburgh Legal Journal. The Pittsburgh Legal Journal is the official legal journal of the Allegheny County Court of Common Pleas. See <https://www.acba.org/news-publications/pittsburgh-legal-journal-opinions/>. On April 22, 2022 (nearly one year after publication), the Academy of Trial Lawyers of Allegheny County hosted the 21st Annual Symposium on Civil Trial Practice, an accredited Continuing Legal Education Program, which included this Jurist among the panelists discussing the application of the Lau Opinion. Attendees were provided handouts including the Lau Opinion via email from the Executive Director of the Academy.

¹⁰ This Court intentionally will not herein belabor an exhaustive analysis of the deposition and the potential application of factual admissibility at trial on a myriad of relevant possibilities. As set forth on the record:

You're asking a judge to make a decision in a small microcosm of understanding the case. I don't know all the facts all these lawyers possess in this case. It may have relevance somehow. Okay. Now look, that's when we're not going to get into these fights. And that's why Lau is what it is.

(5/20/22 H.T. at p. 44, l. 20 to p. 44, l. 2).

The deposition transcript and oral argument hearing transcript are sic loquitur pro se. This Court's findings are transcribed on the record by an official Court Reporter and are incorporated by reference herein. See 5/20/22 Hearing Transcript. As a further note, Lau makes clear that Allegheny County's prior "Happy Hour" Discovery Motions protocol is dead. See Lau at *1, nn.3-4. The previous informal norm of oral argument off the record without transcription fostered a culture whereby counsel could perpetuate an endless cycle of discovery disputes on nuanced minutiae placing the burden on the Court to sift through voluminous transcripts, pleadings, and exhibits for oft-petty squabbles. Historically, this led to a Byzantine codex of discovery opinions.

As previously stated, the "veritable cottage guild of litigants seeking the Special Motions Judge's intervention oft-times to mediate issues related to counsel's behavior" will draw the analytical ire of this Court and consideration of sanctions thrust upon the offending party. Lau at *1, n.3. Simply put, recalcitrant deposition behavior will no longer be tolerated whether it be plaintiff or defendant; deponent or interrogator. Sauce for the goose is sauce for the gander. (5/20/22 H.T. at p. 16, l. 15-20). Litigants bear the risk of sanction for unfounded obstruction or offense that requires Court intervention. Discovery Motions Court is no longer a litigant's free-sample open-menu drive-through. To the contrary, advocates should be prepared that should they avail themselves of Discovery Motions Court to challenge discovery conduct, the offending party – whether movant or respondent – is and will be held accountable, including but not limited to payment of the opposing parties' counsel fees and costs. In the colloquial idiom, parties before this Discovery Motions Court now have "skin in the game" and henceforth are best counseled to work out their disagreements pursuant to the clear parameters of Lau, Fiduciary Trust, Hall, and this Opinion. Ignorance shall no longer be bliss.

To be clear, the parameters of Lau are intended to reduce the number of discovery squabbles – not increase them. Legal professionals are expected to conduct themselves accordingly and will be held to this standard.

¹¹ This Court's reasoning has been affirmatively cited by Judge Nealon in Fiduciary Trust:

Last year, the Court of Common Pleas of Allegheny County revisited its anomalistic McLane approach in *I.L. v. Allegheny Health Network*, 2021 WL 1235495 (Alleg. Co. 2021), and found it to be "an untenable standard applicable to deposition opinion testimony in Allegheny County." *Id.* at *9. Characterizing the holdings in *Karim* and *Howarth-Gadomski* as "instructive and persuasive," *I.L.* "conclude[d] that in the Court of Common Pleas of Allegheny County, a defendant-physician can be asked opinion questions,

including standards of care, and properly grounded hypothetical questions in depositions." Id. at *8. It declared that "it is appropriate and permissible for the defendant treating physician to be required to review fetal monitoring strips and likewise be questioned by plaintiff's counsel about the review" and "whether the treatment provided to the plaintiff met the accepted standard of professional care." Id. at *11. "In accord with Judge Nealon, (the Allegheny County) Court finds that current expert opinions may be discoverable regardless of admissibility at trial," and that "a deponent physician may be examined, in discovery, about his professional opinion or the standard of care related to the timing of delivery for a patient that was in his medical practice's care." Id. at *12-13.

Fiduciary Trust at *8.

¹² The deposition transcript "reflects other instances of unwarranted interpolations" including deponent's counsel's interjection to the witness after a question and before answer of: "if you know" and "to the extent you remember." Fiduciary Trust at *11, n.4. Similar unwarranted interruptions are reflected in the deposition transcript before this Court.

¹³ See Lacka. Co. R.C.P. 4007.1(a), "Counsel making an objection during an oral deposition shall state the word 'objection,' and briefly state the legal basis for the objection without argument," adopted herein. (footnote in original). In the instant matter, as alleged by UPMC's Counsel, Plaintiff DT's deposition transcript reveals that Plaintiffs' Counsel "spoke nearly twice as long as his client (1,705 words versus 975 words, respectively)[.]" (See ECF 31, p. 2). As a practical matter with a purview for common sense, although not a bright-line statistical evaluation; the comparative assessment of "who is doing the talking" should be the sworn deponent -- not to be outweighed by his or her counsel. Otherwise, the purpose of the deposition is defeated and the spirit of discovery undermined.

¹⁴ Per Pa.R.E., Rule 602: "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703."

¹⁵ By referential analogy, while seeking an alternative trade route to the East Indies, Christopher Columbus traveled westerly and "discovered" America for the European continent. History shows that discovery can be occasioned by happenstance and thereby uncover unforeseen effects. See also "The Accidental Scientist: The Role of Chance and Luck in Scientific Discovery," Graeme Donald, Publisher Michael O'Mara (2018), ISBN 9781782437802.

See also: https://www.harvard.com/book/the_accidental_scientist_the_role_of_chance_andLuck_in_scientific_discover/

¹⁶ See Fiduciary Trust, 2022 WL 672386 at *9, wherein deponent nurse's counsel "was not at liberty to instruct [nurse] to refrain from answering" and at *11, "while it is true that counsel is obligated to properly prepare a client for deposition, 'once the deposition has begun the preparation period is over, and the deposing lawyer is entitled to pursue the chosen line of inquiry without interjection by the witness's counsel.'" "[A] deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness," and "there is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness formulate answers." Id. at *11 (citation omitted, quoting Hall, 150 F.R.D. at 528).

¹⁷ (See *infra*, e.g., Werner Dep., p. 83, l. 15 – p. 85, l. 10; p. 105, l. 17 – p. 106, l. 3; p. 163, l. 15 – p. 165, l. 3; p. 195, l. 4 – 12; p. 206, l. 11 – p. 207, l. 4; and p. 210, l. 16 – p. 211, l. 9; p. 167, l. 7 – 10; p. 206, l. 11 – p. 207, l. 4; and p. 210, l. 16 – p. 211, l. 9).

¹⁸ As stated in Lau, 2021 WL 1235495 at *6, n.11:

Pa.R.C.P. 4003.1(b) states: "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." On a practical note, discovery is akin to "peeling an onion." Delving further into discovery, layers are removed and one learns facts the party did not know at an earlier stage of discovery. Thus, later discovered items may render an item which did not appear reasonably calculated to lead to the discovery of admissible evidence to be the exact opposite.

As such, this Opinion does not restrict the discovery of information or inquiry about information based upon the chronological timing of witness depositions to have laid a foundation for subsequent witnesses. In other words, the happenstance of Dr. Werner's deposition "laying a foundation" preceding Plaintiff DT's deposition is not a prerequisite for the discovery inquiry of the Plaintiff on these issues. To suggest otherwise would be folly and would hypothetically require parties to somehow divine the order of discovery – and thereby defeat the entire purpose of "discovery." Simply put, discovery is a process. This Court maintains the jurisprudential position that "lack of foundation" objections in discovery depositions are overwrought, substantively meaningless, and oft-times obstructive semantic endeavors, unless it is clear such an objection falls within a rarified exception as proscribed in Pa. R.Civ.P. 4016(b)(emphasis added):

(b) Objections to the competency of a witness or to the competency, relevancy, or materiality of the testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which was known to the objecting party and which might have been obviated or removed if made at that time.

As iterated in Lau, "[t]o obstruct the answer to a question defeats the purpose of a discovery deposition and disregards the inherent protections afforded by Rule 4016(b) which preserves valid objections for consideration at trial." Lau, at *14. This Court is hard-pressed to identify a scenario whereby in a witness's discovery deposition that a "lack of foundation" objection would be waived on the ground that the "lack of foundation" objection was – at that time – known or could have been known to the objecting party and which might have been obviated or removed if made at that time. To suggest such a draconian standard would place counsel square in the middle of a Ouija board. To be clear, admissibility of evidence, e.g., it lacks foundation, is a matter reserved for motion in limine or at trial. Counsel does not inherently waive the lack of foundation objection as to admissibility at the conclusion of discovery – it is reserved for trial.

This Court has thoroughly reviewed Goodrich Amram 2d on this issue. While it does address "lack of foundation" objections, the only reported case was in a videotaped deposition for use at trial – not a discovery deposition. See 9A Goodrich Amram 2d § 4016(b):2, "Depositions and Discovery," September 2022 Update, and School District of Philadelphia v. Friedman, 507 A.2d 882,

n.1 (Pa. Cmwlth. 1986) (objections are waived if not made at time of videotaped deposition for use at trial as objections had to be preserved at the time of deposition).

¹⁹ “[A] coded message communicated through words or phrases commonly understood by a particular group of people, but not by others.” <https://www.merriam-webster.com/words-at-play/dog-whistle-political-meaning>.

²⁰ At the outset, coaching a witness has the same effect as instructing a witness not to answer – it is merely a more anfractuious route to the same destination – it impedes the proper exchange of question and answer between the interrogator and deponent. The issue of whether coaching a witness or interjecting speaking objections is proper has been laid to rest. Neither interpolations are proper. See Lau at *14-16, affirmatively citing to the rationale of Hall v. Clifton Precision, 150 F.R.D. 525, 530 (E.D. Pa. 1993) and reiterating the protections and procedures set forth in Pa.R.C.P. 4016(b):

While counsel may object at deposition to identify an issue as a transcript place-marker, the objection is not to be an instructional speaking objection nor an instruction not to answer. As set forth earlier in this Opinion, this Court has detailed the objections by Defense Counsel. It is clear all the objections were speaking objections. It is not necessary for objecting counsel to make such lengthy and detailed objections.

Lau at *15.

This Court has reviewed the subject video deposition and transcript in toto. This Court finds that the Plaintiffs’ Counsel improperly injected himself into the proper exchange of question and answer.

²¹ As this Court acknowledged on the record:

And if I were [Defense counsel], and I were doing this deposition, I would have done it a little differently. Okay. I would have started with the questions on, what did you tell Dr. Werner about any conditions such as addiction, mental health, whatever. But, [Plaintiffs’ counsel], let’s make sure we’re clear here. I specifically say in the argument on the [August] 30th [2021] that isn’t going to preclude them from asking about these conditions that she told them about, okay, because it may be that they catch the Plaintiff, you know, and I think the example that I cite is, I says, look, I don’t know what the Plaintiff’s going to say. But if the Plaintiff denies there’s any issues at all, then that may be for impeachment purposes. Okay. So -- now, look. I agree with you, the order maybe could’ve been clearer that aside from asking Werner about mental health and addiction issues as to what Dina told them. I clearly meant by that also that as to things that aren’t covered specifically by . . . the acts in question when we argued the motion: 50 PSE, Section 7111, the Mental Health Procedures Act, Title 42 PA CSA, Section 5944, and Title 71 PS Section 1690.108 which deals on confidentiality regarding addiction. Okay. All this other stuff obviously they can ask on.

(5/20/22 H.T. at p. 36, l. 9 to p. 37, l. 14).

²² With the value of added hindsight, this proper process of redirecting the witness after opposing counsel’s conclusion of examining the deponent witness – and not obtrusively objecting to the examination – supports this Court’s evaluation that Plaintiff DT’s counsel’s objections were frivolous during the initial April 29, 2022 deposition. The objections were unnecessary and as a result caused the expenditure of significant counsel and court time to address the superfluous issues in motions practice. In terms of economic efficiencies and time consumption, a relative comparison of the approximate five hours consumed in the properly resumed September 22, 2022 deposition pales in comparison to the inordinate counsel and Court time and resources consumed as a result of meritless “lack of foundation” objections and the forewarned foreshadowing instruction by Plaintiff DT’s counsel that if said inquiry of Plaintiff DT were to continue that the deposition would be halted. To be clear, this Court does not and will not condone the use of “lack of foundation” objections but for the proper use as outlined herein. The “lack of foundation” objection is no longer an acceptable lawyer’s tactic at a discovery deposition to obstruct or deflect proper examination of the deponent witness.

²³ Pa.R.C.P. No. 4011, Limitation of Scope of Discovery:

No discovery, including discovery of electronically stored information, shall be permitted which

- (a) is sought in bad faith;
- (b) would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party;
- (c) is beyond the scope of discovery as set forth in Rules 4003.1 through 4003.6;
- (d) is prohibited by any law barring disclosure of mediation communications and mediation documents; or
- (e) would require the making of an unreasonable investigation by the deponent or any party or witness.

²⁴ UPMC Defendant’s Counsel’s detailed billing statement contained numerous categorized time entries. By example, the first entry dated May 2, 2022 – index #19159876 includes 3.10 hours at a billable rate of \$215.00 per hour totaling \$666.50. For this entry, there are four items identified in the “Time Details” section. Three of the four items are awardable. The fourth item is not awardable as it involves a meeting or conference with other UPMC attorneys. As there is no time allotment for each of the items, this Court equally weighted each item. Three awardable items of the four total billings constitutes seventy-five percent (75%) thus this Court awarded \$499.88 (\$666.50 x .75 = \$499.88). The Court followed this process for all entries.

²⁵ A variation of this common apocryphal quip may be ascribed to Justice Felix Frankfurter’s, “wisdom too often never comes, and so one ought not to reject it merely because it comes late.” *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter J., dissenting); or Sir Arthur Conan Doyle’s “it is better to learn wisdom late than never to learn it at all” from *The Man with the Twisted Lip* as originally published in *The Strand Magazine* (1891) and republished and collected in *The Adventures of Sherlock Holmes* (1892).

