

presented to Brown University Health Services in May of 2006. At that time, Quest provided laboratory testing services at Brown University Health Services pursuant to a Professional Services Agreement.

On December 10, 2010, Brown filed a cross-complaint against Quest alleging negligence, breach of contract, indemnity, and contribution. Brown alleges that Quest was negligent in the provision of laboratory services to Ms. Hall and, furthermore, that Quest's negligence was a proximate cause of Ms. Hall's injuries. The underlying litigation was resolved in 2011. Brown settled the case for \$6.5 million and now seeks contribution from Quest.

This Court issued a scheduling order requiring the parties to disclose experts. Both Brown and Quest have served answers to interrogatories disclosing expert witnesses and are presently in the process of deposing each other's experts. Brown disclosed Daniel J. Sullivan, M.D. (Dr. Sullivan) as an expert witness in the field of internal medicine. In response, Quest disclosed Mark D. Aronson, M.D. (Dr. Aronson), who is also a specialist in internal medicine. Generally, both Dr. Sullivan and Dr. Aronson are expected to testify regarding whether Brown's physician's assistant, Rita Shiff (Ms. Shiff), performed her duties within the applicable standard of care.

Dr. Sullivan is a member of the Health Care Associates Practice Group and a member of the Department of Medicine in the Division of General Medicine at Beth Israel Deaconess Medical Center. Dr. Sullivan is also an Assistant Professor at Harvard Medical School. Dr. Aronson is also a member of the Health Care Associates Practice Group and the Vice Chair of the Department of Medicine and Interim Chief of the Division of General Medicine at Beth Israel Deaconess Medical Center. Dr. Aronson is a Full Professor of Medicine at Harvard

Medical School. Accordingly, Dr. Aronson holds certain positions at Beth Israel Deaconess Medical Center and Harvard Medical School superior to those held by Dr. Sullivan.

Dr. Sullivan was deposed by Quest on December 18, 2014. During the deposition, Quest's attorney, Mark Dolan (Mr. Dolan), inquired as to whether Dr. Sullivan disagreed with some of Dr. Aronson's medical opinions and conclusions. Brown's attorney, William Dailey (Mr. Dailey), objected to this line of questioning and instructed Dr. Sullivan not to answer. The pertinent portions of the deposition transcript read:

“Q: Okay. Now, the fourth paragraph says, ‘Doctor Aronson will testify that Ms. Hall’s history and signs and symptoms required further work-up.’ Do you see that?”

“A: I do.”

“Q: You disagree with that?”

“Mr. Dailey: Well, I’m gonna object and instruct the witness not to answer. It’s not for him to critique the expert testimony that may come from Doctor Aronson.”

....

“Q: Do you agree with the proposition that Ms. Hall’s history and signs and symptoms required further work-up? Do you agree with that proposition?”

“A: No.”

“Q: This continues, ‘Doctor Aronson will testify that this work-up, including but not limited to blood work, to a reasonable degree of medical certainty, would have revealed abnormal findings, including an abnormal white count and elevated creatinine.’ Do you see that?”

“A: I do.”

“Q: Do you agree with that?”

“Mr. Dailey: Objection. Again, I’ll instruct the witness not to answer.” Sullivan Dep. 126:5-128:4, Dec. 18, 2014.

II

Standard of Review

In granting or denying motions to compel, this Court has “broad discretion,” which must be guided by the principle that Rhode Island’s discovery rules “are liberal [and] designed to promote broad discovery among parties.” Colvin v. Lekas, 731 A.2d 718, 720 (R.I. 1999); Henderson v. Newport Cnty. Reg’l YMCA, 966 A.2d 1242, 1246 (R.I. 2009). This liberality notwithstanding, the discovery rules also empower the Court to restrict a discovery request on the grounds that it is “unduly burdensome” to the opposing party. Rule 26(b)(1), (c). If, on the other hand, a party fails to cooperate with legitimate discovery requests, the Court may, on motion from the discovering party, issue an order compelling the opposing party to respond. Rule 37(a).

Rule 26(b)(1) provides that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]” Rule 26(b)(1). With respect to the deposition of experts, Rule 26(b)(4)(A) provides that “[a] party may depose any person who has been identified as an expert expected to testify when the expert interrogatory has been responded to by the other party.” Rule 26(b)(4)(A).

Rule 30(c) sets forth the proper manner in which an attorney may object to a question during a deposition.

“All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings, shall be noted by the officer upon the record of the deposition, *but the examination shall proceed with the testimony being taken subject to the objections.*” Rule 30(c) (emphasis added).

Furthermore, Rule 30(d)(1) provides:

“[a] party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3).” Rule 30(d)(1) (emphasis added).

Accordingly, paragraph three states, in relevant part:

“[a]t any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the county where the deposition is being taken may order the officer or examining attorney conducting the examination to cease forthwith from taking the deposition or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c).” Rule 30(d)(3).

In Kelvey v. Coughlin, our Supreme Court had the opportunity to construe “[t]he language of Rules 26(b)(1) and 30(c) of the Superior Court Rules of Civil Procedure.” 625 A.2d 775, 776 (R.I. 1993). The Court held:

“[t]he language of the [the] [r]ules . . . is so clear and direct that there can be no question about its meaning. The only instance, we repeat, the *only* instance in which an attorney is justified in instructing a deponent not to answer is when the question calls for information that is privileged.” Id.; see also Cunningham v. Heard, 667 A.2d 537, 538 (R.I. 1995) (“[C]ounsel may not instruct a witness at a deposition not to answer unless the answer calls for information that is privileged.”).

Otherwise, the Court held, “the objection is stated, and the evidence objected to is taken subject to the objections.” Kelvey, 625 A.2d at 776.

Finally, Rule 37(a)(2) provides, in relevant part, that “[i]f a deponent fails to answer a question propounded or submitted under Rules 30 and 31 . . . the discovering party may move for an order compelling an answer, or a designation, or an order compelling production or inspection in accordance with the request.” Rule 37(a)(2). Furthermore, “[i]f the motion is granted . . . the court may . . . require the party or deponent whose conduct necessitated the motion or the party

or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees[.]” Rule 37(a)(4)(A).

III

Analysis

Citing the Kelvey holding, Quest argues that because the information sought is not privileged, it is entitled to cross-examine Dr. Sullivan with respect to the specifics of Dr. Aronson's opinions. In response, Brown argues 1) that the Motion is moot because Dr. Sullivan answered completely and without objection, 2) that Dr. Sullivan's opinion as to the credibility of Dr. Aronson's opinions and conclusions are outside the scope of discovery, and 3) that any testimony Dr. Sullivan may give relating to Dr. Aronson's opinions and conclusions would be inadmissible at trial. Brown, with respect to the second prong of its argument, alleges that “Attorney Dolan went out of his way to put Dr. Sullivan in a position where his testimony could potentially have some negative effect on his employment. (Brown's Mem. in Supp. of the Opp'n. to Quest's Mot. to Compel Dep. Test. (Brown's Mot.)). Accordingly, Brown requests that this Court find Mr. Dolan's line of questioning to be “unduly burdensome” or otherwise outside the scope of Rule 26(b)(1)(C). (Brown's Mot. 5).

A

Mootness

This Court disagrees that the Motion is moot. Mr. Dailey instructed Dr. Sullivan not to answer Mr. Dolan's questions regarding his opinion of Dr. Aronson's findings. Therefore, Quest has not had the opportunity to question Dr. Sullivan about Dr. Aronson's opinions and conclusions, and thus the Motion is not moot.

B

Scope of Discovery

Rule 26(b)(1) provides that “[p]arties may obtain discovery regarding any matter, not privileged, which is *relevant* to the subject matter involved in the pending action[.]” Rule 26(b)(1) (emphasis added). Our Supreme Court has given “the concept of relevancy, as it applies to discovery purposes, a liberal application and *the test to be applied is whether the material sought is relevant to the subject matter of the suit*, not whether it is relevant to the precise issues presented by the pleadings, hence it is broader than the rule governing relevancy of evidence adduced at a trial.” Borland v. Dunn, 113 R.I. 337, 341, 321 A.2d 96, 99 (1974) (emphasis added).

Here, Dr. Sullivan is expected to testify that Ms. Shiff acted in accordance with the applicable standard of care. Dr. Aronson, in contrast, is expected to testify that Ms. Shiff deviated from that same standard of care. Therefore, whether Dr. Sullivan agrees or disagrees with Dr. Aronson’s medical findings and conclusions is relevant to the subject matter of the suit. Accordingly, this Court finds that the line of questioning—regarding whether Dr. Sullivan agreed with Dr. Aronson’s findings—falls within the scope of the liberal discovery standard.

C

Admissibility at Trial

Rule 26(b)(1) specifically states that “[*i*]t 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.” Rule 26(b)(1) (emphasis added). As this Court has already detailed, Mr. Dolan’s line of questioning was relevant to the subject matter of the

suit. Accordingly, Brown's argument that such testimony may later be inadmissible at trial is of no moment.

D

The Kelvey Decision

Pursuant to our Supreme Court's decision in Kelvey, this Court finds that Brown's attorney, Mr. Dailey, was not justified in instructing Dr. Sullivan not to answer Mr. Dolan's questions. The only instance in which Mr. Dailey would have been justified in instructing Dr. Sullivan not to answer would have been if Mr. Dolan's questions called for information that was privileged. Kelvey, 625 A.2d at 776. Plainly, these questions did not. As the Kelvey Court noted, "[i]t is not the prerogative of counsel, but of the court to rule on objections. Indeed, if counsel were to rule on the propriety of questions, oral examination would be quickly reduced to an exasperating cycle of answerless inquiries and court orders." Id. (citing Shapiro v. Freeman, 38 F.R.D. 308, 311 (S.D.N.Y. 1965)).

Here, Brown never asserts that Mr. Dolan's line of questioning called for privileged information. Rather, the impetus of the objection stemmed from Mr. Dailey's efforts to shield Dr. Sullivan from having to directly disagree with his colleague's findings. Like the Court in Kelvey, this Court finds "[t]he harm caused by being required to take additional depositions of a witness who fails to answer a question based on an improperly asserted objection far exceeds the mere inconvenience of a witness having to answer a question which may not be admissible at the trial of the action." Kelvey, 625 A.2d at 777. Mr. Dailey was entitled to object to Mr. Dolan's line of questioning, but, pursuant to Rule 30(c), he should not have instructed Dr. Sullivan not to answer, but, rather allowed the deposition to "proceed with the testimony being taken subject to

the objection[.]” Rule 30(c). Accordingly, this Court finds no reason why Dr. Sullivan should not answer Mr. Dolan’s questions.

E

Second or Supplemental Deposition

Quest asks this Court to order that Dr. Sullivan be produced for deposition—at Quest’s counsel’s office in Providence—at Brown’s expense. See Malinou v. Miriam Hosp., 24 A.3d 497, 506 (R.I. 2011) (finding that “[t]he decision to impose a particular sanction is within the sound discretion of the trial court”). Because Brown’s improper objections are the catalyst behind the necessity of Dr. Sullivan’s second deposition, this Court orders that Brown arrange to have Dr. Sullivan deposed at Quest’s counsel’s office in Providence. Brown shall bear any additional expense that is required to produce Dr. Sullivan in Providence. See Flanagan v. Blair, 882 A.2d 569, 572-73 (R.I. 2005) (holding “Rule 37(b)(2) provides the court with a variety of sanctions that may be imposed on a party who has failed to comply with an order to provide discovery.”).

IV

Conclusion

For the reasons stated above, Quest’s Motion is granted. Brown shall make Dr. Sullivan available to be deposed at Quest’s counsel’s office in Providence. Brown shall bear the cost of the deposition, including the cost of the stenographer and Dr. Sullivan’s reasonable compensation. Counsel shall submit the appropriate order for entry.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Pauline R. Hall v. Rita Schiff, PA-C, et al.

CASE NO: PC 08-2420

COURT: Providence County Superior Court

DATE DECISION FILED: February 17, 2015

JUSTICE/MAGISTRATE: Gibney, P.J.

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