

series of changes to the procedures of the Board. Subsequently—and apparently as a direct result of those changes—Attorney Peter Petrarca (Mr. Petrarca) sustained several adverse decisions against his clients, and filed a complaint with the Rhode Island Ethics Commission against Ms. Harris on August 22, 2014. Id. at ¶ 3. Additionally, Mr. Petrarca filed suit in the Superior Court on October 8, 2014, seeking a preliminary injunction to compel Ms. Harris to recuse herself in all cases before the Board in which Mr. Petrarca represented a client due to the alleged conflict of interest that he argued existed. Id. at ¶ 4.

On October 28, 2014, the Superior Court denied Mr. Petrarca’s motion for a preliminary injunction, and his complaint was ultimately dismissed on March 31, 2015. Id. at ¶¶ 6-7. Furthermore, the Rhode Island Ethics Commission also dismissed Mr. Petrarca’s complaint against Ms. Harris on July 21, 2015. Id. at ¶ 9. As a result of the expenses incurred in defending against these matters, Ms. Harris avers that on April 7, 2015 she submitted a request with the City for indemnification of her legal expenses in accordance with G.L. 1956 § 45-15-16¹, but that her request was denied. Id. at ¶¶ 8, 10.

¹Sec. 45-15-16 reads in pertinent part:

“All town or city councils . . . shall, by ordinance or otherwise, indemnify any and all . . . officials, members of boards, agencies and commissions appointed by town councils . . . whether or not the . . . officials, or members are paid, from all loss, cost, expense, and damage, including legal fees and court costs, if any, arising out of any claim, action, compromise, settlement, or judgment by reason of any intentional tort or by reason of any alleged error or misstatement or action or omission, or neglect or violation of the rights of any person under any federal or state law, including misfeasance, malfeasance, or nonfeasance or any act, omission, or neglect contrary to any federal or state law which imposes personal liability on any . . . official, or member, if the . . . employee, official, or member, at the time of the intentional tort or act, omission or neglect, was acting within the scope of his or her official

Following the denial of her request—and apparently after settlement talks with the City were unsuccessful—on September 1, 2015 Ms. Harris filed a petition for a writ of mandamus with the Superior Court, seeking indemnification for her legal expenses (totaling \$17, 983) resulting from her defense against Mr. Petrarca’s claims.

Ms. Harris brought a motion for judgment on the pleadings before the Court on January 26, 2016. At that hearing, the Court denied Ms. Harris’ motion and further informed her that her petition seeking a writ of mandamus was improper. However, because the City conceded that Ms. Harris properly filed a claim with the City Council (pursuant to § 45-15-16), the Court allowed her leave to amend her pleadings to a complaint seeking damages pursuant to that statute. While Ms. Harris would eventually file an amended complaint, she continued to seek a writ of mandamus, despite the Court’s earlier ruling. Having already determined that a petition for a writ of mandamus was improper, the Court (on May 3, 2016) granted Defendants’ motion to dismiss the portion of her action seeking mandamus. As such, what remains before the Court is Ms. Harris’ complaint seeking damages pursuant to § 45-15-16.

duties or employment. The municipality or any fire district may decline to indemnify any . . . official, or member for any misstatement, error, act, omission, or neglect if it resulted from willful, wanton, or malicious conduct on the part of the . . . official, or member. The indemnity shall be provided by the city or town council or any fire district on a case by case basis or by ordinance of general application. The ordinance or agreement to indemnify shall include, among other things, the provision of legal counsel at the expense of the city or town and/or the reimbursement for attorneys’ fees and other expenses incurred in connection with the conduct of the defense, including payment of the judgment. . . .”

Ms. Harris originally began conducting the deposition of Mr. Zurier on February 23, 2016. See Pl.’s Mot. Compel ¶ 1, Feb. 25, 2016. At that time, counsel for Mr. Zurier suspended the deposition after conveying his belief that the questions being asked by Ms. Harris were inappropriate and not relevant to the merits of the instant action. Id. at ¶¶ 3, 6. Ms. Harris then moved to compel Mr. Zurier’s attendance for his continued deposition, and is seeking sanctions based on Defendants’ alleged bad faith tactics in suspending or otherwise interfering with Mr. Zurier’s deposition. At a hearing for this motion held on March 10, 2016, the Court sua sponte raised the possible issue of Mr. Zurier’s legislative immunity, and asked both parties for further briefing on this issue. See Hr’g Tr. 25; 38, Mar. 10, 2016.

The questions of legislative immunity and sanctions for suspending the deposition are the issues presently before the Court.

II

Standard of Review

A motion to compel is governed by Super. R. Civ. P. 37(a)(2).² “When a party or deponent refuses to answer a question, the proponent may apply to the court for an order compelling an answer.” Fremming v. Tansey, 626 A.2d 219, 220 (R.I. 1993) (internal citation omitted). “The burden is upon the party seeking the discovery to show that the ‘denial of production or inspection will result in an injustice or undue hardship.’ The

² Rule 37(a)(2) reads in pertinent part:

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

...

(2) *Motion.* If 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 . . .

determination of this issue is vested in the sound discretion of the trial justice, who should look at the facts and circumstances of each case in arriving at an ultimate conclusion.” Jordan v. Stop & Shop Companies, Inc., 558 A.2d 957, 958 (R.I. 1989) (internal citations omitted).

III

Analysis

In support of her motion to compel, Ms. Harris proffers several arguments. Initially, Ms. Harris avers that Mr. Zurier did not perform any legislative function during his involvement in this case, as he played a purely passive role with respect to her claims. Considering this, Ms. Harris argues that Mr. Zurier should be compelled to answer her deposition questions—specifically questions related to billing practices from his past employer, the law firm of Oliverio and Marcaccio, who represented Ms. Harris during the underlying ethics complaint filed against her.³ Additionally, Ms. Harris asserts that she should be entitled to confront Mr. Zurier with direct evidence she purportedly possesses that directly contradicts statements made by Mr. Zurier at his deposition—something she did not have the opportunity to do after the deposition was suspended. For their part, Defendants object to these arguments and contend that Ms. Harris’ motion to compel should be denied on the basis that Mr. Zurier is entitled to legislative immunity in this

³ Mr. Zurier’s attorney objected to such questions, contending that they had nothing to do with the merits of the case, and further that Mr. Zurier was not an expert witness and could not be required to answer questions regarding the appropriateness of a law firm’s billing practices. Thus, Mr. Zurier was instructed not to answer these questions at his deposition. See Zurier Dep. Tr. 47:12-25; 48:1-12, Feb. 23, 2016.

matter, because his only involvement in the case stems from his role as Chairman of the Providence City Council's Committee on Claims and Pending Suits.⁴

A

Legislative Immunity

The issue to be decided is whether the Court, in its discretion, should compel Defendants to make Mr. Zurier available for further deposition, or if he should be shielded from doing so because his position as Chairman of the Committee on Claims and Pending Suits entitles him to legislative immunity. In responding to this question, Ms. Harris contends that Mr. Zurier was not performing a legislative function when dealing with her claim and thus, is not entitled to immunity. Specifically, Ms. Harris points to statements made by Mr. Zurier at his deposition, where he explains that upon receiving Ms. Harris' claim for indemnification, he passed it on to the City Clerk, and then proceeded to await instruction from the City Solicitor's Office. See Zurier Dep. Tr. 12:5-17; 15:15-25, Feb. 23, 2016. Ms. Harris' claim, however, was never placed on the agenda of the Committee on Claims and Pending Suits. See id. at 20:8-13. Thus, Ms. Harris contends that Mr. Zurier never performed a legislative function in this matter and therefore, should be compelled to complete his deposition.

Conversely, Defendants contend that Mr. Zurier is in fact protected by the legislative immunity privilege and cannot be required to provide further testimony. They note that the legislative immunity privilege should be applied liberally, and as Chairman

⁴ Defendants also refute any possibility that Mr. Zurier has waived his right to legislative immunity by participating in his earlier deposition. See Holmes v. Farmer, 475 A.2d 976, 984 (R.I. 1984) (where the Rhode Island Supreme Court determined that the privilege of legislative immunity could not be waived even if a party has already participated in an earlier deposition). This argument has not been asserted by Ms. Harris, however, so the Court need not address it further.

of the Committee on Pending Claims and Suits, Mr. Zurier’s duties to “advise (sic) and consent” on the compromise of claims make his actions legislative. See Providence Code of Ordinances § 21-18. Moreover, Defendants argue that the Rhode Island Supreme Court has applied the legislative immunity doctrine to members of the General Assembly’s Committee on Accounts and Claims, whose activities are substantially similar to those of the Providence City Council’s Committee on Claims and Pending Suits. See Marra v. O’Leary, 652 A.2d 974, 975 (R.I. 1995). Considering this, Defendants argue that Mr. Zurier is entitled to legislative immunity.

The doctrine of legislative immunity in Rhode Island is derived from the speech in debate clause in article 6, section 5 of the Rhode Island Constitution, which reads in pertinent part: “[f]or any speech in debate in either house, no member shall be questioned in any other place.” In interpreting that clause, the Supreme Court has determined that “[inquiry] by the court into the actions or motivations of the legislators in proposing, passing, or voting upon a particular piece of legislation falls clearly within the most basic elements of legislative privilege.” Marra, 652 A.2d at 975 (quoting Holmes, 475 A.2d at 984.) “. . . [T]he speech in debate clause limits judicial inquiry into words or actions that are clearly a part of the legislative process. The scope of the privilege does not extend to actions by legislators outside the legislative process.” Id. at 983. Furthermore, the Rhode Island Supreme Court has recognized that municipal legislators are entitled to absolute legislative immunity. See Maynard v. Beck, 741 A.2d 866 (R.I. 1999) (following Bogan v. Scott-Harris, 523 U.S. 44 (1998)).⁵

⁵ The Court in Maynard also stated that: “[w]e also observe that the doctrine of legislative immunity is not reserved solely for legislators, and that ‘officials outside the legislative

Accordingly, the Court must determine whether Mr. Zurier's conduct in the underlying matter was legislative, and if he should thus be afforded legislative immunity. "To determine whether challenged conduct is legislative, the Supreme Court stated, a court must consider the nature of the acts in question, rather than the motive or intent of the official performing them." Maynard, 741 A.2d at 870 (quoting Bogan, 523 U.S. at 54). In Bogan, the respondent was the administrator of the Department of Health and Human Services for the City of Fall River, Massachusetts, whose position was later eliminated by a city ordinance. 523 U.S. at 47. The United States Supreme Court concluded that absolute legislative immunity applied to the municipal defendants' actions, and that such actions were legislative because they "... reflected a discretionary, policymaking decision implicating the city's budgetary priorities and its services to constituents. . . ." Id. Additionally, the Court in Maynard recognized that many courts have utilized a two-part test in order to determine whether an action was legislative as opposed to administrative or executive. Specifically, the Court acknowledged the standard set forth by the Third Circuit, which states that "[t]o be legislative, the act must be (1) substantively legislative, such as 'policy-making of a general purpose' or 'line-drawing'; and (2) procedurally legislative, such that it is 'passed by means of established legislative procedures.'" Maynard, 741 A.2d at 871 (quoting Carver v. Foerster, 102 F.3d 96 (3d Cir. 1996)).

There is no question that Mr. Zurier is entitled to legislative immunity as a municipal official under the circumstances present here. Mr. Zurier only became involved in this action as a result of his position as Chairman of the Committee on Claims and

branch are entitled to legislative immunity when they perform legislative functions." 741 A.2d at 870.

Pending Suits. As part of his responsibilities stemming from this position, Mr. Zurier forwarded Ms. Harris' claim to the City Clerk upon receiving it, and then awaited further instruction. See Zurier Dep. Tr. 20:8-12, Feb. 23, 2016. While Mr. Zurier acknowledged that Ms. Harris' claim was never placed on the agenda of the Committee on Claims and Pending Suits, his action of forwarding the claim to the City Clerk was only undertaken pursuant to his legislative responsibilities as Chairman, and was thus part of the legislative process. See id.; see also Marra, 652 A.2d at 983. Therefore, Mr. Zurier's actions or lack of action were legislative in nature, regardless of the subsequent travel of Ms. Harris' claim. See Maynard, 741 A.2d at 870. Failure to act on a legislative matter for any reason or for no reason is still a legislative act and a litigant cannot inquire into the motivation for inaction or passivity. If he had not been Chair of the Committee, he never would have had any involvement in this matter. As was the case with the members of the Rhode Island General Assembly in Marra, the allegations levied against Mr. Zurier involve him solely in his legislative capacity. 652 A.2d at 975. Thus, he is entitled to the same legislative immunity as the defendants there.

The Court finds that Mr. Zurier is entitled to legislative immunity in the instant matter and cannot be required to be further deposed.⁶

⁶ Regarding Ms. Harris' contention that further deposition of Mr. Zurier is necessary to obtain billing practices information concerning Mr. Zurier's former employer, Oliverio and Marcaccio, the Court feels that such information can be attained by Ms. Harris through alternative means of discovery if necessary, and thus deposing Mr. Zurier on these matters is not required.

B

Sanctions

In addition to seeking an order from the Court compelling Mr. Zurier to appear for continued deposition, Ms. Harris has also requested sanctions from the Court due to the decision of Mr. Zurier's attorney to suspend his deposition on what she contends were improper grounds. "The standard used to determine whether costs or sanctions should be imposed on counsel-seeking-discovery requests is whether the request was substantially justified. The trial court may award attorney's fees 'unless the court finds that opposition was substantially justified or that other circumstances make an award of expenses unjust.' The rule serves to streamline the discovery process. 'Because baseless refusals can completely disrupt the deposition process and because groundless requests for orders to answer constitute harassment and abuse of discovery, the court may order offending parties or counsel to pay expenses. In practice this sanction has been reserved for outrageous conduct.'" See Fremming, 626 A.2d at 220 (quoting Reporter's Notes to Super. R. Civ. P. 37(a)). Moreover, the Rhode Island Supreme Court "shall reverse a trial justice's decision to impose sanctions only upon a showing of abuse of discretion." Limoges v. Eats Restaurant, 621 A.2d 188, 190 (R.I. 1993). "The exercise of a judge's discretion to issue sanctions involves a rational approach to all the facts. It 'requires a sound judicial judgment made in the interests of justice and fair play, and may not be the subject of whim or caprice or fortuitous choice.'" Fremming, 626 A.2d at 220 (internal citations omitted).

Ms. Harris looks to Kelvey v. Coughlin, 625 A.2d 775 (R.I. 1993) to support her contention that Mr. Zurier's attorney's actions violated the generally applicable rules of

conduct at depositions. In Kelvey, the Court set out five conditions applicable in the deposition setting:

- “1. Counsel for the deponent shall refrain from gratuitous comments and directing the deponent in regard to times, dates, documents, testimony, and the like.
- “2. Counsel shall refrain from cuing the deponent by objecting in any manner other than stating an objection for the record followed by a word or two describing the legal basis for the objection.
- “3. Counsel shall refrain from directing the deponent not to answer any questions submitted unless the question calls for privileged information.
- “4. Counsel shall refrain from dialogue on the record during the course of the deposition.
- “5. If counsel for any party or person given notice of the deposition believes that these conditions are not being adhered to, that counsel may call for suspension of the deposition and then immediately apply to the court in which the case is pending, or the court in which the case will be brought, for an immediate ruling and remedy. Where appropriate, sanctions should be considered.” 625 A.2d at 777.

Additionally, the Court in Kelvey emphasized that “[t]he 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.” 625 A.2d at 776 (emphasis in original). “It 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.⁷

⁷ The Court in Kelvey also looked to an explanation from one Massachusetts practitioner that is persuasive here: “[a] practical problem arises at the motion level, before the Superior Court judge. The moving party contends that the opposing counsel improperly instructed the witness not to answer. The opposing counsel claims that the questions were improper, and should not have to be answered. The judge’s first instinct is to review the questions, and make his or her own decision on whether they were proper questions. At this point, the judge has already missed the boat! Unless the party opposing the motion to compel is claiming that the question called for ‘privileged’ information, the judge should

Ms. Harris asserts that Mr. Zurier’s counsel violated all five of the conditions laid out in Kelvey, and therefore the Court in its discretion should impose sanctions on Defendants—specifically for improperly instructing Mr. Zurier not to answer questions that were not privileged and ultimately suspending his deposition. Indeed, the Court agrees that some of the conduct by Mr. Zurier’s attorney at the deposition was inappropriate, most pertinently his repeated instructions to Mr. Zurier not to answer questions that he felt were attempting to elicit expert testimony. Accordingly, the Court finds that the action of suspending Mr. Zurier’s deposition for such reasoning was not substantially justified. See Fremming, 626 A.2d at 220. In fact, Mr. Zurier’s attorney even acknowledged at the deposition that Ms. Harris’ questions were not seeking privileged information, which under Kelvey is the *only* proper basis for suspending a deposition. See Zurier Dep. Tr. 51:2-7, Feb. 23, 2016.

Considering this, the Court agrees that some measure of sanctions is appropriate in this case. However, when considering an appropriate sanction, the Court is cognizant of the fact that due to the contentious nature exhibited at the depositions in this matter thus far, it has already seen fit to appoint a Special Master to supervise subsequent depositions and ensure that they are completed in a reasonable manner.⁸ Furthermore, the Court ordered the City to cover all expenses associated with appointing the Special Master. See Super. Ct. Order, Apr. 15, 2016. Bearing that in mind—and also considering

not look at the question. When the judge undertakes to examine the propriety of the question, he or she immediately renders nugatory the rule’s mandate, “[t]he evidence objected to shall be taken subject to the objections.” Ned C. Lofton, Deposition Witnesses Must Answer Questions, 21 M.L.W. 2043, 2059 (Mar. 8, 1993) (quoting Mass. R. Civ. P. 30(c)).

⁸ On April 15, 2016, the Court appointed Attorney Jack Boland of Reynolds, DeMarco & Boland as Special Master in this case.

that the issue of imposing appropriate sanctions is a discretionary action of the Court—the Court believes that its Order requiring the City to pay for the services of the Special Master appropriately remedies Mr. Zurier’s attorney’s indiscretions at his deposition. See Fremming, 626 A.2d at 220. Therefore, the Court does not see fit to impose any additional sanctions on Defendants at this time.

IV

Conclusion

Upon consideration of the parties’ arguments, this Court finds that Mr. Zurier is entitled to legislative immunity under the facts of this case. Additionally, the Court at this time does not believe further sanctions on Defendants are necessary given that it has already ordered the City to cover the expenses associated with hiring a Special Master. Accordingly, Ms. Harris’ motion to compel further deposition of Mr. Zurier is denied, and no further sanctions will be imposed on Defendants at this time.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Johanna Harris v. Jeffrey Dana, et al.

CASE NO: PC 2015-3821

COURT: Providence County Superior Court

DATE DECISION FILED: August 12, 2016

JUSTICE/MAGISTRATE: Licht, J.

ATTORNEYS:

For Plaintiff: Johanna Harris, *Pro Se*

For Defendant: Dennis E. Carley, Esq.; James D. Cullen, Esq.