STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: November 1, 2018]

PATRICIA NOONAN, individually and in her capacity as EXECUTRIX of and on behalf of the beneficiaries of THE ESTATE OF WILLIAM J. NOONAN, LINDA BYRNE, TERRI PARE, KAREN LECAM, AND STEVEN NOONAN,	:	
Plaintiffs,	:	
VS.	:	**C.A. No. PC-2016-4767**
RHODE ISLAND HOSPITAL, BARRY SHARAF, M.D., PHILIP STOCKWELL, M.D., NAZIA KHAN, M.D., PETER B. RINTELS, M.D., and SUNDARESAN T. SAMBANDAM, M.D.,	:	
Defendants.	:	

DECISION

LANPHEAR, J. Before the Court is the Plaintiffs' Motion to Compel Deposition Testimony of Defendant Peter B. Rintels, M.D. This matter came on for hearing on September 27, 2018. Jurisdiction is pursuant to Super. R. Civ. P. 37(a).

I

Facts and Travel

On October 12, 2016, the wife and children (Plaintiffs) of William J. Noonan filed a medical malpractice action against Rhode Island Hospital and five doctors involved in the care and treatment of Mr. Noonan. Plaintiffs allege that as a result of Defendants' negligence, Mr. Noonan was prescribed an anti-coagulant drug in error, causing his sudden death. Peter B. Rintels, M.D. (Dr. Rintels), a named defendant, was Mr. Noonan's hematologist during the events that allegedly caused his death. During a deposition of Dr. Rintels on May 21, 2018,

Plaintiffs' attorney asked Dr. Rintels several questions concerning the medical treatment of Mr. Noonan, and his counsel instructed him not to answer. Plaintiffs now move to compel Dr. Rintels' deposition testimony.

II

Analysis

Plaintiffs assert that this Court should compel Dr. Rintels to answer counsel's deposition questions because the only instance in which a deponent may refuse to answer a deposition question is when doing so would require the disclosure of privileged information. Plaintiffs contend that the questions are related to Dr. Rintels' role and knowledge in relation to Mr. Noonan's care and treatment. In response, Dr. Rintels avers that he should not be required to answer because Plaintiffs' counsel was improperly attempting to have Dr. Rintels provide expert testimony as to the standard of care and the possible breach of that standard.

According to Super. R. Civ. P. 30(c), any objections made during an oral deposition should be noted by the stenographer; however, "the examination shall proceed with the testimony being taken subject to the objections." Additionally, counsel is only permitted to instruct a deponent not to answer "when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a [specified type of] motion." Super. R. Civ. P. 30(d)(1); *see also* Super. R. Civ. P. 26(b)(1) (providing that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action").

In *Kelvey v. Coughlin*, 625 A.2d 775, 776-77 (R.I. 1993), our high court opined on the need for witnesses to answer deposition questions. The trial justice granted the plaintiff's request to redepose the defendant after the defendant's counsel made "improper comments,

objections, and instructions" and the Supreme Court affirmed. *Id.* at 775. The high court pressed for attorneys to allow deponents to answer, unless the question seeks a matter protected by privilege, and to allow the deposition to proceed to its conclusion. *Id*. at 776.

In *Plante v. Stack*, 109 A.3d 846 (R.I. 2015), the *Kelvey* precedent was challenged when a *pro hac vice* attorney stretched our Supreme Court's patience to its limits. The case involved a negligence action brought by a plaintiff who was left permanently disabled as a result of a collision with a defendant who was driving while intoxicated. *Id.* at 849. In a nothing-barred deposition of the plaintiff, opposing counsel inquired of romantic relationships, sexual history and religious beliefs. *Id.* at 850. He asked plaintiffs' parents to explain the specific reasons for their divorce, and asked the father to describe who his ex-wife was living with and her present romantic relationship. *Id.* at 850-51. As if those inquiries did not polarize the plaintiff sufficiently, counsel then wreaked havoc with plaintiff's physicians—asking hypothetical questions and treating them as retained experts. *Id.* at 851. Not surprisingly, the hearing justice revoked counsel's *pro hac vice* status. *Id.* at 852.

The high court reversed in a split decision finding the attorney's behavior did not warrant such severe punishment. *Id.* at 846, 860. Referencing Professor Kent's time-honored rationale, the court emphasized that opposing counsel should only instruct his or her client not to answer a deposition question when the information is privileged.[1] *Id.* at 853-54. *See* 1 Robert B. Kent et al., *Rhode Island Civil Practice* § 30:8, V-47, V-48 (West 2006). Fortunately, such callous interrogations are a rarity here. Scorched earth tactics are discouraged by the professionals in the Rhode Island bar, and common decency is embedded in the court's construction of its civil rules. *See* Rules of Prof'l Conduct, App. I, B. Lawyer's Obligations to Opposing Parties and Their

[1] *But see* Chief Justice Suttell's dissent, suggesting that, if the question is solely posed for harassment, a refusal to answer may be justified. *Plante*, 109 A.3d at 863.

Counsel ¶ 17 ("I will take depositions only when actually needed. I will not take depositions for the purposes of harassment or other improper purpose.").

Depositions are unique proceedings. Although witnesses provide testimony under oath, no judicial officer is present to rule on objections and limit the inquiry. Various states handle problematic inquiries in different matters. *See* W. J. Dunn, *Construction and effect of Rules 30(b), (d), 31(d), or the Federal Rules of Civil Procedure, and similar state statutes and rules, relating to preventing, limiting, or terminating the taking of depositions*, 70 A.L.R.2d 685 (1960). In the hope that depositions will proceed without interruption or extensive judicial intervention, our high court has continued to rely on *Kelvey* as the bedrock rule. *See Plante*, 109 A.3d at 854. As restated in *Plante*:

> "[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. *Kelvey*, 625 A.2d at 776. When an attorney instructs a deponent not to answer certain questions, that attorney becomes an arbiter, a situation we have consistently sought to avoid." *Id.* (internal quotation marks omitted).

Simply put, the witness and counsel should get through the deposition, answer the questions, pose objections on the record, stop the disclosure of privileged information, and proceed respectfully.

In the medical malpractice case at bar, Plaintiffs' counsel deposed Dr. Rintels, a defendant and <u>treating</u> physician. To the Court's knowledge, he was not identified as an expert witness, but was being deposed as a treatment provider, fact witness and defendant. As such, he is called upon to testify not only to the facts, but also to his understanding of the standard of care at the time. Here, his understanding of the effects and complications of medicines and the treatment provided to Mr. Noonan are particularly important. As an adverse party, deference

should be given to the examiner so that technical or grammatical errors in questions do not impede the witness from cooperating.

Several deposition questions were objected to and not answered. The Court will review each question individually.

Question 1. "Would you agree with me that Plavix would be contraindicated in a patient with a low platelet count"? Dr. Rintels Dep. 93:2-4.

Defense counsel suggests that this was an effort to elicit an expert opinion from a doctor whom the Plaintiffs did not retain as an expert, as Dr. Rintels never ordered Plavix. Nevertheless, Dr. Rintels was a treating physician, and his scope of knowledge—now and at the time of treatment—is clearly relevant. Moreover, the inquiry is not asking for privileged material. *See Menard v. Blazar*, 669 A.2d 1160, 1162 (R.I. 1996) (finding that no privilege existed regarding a defendant physician's opinion regarding the standard of care in a medical malpractice suit). Depending on his answer, a variety of other lines of inquiry may have followed, such as: whether Dr. Rintels knew Plavix was prescribed, when he learned of it, whether he would have recommended Plavix, whether he attempted to stop the Plavix, whether he communicated with other treatment providers, and his reasons for doing so or not doing so.

While the identical questions may have been objectionable if posed to a non-treating expert, Dr. Rintels was a treating doctor and defendant. His knowledge, actions and inactions are key. The case is clearly distinct from *Ondis v. Pion*, 497 A.2d 13, 18 (R.I. 1985) (in which the court held that a physician who treated the plaintiff's injuries but was not a defendant in the case could not be compelled to give an opinion as to the plaintiff's medical prognosis). Here, there is no harm in requiring the defendant doctor to explain his knowledge and scope of treatment.

Question 2. "Do you have an understanding as to whether or not Plavix would be contraindicated in your patient, Mr. Noonan"? Dr. Rintels Dep. 97:1-2.

Presumably, counsel was inquiring about Dr. Rintels' knowledge at the time he was treating Mr. Noonan, as Mr. Noonan passed within days of the treatment. Defense counsel again instructed Dr. Rintels not to answer, which was improper for all of the reasons set forth above—Dr. Rintels was not retained as an expert and the information was not privileged. Instead, the inquiring attorney was unable to determine what standard of care Dr. Rintels was following.

Defense counsel cites *Ondis* to justify the refusal to allow his client to answer. In *Ondis*, which involved a personal injury action arising from a motor vehicle collision, a plastic surgeon that treated the plaintiff's injuries was subpoenaed to give testimony at trial. *Id.* at 13-14. The surgeon was asked to testify concerning the scope of future treatment and the surgeon voluntarily declined. *Id.* at 18. The high court limited the scope of his testimony to the facts concerning "the extent of the plaintiff's injuries that he had observed and treated." *See id.* (holding that an expert who had not been retained as such "could not be compelled to give opinion testimony against his will."). In the immediate case, Dr. Rintels' actions and knowledge are essential as he is alleged to be medically negligent in treating Mr. Noonan. To bar Plaintiffs from obtaining this information would leave Plaintiffs to shoot in the dark at trial.

Question 3. "Had you been aware that during the course of a cardiac catheterization your patient would be administered Plavix, would you in treating that patient have agreed to that treatment"? Dr. Rintels Dep. 98:10-13.

Dr. Rintels' counsel objected, instructed his client not to answer, and Dr. Rintels complied. Dr. Rintels' counsel noted that the inquiry was a hypothetical. This Court agrees that the question was a hypothetical, but also notes that the examining attorney had no alternative but to ask a hypothetical—the prior objections deprived him from building a factual predicate to inquire on this line with any concreteness. Hamstrung, he was left to ask hypotheticals.

This question illustrates the advantage of having questions answered with objections determined later, as required by Kelvey, 625 A.2d at 776-77. To do otherwise would force piecemeal depositions at great inconvenience to counsel and the deponent. *Id.* at 777.

The Court's concern is heightened as counsel not only objected, but instructed the doctor not to answer these questions. *See* Dr. Rintels Dep. 93:10-12; 97:3-4; 98:14-15. Defense counsel even instructed the interrogating counsel to continue on with the deposition "save for the questions that we have a dispute over" because "[he did] not intend to bring the witness back . . . ." *Id.* 95:20-22. This effectively forced the interrogating attorney to continue on, in fear that there would be no other chance. Counsel then asked questions without knowing how or why Dr. Rintels acted, or failed to act, at the time of the alleged negligence. The doctor's attorney "[became the] arbiter" ruling on objections. *Plante*, 109 A.3d at 854. That was unfair. The question was not privileged. There was no irreparable harm that would have resulted from an answer. The Court could have barred the use of objectionable inquiries at trial. Instead, Plaintiffs' counsel was left to eventually recess the deposition. Accordingly, when and if Dr. Rintels' deposition is reconvened, Dr. Rintels shall answer questions and counsel for Dr. Rintels shall bear the expense of the stenographer's first hour. By this, the Court is not intending to limit the duration of the deposition.

IV

Conclusion

Instructing a client not to answer does not create an impervious shield for the deponent. The deponent had no privilege to preserve and was not being harassed. A defendant was asked his knowledge of a field of medicine at the time of his treatment of Mr. Noonan. He was

compelled to answer.[2] Presumably, he would then have been asked what he did or did not do vis-à-vis the standard of care. As stated in *Kelvey*, 625 A.2d at 776, and echoed in *Plante*, 109 A.3d at 854, "[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."

For the reasons stated above, Plaintiffs' Motion to Compel Dr. Rintels' Deposition Testimony is granted.

Counsel shall prepare an appropriate order for entry.

[2] While this Court suggests that an instruction may be appropriate where there is clear harassment, such improper conduct was not alleged or established here.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Patricia Noonan, et al. v. Rhode Island Hospital, et al.
CASE NO:	PC-2016-4767
COURT:	Providence Superior Court
DATE DECISION FILED:	November 1, 2018
JUSTICE/MAGISTRATE:	Lanphear, J.

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