SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DANIEL COHEN, *et al.*	:	
	:	
Plaintiffs,	:	
	:	
v.	:	**Civil Action No.: 2018 CA 006284 M**
	:	**Judge Florence Y. Pan**
MEDSTAR WASHINGTON HOSPITAL CENTER	:	**Next Event: December 20, 2019, 11:00am Close of Discovery and Status Conference**
	:	
Defendant.	:	
	:	

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SANCTIONS RELATING TO DEFENDANT'S RULE 30(B)(6) DEPOSITION

In response to plaintiffs' detailed documentation of repeated and flagrant misconduct at the defendant MWHC's 30(b)(6) deposition, the defendant files an opposition brief that does little more than repeat false and misleading statements already shown to be wrong. We respond as briefly as possible:

1. Reasonableness of defendant's efforts to identify the "curbside" radiologist

MWHC tries to justify its radiology chief's failure to ask a single radiologist in his department about Mr. Cohen's imaging study by saying it was "not likely to result in the radiologist's identification" and that to actually question any of the radiologists would be "unduly burdensome." (Opp. Br. at ¶ 4, ¶ 5.) Yet this was the gist of the defendant's motion for protective order, which it lost. Its persistent refusal to take any investigative steps justifies an inference that it does not want to know the answer.

2. Assertion that the corporate spokesman was not required to give "personal opinion" about what is on the MRI and was not the right person to address it

MWHC fails to address the caselaw showing there is no privilege allowing a medical witness to refuse to answer medical questions, and similarly no privilege for a corporate

spokesperson to refuse to give opinion answers. Instead, it simply repeats the position its counsel took in the deposition, namely, that the hospital was entitled to say that its position on the MRI was "whatever our experts say," even when the experts have not addressed a particular matter. The hospital provides no support in the rules or caselaw that its unorthodox proposal during the deposition – that plaintiff's counsel should provide questions to the witness, take a timeout, let the witness go talk to the expert, and then return with an answer – is anything other than a violation of Rule 30(c)(1)'s requirement that testimony at a deposition be taken in the same way as at trial. (See discussion in our opening brief at p. 20.) Like any other party to a lawsuit, MWHC must produce a witness who can answer cross-examination questions himself, not take a timeout to get the answer from someone else.

MWHC also quotes its radiology chief's testimony: "I am not the expert on imaging of the pelvis." (Opp. Br. at ¶ 8.) Having identified MWHC's chief of radiology as a suitable spokesperson to answer plaintiff's questions about how its curbside radiologist would have interpreted the MRI study, and about how it now interprets the MRI, MWHC cannot complain that it picked the wrong person to answer the questions. MWHC also is silent about why it blocked the witness from answering plaintiff counsel's next question about whether the witness was competent to read a pelvic MRI. Dep. 80.19-80.22. This is further addressed in our opening brief at p. 19.

3. "Altered imaging" and "female pelvis"

In ¶ 11 of its brief, MWHC repeats its accusations that plaintiff's counsel had improperly "altered the imaging" and tried to show the witness a female pelvis. This is the only place in its brief where it tries to justify instructing the witness not to answer. But its premise is already proven false. At pages 27-31 of our opening brief and exhibits 9 and 10, we showed that there

was no image alteration and that "female pelvis" was embedded in the metadata of Mr. Cohen's MRI study as the name of the technical protocol used by the technicians who performed the study. We also showed there was no merit to defense counsel's accusation during the deposition that plaintiff's counsel was violating HIPAA privacy rules by showing the witness a list of patient names to prove that this study was Mr. Cohen's. (Opening br. at pp. 30-31.) The hospital's counsel also could have checked in with their own radiology expert witness, Dr. Donald Mitchell, who would have confirmed, as he did at a deposition this week, that the images shown to Dr. Jelinek were Mr. Cohen's, were not altered, and that "female pelvis" in the metadata refers to the protocol used for the study. When MWHC simply repeats its false and baseless accusations without addressing our evidence, it shows that it does not feel bound by the ordinary rules of civil procedure.

4. "It would take hours of study"

Another excuse for not looking at the actual imaging in the 30(b)(6) deposition was that it would take hours to figure out this particular study. (Opp. Br. at ¶ 10 and 12.) This objection should have been raised in the motion for protective order. For MWHC to say now that its "designee should not be forced to endure hours of cross-examination questions about nuanced MRI imaging" (br. at ¶ 12) is nothing more than an effort to relitigate a motion that it lost. On the merits, it is also specious. Topic No. 6 of the notice of deposition called for MWHC to testify about what its radiologist would have concluded in the "curbside" consultation. How could that take hours of study to determine? Presumably it should require little more time than the curbside itself must have taken.

5. "Plaintiffs fail to identify any shortfall in the information obtained." (Opp. Br. at ¶ 14.)

Our opening brief identified numerous examples where inquiry was cut short or the witness was steered by improper coaching to sidestep our questions. We counted 38 instances of improper coaching/speaking objections and 25 instances of improper instructions to not answer the question. (See opening brief at p. 21 and exhibit 1, annotated transcript.) This occurred not only with respect to the details of the MRI study, but also concerning Dr. Jelinek's competence to interpret a pelvic MRI (opening br. at p. 19) and the key question of the degree of diligence he would have expected his radiologist to have exercised (opening br. at pp. 37-38.) Those are only examples. On this last example, for the court to appreciate the flagrant nature of the coaching and the obstruction of the proper course of the deposition, we suggest viewing the video (exhibit 2 of our opening brief) at deposition transcript pp. 108-113. The court will see defense counsel pushing documents at the witness in the middle of plaintiff counsel's questioning and giving her own version of what she wanted the answer to be.

6. Reopening Dr. Hwang's deposition and producing the entire audit trail

MWHC again fails to address the real issue. Two documents relevant to Dr. Hwang's delivery of the MRI study to the radiology department and his curbside review were withheld until after his deposition. MWHC now gives no reason for why it did that; it merely asserts that he has nothing to say on these documents. (Opp. Br. at ¶ 16.) Plaintiffs have the right to make their own determination of that. As for the redactions on the audit trail document, the defendant says "the court ruled on the scope of the audit trail." Id. Not true. The court never gave MWHC permission to make its extensive redactions.

7. MWHC's silence on its many violations of the basic rules for depositions

MWHC asks the Court to deny the motion "in its entirety." Yet the defendant makes no effort to acknowledge, much less justify, the many instances by defense counsel (and some by the witness himself) in which the plain textual mandates of Rule 30(c)(1) and Rule 30(c)(2) were violated. In fact, the rules themselves make no appearance in the defendant's brief. Do the rules bar defense counsel from coaching, testifying for the witness, blocking questions, hurling baseless accusations of impropriety against plaintiff's counsel, and other misconduct documented to have happened dozens of times during the deposition? We believe they do. This court can answer that question with clarity by issuing sanctions appropriate to the offense.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2019 the foregoing was served on the following *via* the Court's electronic filing system:

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