

**STATE OF MINNESOTA**  
**COUNTY OF HENNEPIN**

**WRONGFUL DEATH**  
**DISTRICT COURT**  
**FOURTH JUDICIAL DISTRICT**

Jay Landy, as trustee for the next-of-kin  
of Dorothy Landy,

Court File Number: WD 04-18960

Plaintiff,

vs.

Sholom Home West, Inc., Sholom  
Community Alliance, and Sholom  
Homes, Inc.,

**MEMORANDUM OF LAW IN SUPPORT OF  
PLAINTIFF'S MOTION TO ESTABLISH  
DEPOSITION PROTOCOL AND TO RULE  
ON DEFENDANTS' OBJECTIONS**

Defendants.

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**INTRODUCTION**

This case arises out of the failure of Defendants' corporate oversight resulting in the dangerous delivery of health care at Defendants' nursing home in St. Louis Park. Due to Defendants' neglect, Defendants' disregard caused the death of their patient, Dorothy Landy, on December 7, 2004. In this law suit, Defendants have engaged in a concerted effort to obstruct discovery. Plaintiff now requests Rule 37 sanctions for the deposition misconduct of Defendants' counsel.

**FACTUAL BACKGROUND**

To date, Plaintiff's counsel has taken two depositions on January 3 and 5, 2006. Other depositions noted for January 6, 2006 and thereafter have been postponed due to the conduct of Defendants' attorney in order to request the Court to rule on Defendants' deposition objections and to establish a deposition protocol so that the depositions may

proceed in an orderly manner.<sup>1</sup>

The January 3<sup>rd</sup> deposition involved the testimony of James Newstrom, whom Defendants produced as their designee under Minn.R.Civ.P. 30.02(f), regarding the Defendants' corporate structure and interrelation.<sup>2</sup> Throughout this deposition, Defendants' counsel repeatedly interrupted the proceeding.

Plaintiff's counsel asked Defendants' counsel on several occasions to refrain from obstructing the deposition.<sup>3</sup> Following the January 3<sup>rd</sup> deposition, Plaintiff's counsel immediately provided Defendants' counsel with a proposed stipulation regarding the parties' deposition conduct.<sup>4</sup> Defendants' counsel faxed a letter the following morning, January 5<sup>th</sup>, rejecting Plaintiff's request.<sup>5</sup>

Defendants' counsel's obstruction escalated during the January 5<sup>th</sup> deposition involving the testimony of Scott Jackson, whom Defendants produced as their designee under Minn.R.Civ.P. 30.02(f), regarding a variety of documents produced in response to Plaintiff's document request under Minn.R.Civ.P. 30.02(e) and 34.<sup>6</sup> During the January 5<sup>th</sup>

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<sup>1</sup> Affidavit of Mark R. Kosieradzki, Esq., which Affidavit accompanies the filing of this Memorandum of Law (herein "Kosieradzki Affidavit"), ¶ 5.

<sup>2</sup> A copy of the deposition notice is attached as **EXHIBIT 1** to the Kosieradzki Affidavit, ¶ 6.

<sup>3</sup> See, e.g., Deposition of James Newstrom, as Rule 30.02(f) designee, taken January 3, 2006, at 22:16-23:4 (in this section of the transcript, Mr. Kane proclaims that speaking objections are "going to happen" throughout the deposition); and 23:12-23 (when Mr. Kosieradzki asked Mr. Kane not to engage in speaking objections, Mr. Kane's reply was "that's too bad"); see also, e.g., 30:5-25 and 31:2-11 and 72:7-19. The cited pages from this deposition transcript are attached as **EXHIBIT 2** to the Kosieradzki Affidavit, ¶ 7.

<sup>4</sup> January 4, 2006 Letter from Mark R. Kosieradzki to Anthony Kane, a copy of which is attached as **EXHIBIT 3** to the Kosieradzki Affidavit, ¶ 8; a copy of the proposed stipulation is attached as **EXHIBIT 4** to the Kosieradzki Affidavit, ¶ 9.

<sup>5</sup> January 5, 2006 Letter from Anthony Kane to Mark R. Kosieradzki, a copy of which is attached as **EXHIBIT 5** to the Kosieradzki Affidavit, ¶ 10.

<sup>6</sup> A copy of the deposition notice is attached as **EXHIBIT 6** to the Kosieradzki Affidavit, ¶ 11.

deposition, Defendants' interruptions account for one transcript line for every two lines of witness testimony; the transcript's 234 pages of witness examination contain 232 interruptions by Defendant's counsel; and counsel's interruptions consumed 679 lines of the transcript, versus the deponent's own testimony, which comprised 1,466 lines of the transcript.<sup>7</sup> Defendants' counsel repeatedly engaged in disruptive conduct by improperly interrupting the deposition in violation of the Rules of Civil Procedure:

- a. Speaking objections – 71 times;
- b. Instructing the deponent not to answer – 29 times;
- c. Interjecting to offer his own testimony on question presented to the deponent – 61 times;
- d. Rephrasing a question asked of the deponent – 19 times;
- e. Other interjections that disrupted the deposition – 45 times; and
- f. Interjections based on his own failure to understand a question – 7 times.<sup>8</sup>

### **LEGAL ANALYSIS**

#### **1. DISCOVERY ABUSE MUST BE DETERRED.**

The problem of discovery abuse in the American judicial system was addressed by the United States Supreme Court<sup>9</sup> and subsequently analyzed in the Harvard Law Review.<sup>10</sup> The Supreme Court, in response to growing abuses in civil discovery determined that discovery sanctions must accomplish not only a remedial purpose, the sanctions must also deter such inappropriate conduct in the future:

[I]ndulgence of discovery abuses and the narrowly remedial orientation toward

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<sup>7</sup> Kosieradzki Affidavit, ¶ 12; see also, the color-coded copy of the January 5, 2006 deposition transcript, attached as **EXHIBIT 7** to the Kosieradzki Affidavit, ¶ 14.

<sup>8</sup> Kosieradzki Affidavit, ¶¶ 14 and 15.

<sup>9</sup> *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976).

<sup>10</sup> Note, *The Emerging Deterrence Orientation in the imposition of Discovery Sanctions*, 91 Harv.L.Rev. 1033, 1036 (1978).

discovery sanctions are inappropriate in light of the need to deter all litigants from exploiting the dilatory potential of discovery. These courts have urged that such deterrence requires the use of sanctions whose effect is more directly punitive.<sup>11</sup>

Recognizing that the severe sanctions may be imposed to deter disobedience of discovery orders, the United States Supreme Court has criticized as too lenient the traditional learning that parties will, if given one more chance, comply in the future.<sup>12</sup> Instead, the Supreme Court insisted that unconditional impositions of these sanctions are necessary in order to deter "other parties to other lawsuits" from feeling free "to flout other discovery orders of other district courts."

The motivation to stonewall is so great that offenders will not comply with their discovery obligations unless they know *in advance of litigation* that the cost of stonewalling will be greater than the benefits.<sup>13</sup> Because stonewalling effectively forecloses the rights of the discovering party, a nominal sanction will not be effective in preventing the practice. The courts must apply disincentives that make stonewalling prohibitively expensive.<sup>14</sup>

## **2. OBSTRUCTIVE DEPOSITION TACTICS ARE PROHIBITED.**

In the landmark case of *Hall v. Clifton Precision*,<sup>15</sup> the court evaluated and listed what was to be considered appropriate deposition conduct. The court explained:

The 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

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<sup>11</sup> *Id.*, citing *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) (other citations omitted).

<sup>12</sup> *National Hockey League*, 427 U.S. at 642-43; 91 Harv.L.Rev. at 1046-47.

<sup>13</sup> Hare, Gilbert, Ollanik, *Full Disclosure, Combating Stonewalling and Other Discovery Abuse* (1994) at 79, citing Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 Harv.L.Rev. 1033 (1978).

<sup>14</sup> *Id.*

<sup>15</sup> *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993).

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 formulate the answers. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy with lawyers coaching or bending the witness's words to mold a legally convenient record. It is the witness – not the lawyer – who is the witness.

The court explained that:

... 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. When a deposition becomes something other than that because of **strategic interruptions**, suggestions, statements, and arguments of counsel, it not only becomes unnecessarily long, but it ceases to serve the purpose of the Federal Rules of Civil Procedure: to find and fix the truth.<sup>16</sup>

Rule 30.04(a) of the Minnesota Rules of Civil Procedure provides for the type and manner in which objections during a deposition may be made. Objections are to be non-argumentative and non-suggestive.<sup>17</sup> The Advisory committee notes following Rule 30 offers insight into the purpose of this rule:

Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond... [o]bjections... should be limited to those that under Rule 32(d)(3) might be waived if not made at that time... [o]ther objections can... be raised for the first time at trial and therefore should be kept at a minimum during a deposition. "Directions to a deponent not to answer a question can be even more disruptive than objections. The second sentence of new paragraph (1) prohibits such directions except in the three circumstances indicated... In general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer. **The making of an excessive number of objections may itself constitute sanctionable conduct.**"<sup>18</sup>

Given the objections of discovery, courts have repeatedly deemed the following conduction to be improperly obstructive and in violation of the Rules of Civil Procedure.

**2a. INSTRUCTING THE DEPONENT NOT TO ANSWER.** A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation of evidence

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<sup>16</sup> Hall, 150 F.R.D. at 527. (Emphasis added.)

<sup>17</sup> Fed.R.Civ. P. 30(d)(1).

<sup>18</sup> Fed.R.Civ.P. 30(d), Advisory Committee Note. (Emphasis added.)

directed by the court, or to present a motion under Rule 30(d)(4) for protective order.<sup>19</sup> Instructing a witness not to answer a question for any other reason, such as calling for inadmissible facts, is sanctionable.<sup>20</sup>

In the present action, Defendants' counsel has instructed the deponents not to answer questions on 30 occasions thus far. For example, in the January 3, 2006 deposition, counsel instructed the deponent not to answer a question that was fundamental to his being designated and produced by Defendants as their witness under Rule 30.02(f):

Q. Do you agree to have your answers to these questions be binding upon Sholom Homes West, Inc.; Sholom Community Alliance and Sholom Homes, Inc.?

MR. KANE: I'm going to object to the characterization of that. Mr. Newstrom is going to testify to the best of his ability regarding those issues as to the relationships between the various entities, which is the purpose of the deposition.

MR. KOSIERADZKI: Well, under the rules of a 30.02(f) deposition the issue is binding and it's not his personal knowledge but the corporate, so I understand your objection.

Q. (By Mr. Kosieradzki) And the question that I have for you, sir, is: Do you agree to have your answers to our questions be binding upon Sholom Homes West, Inc.; Sholom Community Alliance and Sholom Homes, Inc.

MR. KANE: Jim, you don't need to answer that.

MR. KOSIERADZKI: What is the basis of directing him not to answer?

MR. KANE: What I just indicated to you. He's appearing on behalf of these entities. If you want to ask him a question regarding the entities, ask him a question regarding the entities.

MR. KOSIERADZKI: Well, this is one of the foundational questions required by the case law.

MR. KANE: He's already satisfied the foundation that he is the appropriate person to testify to matters regarding the various entities.

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<sup>19</sup> Fed.R.Civ.P. 30(d)(1).

<sup>20</sup> *Boyd v. University of Maryland Medical Systems*, 173 F.R.D. 143, 147 (D.Md. 1977); *International Union of Elec., Radio & Mach. Workers AFL-CIO v. Westinghouse Elev. Corp.*, 91 F.R.D. 277, 280 (D.C. D.C. 1981); *Preyer v. US Lines Inc.*, 64 F.R.D. 430, 431 (E.D. Pa. 1973).

MR. KOSIERADZKI: Anything else?

MR. KANE: That's it.

MR. KOSIERADZKI: Okay.

Q. (By Mr. Kosieradzki) Are you refusing to answer that question?

A. That's correct.<sup>21</sup>

In response to a valid Rule 30.02(f) deposition notice, the responding deponent organization must either designate one or more of its officers, directors, or managing agents to testify on its behalf, or designate another person who consents to speak for the deponent.<sup>22</sup> By designating someone pursuant to Rule 30(b)(6), an organization indicates that the person "has the authority to speak on behalf of the corporation with respect to the area within the notice of deposition . . . not only to facts but also to subjective beliefs and opinions."<sup>23</sup> In the present action, Defendants' refusal to answer the question violates the very foundation of a Rule 30.02(f) deposition.

In addition to the January 3<sup>rd</sup> deposition, the instructions not to answer escalated the next day, when Defendants' counsel instructed the witness not to answer 29 times.<sup>24</sup>

**2b. SPEAKING OBJECTIONS:** Speaking objections occur when the defending attorney actually engages in coaching the witness, attempting in the course of articulating the objection to direct the witness' attention to what the "right" or "correct answer should

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<sup>21</sup> EXHIBIT 2, Newstrom Depo., 15:11-16:21.

<sup>22</sup> Fed.R.Civ.P. 30(b)(6).

<sup>23</sup> *Lapenna v. Upjohn Co.*, 110 F.R.D. 15, 20 (E.D. Pa. 1986); see also *Mitsui & Co., Inc. v. Puerto Rico Water Res. Auth.*, 93 F.R.D. 62, 66-67 (D.P.R. 1981); *Alexander v. Federal Bureau of Investigations*, 186 F.R.D. 148, 151 (D.C. D.C. 1999); *Frechette, Beware the Rule 30(b)(6) Deposition, For the Defense* 38 (Mar. 2000).

<sup>24</sup> Kosieradzki Affidavit, ¶¶ 14 and 15.

be."<sup>25</sup> "Objection to form" should be sufficient explanation to notify the interrogator of the grounds for the objection, and thereby allow revision of question.<sup>26</sup> Any further explanation is inappropriate.

In the present case, the witness frequently would echo the contents of counsel's interjections as his own testimony.<sup>27</sup> Defendants' counsel frequently offered his own testimony on questions directed to the deponent.<sup>28</sup> At one point, instead of answering a question himself, the witness referred to Mr. Kane's interjected testimony as the answer.<sup>29</sup> In the January 5<sup>th</sup> deposition, Defendants' counsel made similar improper speaking objections 71 times.<sup>30</sup>

**2c. LAWYER'S LACK OF UNDERSTANDING:** The interrogating counsel has the right to the deponent's answers, not an attorney's answers.<sup>31</sup> If the deponent does not understand the question, or the meaning of a word or phrase, or even if the deponent has a question about a document, the deponent should ask the questioning attorney. In the present action, Plaintiff's counsel was assured by the deponents that they would do so.<sup>32</sup>

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<sup>25</sup> *Applied Telematics, Inc., v. Sprint Corp.*, 1995 WL 79237 (E.D. Pa.), citing the Federal Bar Council Committee on Second Circuit Courts, "A Report on the Conduct of Depositions" 131 F.R.D. 613, 617 (1990), quoted by Virginia E. Hench, *Mandatory Disclosure and Equal Access to Justice: The 1993 Federal Discovery Rules Amendments and the Just, Speedy and Inexpensive Determination of Every Action*, 67 Temple L. Rev. 179, 218, n. 182 (1994).

<sup>26</sup> See 8A Wright and Miller, *Federal Practice and Procedure Civil 2d.*, § 2156 at 206 (1994).

<sup>27</sup> See, e.g., EXHIBIT 7, Jackson Depo., 61:4-10 and 107:14-18.

<sup>28</sup> See, e.g., *Id.*, 15:19-21 and 86:13-17; EXHIBIT 2, Newstrom Depo., 30:11-31:11; 33:8-13; and 72:7-19.

<sup>29</sup> EXHIBIT 7, Jackson Depo., 138:14-23.

<sup>30</sup> Kosieradzki Affidavit, ¶ 15(a).

<sup>31</sup> *In Re: Stratosphere Corp. Securities Litigation*, 182 F.R.D. at 621.

<sup>32</sup> EXHIBIT 2, Newstrom Depo., 9:5-13; EXHIBIT 7, Jackson Depo., 11:12-23.

A lawyer's purported lack of understanding is not proper reason to disrupt the deposition.<sup>33</sup> It does not matter if an attorney does not understand the question. Interruptions and "clarifications" of questions by counsel for the witness are improper.<sup>34</sup> It is the witness who must ask for clarification if the witness does not understand the question. In the present action, Defendants' counsel has interrupted the deposition process on eight such occasions thus far.<sup>35</sup>

**2d. NUMEROUS "PROPER" OBJECTIONS:** A party may object to an irrelevant *line* of questions, but once the objection is noted the testimony should proceed. Protection can become a cover for obstruction.<sup>36</sup> Therefore, counsel should avoid the prohibited practice of engaging in so-called *Rambo Tactics* where counsel attacks or objects to every question posed, thus interfering with, or preventing, the elicitation of any meaningful testimony and disrupting the orderly flow of the deposition.<sup>37</sup> The advisory committee notes for Rule 30(d) explain that "the making of an excessive number of unnecessary objections may itself constitute sanctionable conduct."<sup>38</sup>

In the present action, Mr. Kane's tactical interruptions included granting the witness "permission" to answer a question,<sup>39</sup> and eventually influenced the witness to seek Mr.

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<sup>33</sup> *Applied Telematics, Inc. v. Sprint Corp.*, 1995 WL 79237 (E.D. Pa.).

<sup>34</sup> *Unique Concepts, Inc. v. Brown*, 115 F.R.D. 292, 293 (S.D. N.Y. 1987).

<sup>35</sup> EXHIBIT 2, Newstrom Depo., 26:16-24; Kosieradzki Affidavit, ¶ 15(d).

<sup>36</sup> William Fortune, et al., *Modern Litigation and Professional Responsibility handbook: The Limits of Zealous Advocacy*, n. 267, section 6.7.4 at 264 (1996).

<sup>37</sup> *American Directory Service Agency Inc. v. Beam*, 131 F.R.D. 15, 18-19 (D.C. D.C. 1990).

<sup>38</sup> Fed.R.Civ.P. 30(d)(1), advisory committee notes on the 1993 amendment.

<sup>39</sup> EXHIBIT 7, Jackson Depo., 35:3-8; 62:12-23; 197:18-198:10; 238:14-17; and 239:20-23.

Kane's approval before answering.<sup>40</sup> Mr. Kane often prefaced witness answers with the statement "if you can," which suggested that the witness should find himself unable to answer a question.<sup>41</sup> Mr. Kane's barrage of objections and instructions affected the witness so strongly, that at one point, the witness himself tried to assert an objection to a question.<sup>42</sup>

In addition to his numerous directions to the deponent, Mr. Kane attempted to direct the deposing attorney by demanding that he ask particular questions.<sup>43</sup> When the deposing attorney asked a question that Mr. Kane disliked, he would disparage the question as "comical,"<sup>44</sup> or "poor,"<sup>45</sup> and demand that the deposing attorney ask a "good"<sup>46</sup> or "correct" question.<sup>47</sup> In the January deposition, he did so 45 times.<sup>48</sup>

### **3. THE NEED FOR A COURT-PREScribed DEPOSITION PROTOCOL.**

In *Hall v. Clifton*, the Court set forth standards that have been recognized by Courts throughout the country, including Minnesota.<sup>49</sup> In sum, the standards provide that:

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<sup>40</sup> *Id.*, 54:8-24.

<sup>41</sup> *Id.*, 36:22-24 and 235:24-25.

<sup>42</sup> *Id.*, 25:15-22.

<sup>43</sup> *Id.*, 21:12-14; 47:4-5; 83:15-16; 93:25-94:3; 198:3; 199:25-200:1; and 204:10-12.

<sup>44</sup> *Id.*, 122:4.

<sup>45</sup> *Id.*, 55:12-13.

<sup>46</sup> *Id.*, 120:25-121:1.

<sup>47</sup> *Id.*, 120:25-121:1; 140:14-15.

<sup>48</sup> Kosieradzki Affidavit, ¶ 15(e).

<sup>49</sup> *Miller v. Waseca Medical Center*, 205 F.R.D. 537, 539 (D.Minn. 2002); *Armstrong v. Hussmann Corp.*, 163 F.R.D. 299, 301-05 (E.D. Mo. 1995); *ML-Lee Acquisition Fund II, L.P. Litigation*, 848 F.Supp. 527, 567 (D. Del. 1994); *Bucher v. Richardson Hosp. Authority*, 160 F.R.D. 88, 94 (N.D. Tex. 1994); *Holland v. Fisher*, 1994 WL 878780 (Mass. Super. Ct.); *Van Pilsum v. Iowa State University of Science and Tech.*, 152 F.R.D. 179, 180-81 (S.D. Iowa 1993); *Johnson v. Wayne Manor Apartments*, 152 F.R.D. 56, 58-59 (E.D. Pa. 1993); *Deutschman v. Beneficial Corp.*, 132 F.R.D. 359

