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By: A STEVEN DEVER 0024982

Confirmation Nbr. 758271

EDWARD GRAHAM, ET AL

CV 15 846212

vs.

CITY OF LAKEWOOD, ET AL

Judge:

JOHN P. O'DONNELL

Pages Filed: 11

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

EDWARD M. GRAHAM, et al.

Plaintiffs

VS

CITY OF LAKEWOOD, et al.

Defendants

CASE NO.: CV-15-846212

JUDGE JOHN P. O'DONNELL

1. MOTION TO STRIKE ERRATA SHEET OF MICHAEL SUMMERS

2. MOTION TO REOPEN DEPOSITION OF MICHAEL SUMMERS

Now comes the Plaintiffs, by and through their counsel, and move this Court to strike the errata sheet of Deponent, Michael Summers. Plaintiff also requests to reopen the deposition of Michael Summers for the reasons stated in the attached brief, which is incorporated by reference and made a part hereof as if fully rewritten herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was electronically filed with the Cuyahoga County Common Pleas Court on this 20th day of May, 2016. Notice of filing will be sent to counsel for all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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BRIEF

The Plaintiffs move this Court for an order to strike the errata sheet of deponent Michael Summers for essentially trying to contradict the answers he gave under oath in his deposition testimony. Additionally, counsel for the Plaintiffs also seek to reopen Michael Summers testimony for further examination.

On or about January 20, 2016, counsel for the Plaintiffs took the deposition of Michael Summers, the Mayor of Lakewood, Ohio pursuant to Civ. R. 30. After the deposition was concluded, the deponent reviewed his testimony pursuant to Civ. R. 30 (E) and prepared an errata sheet that changed his testimony. The reason for the change was because of an “Inaccurate Answer”. The changes in testimony do not allege a mistake by the Notary Public that took the testimony. Instead, the answers are complete contradictions to his previous testimony made under oath.

The deponent's errata sheet is attached hereto as exhibit “A” and his complete deposition transcript and the videotape of the deposition have been previously filed with the court and are incorporated into this motion. The following are some of the changes that were made in his errata:

Question: What about, were you aware whether or not there were advertising campaigns or public information activities on the part of Lakewood Hospital Association to attempt to influence the outcome of that election?

Answer: No, I think-no, the Hospital Association did not directly do that. (tr 263)

Errata Correction: “Yes, the Hospital Association did have an advertising campaign on the proposed charter amendment.”

Question: OK, what about direct mail to citizens in Lakewood?

Answer: “I’m not aware of that” (tr 263)

Errata Change to Answer: “Yes, there was a direct mailing”

Question: Were there any authorizations that were made to spend money to send mailers to Lakewood residents?

Answer: "Not, from the Association" (tr 264)

Errata Change to Answer: "Yes"

Question: Okay. Were you aware of whether or not the Cleveland Clinic was spending money to affect the outcome of the election?

Answer: "I saw some Advertisements" (tr 264)

Errata Change to Answer: "I'm not aware of that"

Question: Okay. And the advertisement that you saw was generated by the Cleveland Clinic?

Answer: "I presume so, yeah." (tr 264)

Errata Change to Answer: "No"

The Deponent has not made any claim that the court reporter erroneously transcribed the testimony. More importantly, the video record clearly indicates that the answers were accurately transcribed.

Civ. R. 30 (E) governs the taking of depositions. It states in pertinent part:

When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless examination and reading are waived by the witness and by the parties. Any changes in form or substance that the witness desires to make shall be entered upon the deposition by the officer *with a statement of the reasons given by the witness for making them.*

(Emphasis added.)

Though Civ. R. 30 (E) permits a deponent to change testimony, the deponent must give reasons for those changes and that both the original transcription and changes appear in the deposition. Both the original and changed testimony remains in the record and can be considered by the trier of fact, and ostensibly when a court considers the testimony for a motion for summary judgment. *Wright v. Honda of America Mfg. Inc.* (1995), 73 Ohio St.3d 571.

The Deponent, Michael Summers, Mayor for Lakewood, has failed to provide a legitimate explanation as to why the original testimony should be amended by his errata. Most importantly these direct contradictions establish that the prior testimony made under oath was not true. Such conduct can be construed as deliberate attempt to provide false and misleading testimony in a legal proceeding.

In this case, the veracity of the deponent is important as it relates to factual questions that materially affect the outcome of the case. For instance, the Plaintiffs have recently obtained email records from officials at Metro Health Medical Center that contradicts the Mayor's deposition testimony that Metro Hospital withdrew their submitted proposal to operate Lakewood Hospital. Throughout his deposition, the Mayor testified that "the only interest we had in operating an inpatient model, and it was a very modest interest and a very weekend interest was from Metro hospital" (tr 98). Furthermore, the Mayor claimed that "Metro Hospital pulled out" (tr 111). A more expansive explanation provided by the Mayor is detailed in the deposition transcript pages 173-187. Here, the sworn testimony of a public official alleges that Metro Hospital withdrew from consideration their proposal to operate Lakewood Hospital as an inpatient medical facility. However, the Mayor's testimony is contradicted by the following Metro email attached as Exhibit "B" to this motion. The internal email states:

"I think we should be open about the fact that we (Metro) tried and they, the selection committee turned us down. They would rather have an outpatient office with CCF over a hospital with Metro".

Such testimony is material as it relates to issues concerning bid steering and manipulation.

Ohio practice on this issue borrows from Federal precedents. When a witness substantially departs from his previous testimony, a motion for further examination should be granted. *DeSeversky v. Republic Aviation Corp.*, 2 F.R.D. 113 (E.D. N.Y. 1941) "The necessity of giving some reason for changes may be occasioned by many circumstances such as pointing out plain errors, immaterial mistakes, misunderstood questions, etc. But we are not concerned with any such thing here." *Id.*, 115.

In *DeSeversky, supra*, the deponent, who was also the Plaintiff sought to reverse previously made

answers to essentially change an answer from “yes” to “no” or from “white” to “black.” *Id.* “A witness, however, should not be able to destroy the usefulness of an examination by the means employed here.” *Id.* Subsequent Federal courts have held when such a deposition is changed and its usefulness is negated, “then the deposition will not have been finalized, and the [deponent] will be subject to further examination.” *Colin v. Thompson*, 16 F.R.D. 194, 195 (W.D. Mo. 1954). The subsequent testimony should also be at the deponent or Defendant's costs.

Federal case law, more expansive on this issue than Ohio case law, provides that failure to provide an explanation for changes to a deposition can result in striking the added testimony. *Duff. Lobdell-Emery Mfg. Co.*, 926 F. Supp. 799, 804 (N.D. Ind. 1996). The reasons must be specific. *E. I. DuPont de Nemours & Co., v. Kolon Indus. Inc.*, 277 F.R.D. 286 (E.D. Va. 2011). “Mere statement of some reason does not alone satisfy the rule.” *Id.*, 295. If a revision is extensive, then a deponent would have to explain why it is necessary. “[A] wholesale rewriting of deposition testimony raises other procedural issues, including concerns about witness credibility.” Moore's Federal Practice § 30.60[2]. If a deponent fails to state reasons for changing his testimony, the errata sheet can be stricken. Though a court may not inquire into sufficiency of the changed answers, a court could preclude substantial changes in deposition testimony. *William L. Thorp Revocable Tr. v. Ameritas Inv. Corp.* 57 F. Supp.3d 508 (E.D.N.C. 2014).

Courts have permitted deponents to be re-deposed on the changes and impeached by the inconsistency permitting a trier of fact to examine the two transcripts. *Elwell v. Conair, Inc.*, 145 F. Supp.2d 79 (D. Me. 2001). The important thing is for revised answers to be followed up to see the reasons for such changes. *Pina v. Children's Place*, 740 F.3d 785 (1st Cir. 2014).

This Court may also analogize a similar reasoning when a witness tries to follow up deposition testimony with a subsequent affidavit. *Byrd v. Smith* 110 Ohio St.3d 24 (2006) held a court must first consider whether the subsequent affidavit contradicts or supplements the deposition. If the affidavit is inconsistent with previous testimony, it will not create a genuine issue of material fact. By the same

token, altered testimony in a deposition should not be used to keep that defending witness testimony against that party's interest. The Tenth Circuit adopted the same standard for evaluating sham affidavits in summary judgment motions to determine if corrections to deposition testimony should be permitted. By the same token, the Court should apply *Byrd, supra*, as well as *Turner v. Turner* (1993), 67 Ohio St.3d 337. If a deponent is changing his testimony to perpetuate a material issue of fact, then the original testimony should survive and the errata sheet should be stricken. Criteria to determine if deposition errata is sham includes the number of corrections to the deposition, whether the corrections fundamentally change the prior testimony, the impact on the corrections on the case especially if they affect dispositive issues, the timing of the submission of corrections and the deponent's qualifications to testify. *Karpenski v. American Gen. Life Companies, LLC*, 999 F. Supp. 2d 1218 (W.D. Wash. 2014).

Ohio case law disfavors substantive changes to deposition evidence. "Substantive" is defined as 'substantial; considerable; [o]f or pertaining to the essence or substance of something; essential.'" *Christian v. Wal-Mart Stores East, LP*, Holmes County No. 09-CA-014, 2010-Ohio-3040 ¶44 citing The American Heritage Dictionary (2nd ed. 1985), 1213. Though *Christian, supra*, holds both answers can remain following *Wright v. Honda, supra*, because they can both be considered by a trier of fact.

If the changes made in an errata sheet make the original testimony incomplete or useless, the deposition may be reopened. "Deposing counsel may ask questions necessitated by the changed answers, questions about the reasons the changes were made, and questions as to whether the changes originated with the deponent or with counsel. If the deponent is a party, the deponent may be charged with the costs of reopening the deposition. Moore's Federal Practice, §30.60[4]. The number and type of changes in testimony permitted re-deposition. *Lugtig v. Thomas*, 89 F.R.D. 639 (N.D. Ill. 1981). Courts have also decided what issues could be asked in a second deposition including the reasons for changing testimony, the source of changes, follow up questions to changed responses among other issues. *Reilly v. TXU Corp.*, 230 F.R.D. 486 (N.D. Tex. 2005).

In conclusion, the Plaintiffs request that the errata sheet of Michael Summers be stricken. In

addition, the Plaintiffs request that the court order Mayor Michael Summers to appear for another deposition and that the cost be charged to the Defendant, The City of Lakewood.

Respectfully submitted,

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ERRATA SHEET

Page	Line		Reason
42	2	"marketships" should be "markets"	Typo
49	2	"Trust" should be "Trustee"	Typo
72	19	"Acuputrose" should be "Akram Boutros"	Misspelling
98	15	"weakened" should be "weak"	Typo
100	8-9	"sort of fairness" should be "a divergence of"	Typo
104	12	"lives" should be "levels"	Typo
149	21	"as presented a" should be "as presented as a"	Missing word
150	13	"direction" should be "process"	Wrong word
171	10	"return" should be "turn"	Typo
195	14	"especially a" should be "a specialty"	Typo
228	16	"There's" should be "It's"	Wrong word
230	16	"service" should be "services"	Typo
263	19-20	"No, I think — no, the Hospital Association did not directly do that." should be "Yes, the Hospital Association did have an advertising campaign on the proposed charter amendment."	Inaccurate answer
263	23	"I'm not aware of that." should be "Yes, there was a direct mailing."	Inaccurate Answer
264	1	"Not from the Association." should be "Yes."	Inaccurate Answer
264	5	"I saw some advertisements." should be "I'm not aware of that."	Inaccurate answer
264	8	"I presume so, yeah." should be "No."	Inaccurate answer
264	11	", yeah" should be deleted.	Inaccurate answer

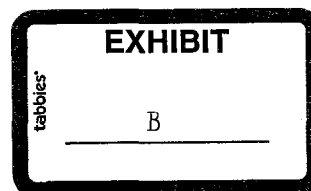
EXHIBIT

From: Julie Jacono <jjacono@metrohealth.org> [jjacono@metrohealth.org]
To: Anne Hill [ghill@metrohealth.org]
CC: Tamiyka Rose [trose@metrohealth.org]
Subject: Re: Lakewood hospital
Created: 15-Jan-2015 21:11:48 UTC-05:00
Delivered: 15-Jan-2015 21:12:01 UTC-05:00
Stored: 16-Jan-2015 19:45:16 UTC-05:00
Status: accepted,opened,read
Box Type: sent
Folder: Julie Jacono Home > Sent Items
Message Id: 54B82D20.GWDMH.GWPMH02.200.200003E.1.96D87.1
Attachments: TEXT.htm [Save] [Open]

Check with Akram but I think we should be open about the fact that we tried and they (the selection committee) turned us down. They would rather have a outpatient office with ccf over a hospital with metro.

Sent from my iPhone

> On Jan 15, 2015, at 1:03 PM, Anne Hill <ghill@metrohealth.org> wrote:
>
> You may both have heard this already but I got a call from Councilman Miller to tell me that CCF informed Lakewood Hospital staff yesterday that they are leaving Lakewood sometime in 2016. He got a constituent call asking if MH might be interested in taking it over. I told him I had no information that we would be interested.
>
> Anne
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>
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>



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