VERMONT SUPERIOR COURT
Lamoille Unit
154 Main Street
Hyde Park VT 05655
802-888-3887
www.vermontjudiciary.org

CIVIL DIVISION
Case No. 65-7-20 Lecv

Estate of Eugeniusz Adamczyk et al vs. Withers et

ENTRY REGARDING MOTION

Title: Motion to Compel; Motion to Compel ; (Motion: 4; 5)
Filer: James A. Valente; James A. Valente
Filed Date: May 26, 2022; May 27, 2022

The motion is GRANTED IN PART and DENIED IN PART.

This is a discovery dispute in a wrongful death action resulting from an auto–truck collision that left two people, Eugeniusz and Alfreda Adamczyk, dead. The discovery dispute revolves around two sets of issues. On one end is the substance of the twin motions to compel. Plaintiffs seek specific deposition testimony from both the Defendant, Arnold Withers, and from Defendants' expert witness, Richard McAlister. On the other end are the issues around what constitutes a speaking objection and the duty of counsel to resolve a discovery dispute.

The procedural history of this deposition is as follows. Plaintiffs' attorney, James Valente, began taking the deposition of Richard McAllister on Wednesday, January 19, 2022, at 10:05 am. The deposition lasted until 2:57pm when Attorney Valente suspended it following the dispute that gave rise to the present motion. Two days later, on Friday, January 21, 2022, at 10:32 am, Attorney Valente began taking the deposition of Defendant Arnold Withers. The deposition lasted until 3:00 pm when Attorney Valente suspended it following the dispute that gave rise to the other motion before the Court. In both cases Attorney Susan Flynn represented the Defendants and the witnesses at the deposition. Plaintiffs filed the motions to compel on May26, 2022 and May 27, 2022, respectively. No motion for a protective order has been filed, but the Defendants have filed oppositions to both of Plaintiffs' motions.

Questions for Motions to Compel

Plaintiffs' motions to compel seek testimony on the following two issues:

- Plaintiffs seek to compel Defendants' expert to perform calculations based on information adduced from the expert during the deposition.
- Plaintiffs also seek to compel Defendant Withers to confirm the location of markings that Plaintiffs' counsel was making atop an electronic copy of a photograph of the intersection where the accident occurred to establish through Defendant where the decedents' car stopped just prior to the accident.

Defendants have objected to and opposed the motion to compel in two ways. First, Defendants argue that the questions go beyond the scope of a deposition, which Defendants define as either identifying what a party knows and/or preserving testimony. Second, Defendants argue that the questions lack necessary foundation, call for speculation, and would not be admissible. On this concern, Defendants express the concern that questions imbedded with assumptions and introduced without foundation can quickly build into exchanges where the unfounded assertions can later be misused to impeach the deponent on "facts" that were never established.

From Defendants' position the second issue in the present motion emerges: When is it appropriate to object to a question or series of questions raised in a deposition for lack of evidentiary foundation?

The answer to this question is rests on both degree and context, but it requires a careful parsing of V.R.C.P. 32 to distinguish between issues giving rise to an objection within the deposition and those issues, which are not waive but can be raised in the post-deposition period when a party can either seek a protective order or challenge the use of a deposition under V.R.C.P. 32(b).

Scope of Depositions

The Court's analysis starts with the purpose of a deposition. As at least one trial court has noted, "The purpose of depositions [is] to gather discoverable information from the deponent, not to argue the case, use intimidation tactics, ask irrelevant and harassing questions,

or otherwise to conduct oneself outside the requirements of legitimate discovery practice." *Jones v. Hart*, Docket No. 175-8-09 Oecv (Feb. 16, 2011) (Eaton, J.), available at 2011WL9154669.

But this purpose is more properly framed as one among many purposes of a deposition. As Defendants properly note, depositions can be admitted under V.R.C.P. 32(a)(3)(E) when a witness is absent and unavailable. See *Nichols v. Brattleboro Retreat*, 2009 VT 4, ¶¶ 5–8 (analyzing the standards for admission under Rule 32(a)(3)(E)). Rule 32 also provides at least seven more purposes for a deposition, including:

- Impeachment (Rule 32(a)(1));
- Obtaining testimony of former employees, agents, and officers by an adverse party (Rule 32(a)(2)); and
- Providing testimony of a witness, who while available:
    - is exempted from testifying,
    - refuses to testify,
    - lacks the memory to testify at trial,
    - lacks the physical capacity to testify, or
    - lacks the mental capacity to testify

  (Rule 32(a)(3)(A), (B), (C), and (D)).

As with other rules of discovery, the rules concerning the purpose and use of depositions are to be interpreted "liberally to carry out the purposes of discovery." WRIGHT & MILLER, 8A FED. PRAC. & PROC. (CIVIL) § 2113 (3d ed.) (2022 update).[1]

Under V.R.C.P. 30, an examiner has discretion to ask a broad range of questions so long as they are relevant to the subject matter of the action. WRIGHT & MILLER, 8A FED. PRAC. & PROC. (CIVIL) § 2113 (3d ed.) (2022 update). Unlike at trial, where an adverse party is limited to the scope of the direct examination, an "examiner may ask about anything relevant to the subject matter of the action, regardless of whether it was raised on direct examination." *Id.*

[1] Given the dearth of Vermont case law on these issues, the Court looks to both the federal court rules, from which the relevant Vermont Rules of Civil Rules were derived, as well as other jurisdiction where the language is the same or similar. *State v. Amidon*, 2008 VT 122, ¶ 16 ("Moreover, when our rule is identical to its federal counterpart, we look to federal cases interpreting the federal rule for guidance.").

In this case, Plaintiffs correctly note that the parties had agreed at the outset to stay any objections except to form and privilege. This practice is generally consistent with the Rules of discovery. As Wright & Miller notes:

> Rule 32(b) must be read in connection with Rule 32(d)(3), dealing with objections as to the taking of a deposition. Taken together these provisions make it clear that if the matter offered is within the scope of discovery, objection to its admissibility as evidence should be made at the trial or hearing when the deposition is offered in evidence and not at the taking of the deposition, unless the ground of the objection is one that might have been obviated or removed if made when the deposition was being taken.

WRIGHT & MILLER, 8A FED. PRAC. & PROC. (CIVIL) § 2151 (3d ed.) (2022 update).

Notwithstanding a stipulation between parties or the general rule that most objections may be raised after the deposition, the section quoted above highlights a category of objections that must be addressed, or it is waived. Under Rule 32(d)(3)(B) errors and irregularities occurring at the deposition must receive a seasonable objection or be considered waived. This includes "errors of any kind which might be obviated, removed, or cured if promptly presented . . . ." V.R.C.P. 32(d)(3)(B).

The Vermont Supreme Court has accepted that Rule 32(d)(3)(B) extends to answers that a party may later seek to limit as speculative or conclusory. *State v. Koveos*, 169 Vt. 62, 68 (1999). As the Court noted in *Koveos*, "we believe defendant had an obligation to make an objection, or motion to strike, at the time of the deposition to give the witness an opportunity to reframe the answer." *Id.* (citing to both federal and state cases in support). While the Court also suggests that these objections may be renewed in either a motion in limine and at trial, the plain language of Rule 32(d) indicates that if they are not raised at the deposition, then they may be waived.

In looking at both this subcategory of objections alongside the general rule, there are several points that inform this distinction. Parties take depositions for a variety of purposes, some of which do not involve admission of the deposition at trial. The question of admissibility is dependent on the purpose for which the deposition is offered. For these reasons, issues of admissibility or conformance with the rules of evidence are best saved for the pre-trial or trial

process when a protective order, motion in limine, or objection to admission can focus on the specific offer, issue, and rule of evidence.

At the same time, there are other issues that involve the foundation of statements within a particular deposition that the examiner may have inadvertently omitted or is assuming for the purposes of the question. If an objection to such speculative or conclusory issues is made in a timely manner, the parties can make a correction in real time and avoid either a discover dispute or additional depositions. *Id.*

In this respect, Defense counsel was within her rights to offer an objection to the line of questions involving Defendant Withers. Plaintiffs' counsel was seeking to put an electronic pin in the spot that he wanted Defendant to identify. Defendant indicated that he was unsure. Plaintiffs did not seek to clarify but sought to mark the spot. Defense counsel's objection sought to clarify and avoid the speculation that Defendant was expressing.

Similarly, Defendants' objections to Plaintiffs' questions of McAlister were similar issues of foundation. Plaintiffs' counsel was directing Defendants' expert to opine on issues based on facts that Plaintiffs' counsel was introducing in his questions. While such questions are fair game for a deposition whether based on the evidence of the case or assumed hypothetical facts, the lack of clarity and distinction between whether a fact was real or assumed gave rise to Defendants' timely objections under Rule 32(d)(3).

Speaking Objections and Instructions Not to Answer

Once Defense Counsel objected, the discovery dispute began to spiral away from resolution. Plaintiffs' counsel's primary concern with Defendants' objections centers on the issue of "speaking objections." Over the course of the two days of depositions, counsel for Plaintiffs and Defendants spared over what was and what was not acceptable and whether Defendants could even object and to what extent and length such an objection could take. This rose to a somewhat comic crescendo in the following exchange during McAllister's deposition:

> PLAINTIFFS' COUNSEL: Can you articulate any basis for that objection?
>
> DEFENDANTS' COUNSEL: The Rules of Civil Procedure.
>
> PLAINTIFFS' COUNSEL: The Rules of Civil Procedure is not a specific articulation of the basis for objection.

> DEFENDANTS' COUNSEL: You're asking him to create information, not to explain information. And that's not proper.
>
> PLAINTIFFS' COUNSEL: Okay. Well, I've since said that any additional speaking objections would result in me suspending the deposition. And this is the third one.
>
> DEFENDANTS' COUNSEL: James, I didn't make a speaking objection. I just told him not to answer, which is what you told me I had to do.

Ex. 2 Deposition of Richard McAllister 183: 1–15.

This exchange is not consistent with the Parties' obligations to effectuate a resolution to objections and issues within a deposition. Plaintiffs' counsel takes a strong position that nearly any objection apart from an objection to form is a speaking objection. This is at odds with the way Courts have sought to balance a party's right to object with the need for brevity and preventing counsel from instructing their clients. As Judge Katz once noted, "Regarding speaking objections, such an issue may often be a question of degree." *Erlandson v. Fletcher Allen Health Care*, Dckt No. 385-6-06CnCv (Apr. 5, 2007) (Katz, J.). The two primary concerns with speaking objections are that counsel uses them improperly to cue a witness and that a counsel may use it to filibuster a deposition. By way of example, the federal court in *Frazier v. Southeastern Pennsylvania Transportation Authority*, 161 F.R.D. 309 (E.D. Pa. 1995), held that under Rule 30(d)(1) of the Federal Rules of Civil Procedure "lawyers are strictly prohibited from making comments, either on or off the record, which might suggest . . . a witness' answer." *Id*. at 315 (quoting *Hall v. Clifton Precision*, 150 F.R.D. 525, 531 (E.D. Pa. 1993)).

In this case, the record shows that Defense counsel's objection were not done for the improper purpose of influencing the witness, suggesting an answer, or delay for delay's sake. Rather the transcriptions indicate that Defense Counsel sought to object to and articulate what she perceived to be an error or irregularity in the nature of certain questions as framed by Plaintiffs' counsel.

Yet, Defense counsel ultimately goes too far in instructing her witnesses not to answer deposition questions. In this respect, Plaintiffs are correct in asserting that an examiner has a fundamental right to conduct a deposition along any of the broad lines of inquiry, and that short of the limited reason of privilege or harassing, the instruction not to answer is inappropriate.

WRIGHT & MILLER, 8A FED. PRAC. & PROC. (CIVIL) § 2113, n.24 (3d ed.) (2022 update) (collecting cases where instruction not to answer was improperly given during a deposition).

At the same time, Plaintiffs' counsel's over-classification of speaking objections made efforts to work out these issues difficult. In nearly each case, Defense counsel allowed the witness to answer and in each of the answers that Plaintiffs' counsel brings forward in the Motions to Compel, there is evidence that Defense counsel was willing to allow the questioning to go forward. Exchanges, like the one quoted above, are not what the rules of the deposition process are intended to engender.

In order to give the parties guidance going forward, the Court has surveyed discovery case law and requires the parties to adhere to the following:

1) A party may object to a foundation issue or similar error or irregularity under Rule 32(d)(3).
2) Such an objection should be short and concise as possible.
3) If the objection requires more than a short description, the parties should consider removing the witness and putting their objections on the record to either try to resolve the issue or to create a record for future motion.
4) Unless one of the stated reasons for not answering set out in the Rules exists, defending counsel may not instruct a witness not to answer.
5) If defending counsel believes that the examiner is persisting in an error, then it is incumbent on the defending counsel to file a motion to strike, exclude, or for a protective order.

The benefit of this process is the deposition can continue, the witness can answer, but if such answer is as flawed as defense counsel fears, then the objection provides a place for the defense counsel to bring the matter forward to the Court and the examiner has had an opportunity to either correct, if he or she believes it is an error, or to defend their completed examination.

Moving Forward in the Present Case

While Defendants' objections were reasonable and timely, the instructions not to testify, were not. This was an issue that should have been subject to a motion to exclude or for a

protective order. At the same time, the record indicates that Plaintiffs' efforts to stop Defendants from objecting beyond issues of form are inconsistent with the intent and purpose of the discovery process and prevented the parties from coming to a resolution. Based on these issues, the Court will not award sanctions to either side.

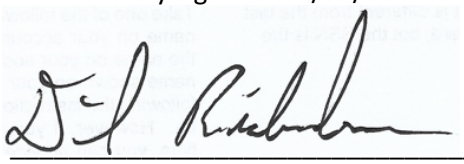
Instead, Plaintiffs are allowed to complete their depositions of both Defendant and Defendant's expert. The parties shall schedule and complete these depositions within the next 60 days. Parties shall use this decision to guide the remainder of their deposition.

Order

Based on the foregoing, Plaintiffs' Motion to Compel is granted consistent with the terms of this Entry Order. Plaintiffs' Motion for Sanctions is denied. The discovery calendar is extended for the two witnesses for 60 days to complete their depositions.

So Ordered.

Electronically signed on 7/15/2022 7:59 PM pursuant to V.R.E.F. 9(d)



Daniel Richardson
Superior Court Judge