NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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Fairfax, Virginia 22030-4009

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September 29, 2020

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Re: ***Kathryn Lohman, Administrator of Estate of Donna Lee Lohman v. Reston Hospital, LLC, dba Reston Hospital Center, et. al.***
Case No. CL–2017–14850

Dear Counsel:

The issue before the Court is whether a party may re-depose a deponent who significantly changes her testimony on an errata sheet after the deposition. The Court holds it has discretion to order a second deposition (or, technically, an "enlarged" deposition) under these circumstances. It orders Plaintiff to submit to a limited deposition wherein the Defendants may probe changes in her testimony.

I. A DEPOSITION WITH 72 CHANGES.

OPINION LETTER

Kathryn Lohman ("Lohman"), daughter of decedent Donna Lee Lohman, as administrator of her mother's estate, sued a variety of doctors and medical entities ("Doctors") for medical malpractice. Lohman alleges the Doctors failed to inform the decedent of an x-ray showing a mass on her lung. Unfortunately, the mass was cancerous. Ms. Lohman asserts the decedent would have received curative cancer treatment had she known of the mass.

The Doctors took Lohman's deposition on October 29, 2019. On November 25, 2019, she submitted an "Errata sheet" with 72 "Change[s] or Correction[s]." In each instance, she identified a portion of the deposition transcript by page and line, noted the change or correction, and entered a "Reason Therefor." The reasons included: "Clarification," "I remembered incorrectly," "I forgot to mention . . .," "I didn't fully understand the question at the time of the deposition," "I forgot to add this," "I miscalculated," "I misunderstood the question," "I misspoke . . .," "The question was confusing," "I was confused . . .," and "I remembered this afterwards."

Three of the defendants, Emergency Medicine Associates, P.A., P.C., Neeraja Akula, M.D., and Anila Mehta, M.D. ("EMA Doctors") filed a "Motion to Re-Depose [Lohman]" in reaction to the numerous changes. They argue the changes are substantial in many instances and they need to ask additional questions.[1] Lohman objects to the second deposition because the rules expressly permit errata and no rule allows a party to re-open the deposition based on them. She further asserts the 72 changes overstate the scope of the alterations. Lohman argues most of the changes were very minor and noncontroversial. She claims her other changes were adequately explained in her errata sheet.

III. DEPOSITION AMENDMENTS MAY PROVOKE FOLLOW-UP DEPOSITION QUESTIONS.

Deposition testimony is not immediately final. A deponent may submit an errata sheet with changes in form or substance following her deposition.

> "When the [deposition] is fully transcribed, the deposition shall be submitted to the witness for examination . . . Any changes in *form or substance* which the witness desires to make shall be entered upon the deposition by the officer with the statement of the reasons given by the witness for making them."

VA. R. SUP. CT. 4:5(e) (emphasis added). By using the words "substance," the Supreme Court of Virginia does not limit a deponent to non-substantive changes, such as typographical errors. A deponent may make completely contradictory, material changes. The rule is silent as to what relief is available to the party taking the deposition when a deponent makes changes.

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[1] The changes differed in brief, oral argument, and sketch order. The sketch order changes are: (1) page 27, line 22 through page 28, line 7; (2) page 49, line 21 through page 50, line 12; (3) page 68, lines 11 through 18; (4) page 70, lines 7 through 9; (5) page 85, lines 13 through 19; (6) page 89, line 12 through page 90, line 8; and (7) page 142, line 20 through page 143, line 5.

The Rules expressly permit a court to *limit* discovery. *See* VA. R. SUP. CT. 4:1(b)(1). Grounds for limitation are cumulativeness or duplicity, requested material is available from another source with less burden or expense, the party seeking the information had ample opportunity to get the material elsewhere in discovery, or the discovery is relatively unduly burdensome or expensive. *Id.* Understandably, courts often consider motions to limit discovery. In such instances, granting or denying discovery is within the sound discretion of the trial court. *Nizan v. Wells Fargo Bank Minnesota Nat'l Ass'n*, 274 Va. 481, 500 (2007) (limiting discovery); *Dick Kelly Enters., Virginia P'ship, No. 11 v. City of Norfolk*, 243 Va. 373, 383 (1992) (limiting discovery).

The present case concerns the power of a court to *expand*, redo, or re-open a deposition. On this point, the rules are silent as to the power of the court. This silence contrasts with express authority for a court to expand a sister form of discovery: interrogatories. VA. R. SUP. CT. 4:8(g) (permitting a court to grant leave to propound more than thirty written interrogatories upon a party). However, the rules for interrogatories and depositions are very different. A party may propound only thirty interrogatories. *Id.* There is no comparable limit for depositions in Virginia, thereby leaving it to the trial courts to determine the number and length.

Looking at the evolution of Virginia deposition law explains the regulatory silence as to the number of depositions allowed (or the right to take a second deposition of the same witness). Prior to revision of the Code of 1887, a party needed advance court consent before retaking the deposition of a witness. During this time "the granting of authority for the second examination was regarded as being within the sound discretion of the trial court." *Leonard v. St. John*, 101 Va. 752, 757 (1903). Upon revising the Code of 1887, § 3364 was added to chapter 164 stating, in essence:

> "the deposition of a witness may be retaken in any case without the consent of the court first obtained, and may be read, if the court, upon application, in the exercise of a sound discretion, would have made an order for such re-examination."

Id. at 757-58. This liberalized the taking of a second deposition. A party no longer needed court permission before taking a second deposition (albeit the party needed permission to use it in court). *Id.* In any event, no limits on a second deposition migrated to the modern Code of 1950, which likely explains why no "leave of court" requirement for it exists.

Virginia further relaxed rules on depositions in a different area—the number of witnesses a party could depose. Prior to October 1, 2001, pursuant to Rule 4:6A, parties were limited to five non-party depositions, with extensions granted for good cause or by stipulation under Rule 4:4. VA. PRAC. CIVIL DISCOVERY § 8:1. However, Rule 4:6A was revised to remove the limit. VA. R. SUP. CT. 4:6A. The General Assembly ultimately expressed Virginia's policy against limiting the number of witnesses deposed. VA. CODE ANN. § 8.01-420.6.

By contrast, federal courts explicitly limit depositions to one per witness absent leave of court. FED. R. CIV. P. 30(a)(2)(A)(ii). Understandably, they therefore provide a mechanism to request leave for an expansion. FED. R. CIV. P. 26(b)(2). Since Virginia lacks an equivalent to the federal rule limiting the number of depositions, logically there is no analogous rule to expand them. In this context, it makes sense the Virginia rules permit a court to expand the number of interrogatories issued but say nothing about expanding depositions. The former are limited, the latter are not.

In addition to limiting the number of depositions per witness, federal rules also limit depositions to seven hours in one day. FED. R. CIV. P. 30(d)(1). Virginia has no such comparable rule limiting deposition duration. Rather, Virginia's rules appear to favor broad discovery through deposition.

With this context, one can read Rule 4:5(b)(3) of the Rules of the Supreme Court of Virginia as giving the Court license to grant leave to re-depose a previously deposed party. That part of Rule 4:5 reads: "The court may for cause shown enlarge or shorten the time for taking the deposition." *Id.* The Court holds this subpart means, *inter alia*, the Court can permit the EMA Doctors to enlarge their deposition of Lohman by asking her more questions related to her errata changes.

A strong policy rationale supports this reading of the rules. Absent the ability to re-depose a deponent who materially changes testimony via a Rule 4:5(e) errata sheet, the discovery-seeking party lacks adequate remedies. It is true, as Lohman argues, the party could cross-examine the witness at trial and use an inconsistent statement against the deponent. However, an important purpose of deposition is information gathering. This cannot wait for trial, of course. There is also the issue of practicality. One can certainly imagine a lawyer, upon receiving a favorable answer to a question during a deposition, moving to another line of questioning, unaware the deponent will later, possibly in consultation with a lawyer or others, change that testimony 180 degrees.

Consider this hypothetical: in a personal injury case an injured plaintiff asks a defendant driver the color of the light when the defendant entered the intersection just prior to the accident. When the defendant testifies, "red," the plaintiff might move on to another line of questions considering the plaintiff's apparent concession. When the defendant, a month later, issues an errata sheet disclaiming the red light and instead avows it was "green," the plaintiff understandably would have a few more questions that could provide important information or lead to additional discoverable information. In addition to simply wanting to know how the defendant is suddenly sure the light was "green," the plaintiff will want to know what caused the new recollection. If someone told the plaintiff, who? If something refreshed the plaintiff's recollection, what? It is not enough to tell the defendant he can ask these questions during the trial.

It is also true, as Lohman argues, there are other ways EMA Doctors can obtain the information they seek on the errata sheet. For example, they could ask more interrogatories. However, the rules permit both depositions and interrogatories precisely because they are different tools, and the tool one uses to get information is important. An interrogatory answer prepared with great consideration and counseling from an attorney is very different than a freewheeling deposition. In a deposition, the deponent answers questions without contemporaneous coaching and the deposing party can tease out nuances by asking a series of follow up questions.

Here, Lohman's errata sheet contained material changes to her deposition testimony. For example, there are many instances of changed testimony from "no" to "yes," or "no" to "I don't remember." A court must exercise restraint when considering the authorization of a Rule 4:5(b)(3) enlarged deposition. It must consider the limiting factors of the rules. VA. R. SUP. CT. 4:1(b)(1). Having considered those factors, the Court concludes the EMA Doctors may enlarge the deposition of Lohman, limited to the changes on her errata sheet. Reopening the deposition generally would violate the spirit of Rule 4:1 and would invite duplicative questions. The EMA Doctors list seven categories of issues they want to probe, which seem reasonable fodder for further inquiry. The Court grants leave to ask questions on the seven categories of issues in a re-opened and enlarged deposition.

III. CONCLUSION.

For the reasons stated herein, the Court holds it may grant leave to enlarge a deposition in the form of a second deposition if a deponent's errata sheet materially changes the testimony.

An appropriate Order is attached.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

cc: Paul T. Walkinshaw, Esquire
Christine A. Bondi, Esquire

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

KATHRYN LOHMAN, Personal Representative of The Estate of DONNA LEE LOHMAN,	)	
Plaintiff,	)	
v.	)	**CASE NO. 2017-14850**
RESTON HOSPITAL CENTER, LLC, dba RESTON HOSPITAL CENTER, *et al.*,	)	
Defendants.	)	

ORDER

THIS MATTER came before the Court upon Defendants Emergency Medicine Associates, P.A., P.C., Neeraja Akula, M.D. and Anila Mehta, M.D.'s Motion to Re-Depose Plaintiff and, having considered the Motion, the opposition thereto, and the arguments of counsel on September 18, 2020; and for the reasons stated in the Opinion Letter dated September 29, 2020, ~~it is hereby~~ which is incorporated by reference; it is hereby

ORDERED that Defendants Emergency Medicine Associates, P.A., P.C., Neeraja Akula, M.D. and Anila Mehta, M.D.'s Motion to Re-Depose Plaintiff be and hereby is GRANTED in part, as limited by this Order; and it is further

ORDERED that Defendants may re-depose Plaintiff on the following issues/testimony set forth in the following portions of her deposition taken October 29, 2019:

(a) Page 27, line 22 through page 28, line 7;

(b) Page 49, line 21 through page 50, line 12;

(c) Page 68, lines 11 through 18;

(d) Page 70, lines 7 through 9;

(e) Page 85, lines 13 through 19;

(f) Page 89, line 12 through page 90, line 8; and

(g) Page 142, line 20 through page 143, line 5.

ENTERED this 29 day of Sept., 2020.

[redacted]

Judge David A. Oblon

WE ASK FOR THIS:

MITCHELL BANKS, PC

[redacted]

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SEEN AND OBJECTED TO FOR THE REASONS ARGUED DURING THE MOTIONS HEARING:

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[redacted]

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Endorsement Waived
Per Rule 1:13

SEEN AND _____:

TIMBERLAKESMITH

_____

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