

IN THE CIRCUIT COURT FOR  
ANNE ARUNDEL COUNTY, MARYLAND  
Civil Division

, <i>et al.</i> ,  Plaintiffs,  v.  INC.  Defendant.	Case No.:
--	-----------

**PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO COMPEL,  
OBJECTION TO SUBPOENA AND MOTION FOR PROTECTIVE ORDER**

Plaintiffs, *et al.*, by and through their counsel, Rodney M. Gaston and Miller & Zois, LLC, hereby file Plaintiffs' Response to Defendant's Motion to Compel the Deposition of \_\_\_\_\_, M.D., Objection to Subpoena and Request for Protective Order for the Deposition of \_\_\_\_\_, WOCN, and Rule 2-431 Certificate. In support thereof, Plaintiffs state as follows:

**INTRODUCTION AND SUMMARY OF ARGUMENT**

In its torturously titled Motion, Defendant is seeking two kinds of relief. First, it seeks an Order compelling the deposition of Plaintiffs' certifying expert in this matter, M.D. Defendant requests a deposition limited to the opinions contained in Dr. \_\_\_\_\_ Certificate of Qualified Expert and Report concerning Plaintiffs' decedent, \_\_\_\_\_ Additionally, Defendant asks for leave to conduct a discovery deposition of Dr. \_\_\_\_\_ at a later date. Second, Defendant has moved for a protective order precluding Plaintiffs from taking the deposition of a fact witness, \_\_\_\_\_, WOCN, until after Dr. \_\_\_\_\_ deposition has taken place.

**MILLER & ZOIS**  
ATTORNEYS AT LAW  
SUITE 1001  
7310 RITCHIE HWY  
GLEN BURNIE, MD 21061

410-553-6000

FILED

2012 APR -6 A 8:43

Defendant is entitled to none of the requested relief. With respect to Dr. [redacted]'s deposition, Defendant's Motion should be denied. Plaintiffs have agreed to produce Dr.

[redacted] for a discovery deposition (including his Certificate and Report) on May 14, 2012. Defendant has served a corresponding Notice to Take Deposition *Duces Tecum* that requests a broad-ranging discovery deposition and production of documents, and which does not seek to limit the scope of Dr. [redacted]'s deposition in any way. Defendant should not be permitted to change its mind and seek two bites at the apple by now asking to limit the scope of Dr.

[redacted]'s deposition to his Certificate and Report, only to later seek to re-depose him under the guise of "discovery."

With respect to the requested protective order precluding the discovery deposition of Ms. [redacted], Defendant's Motion should be denied because it is inconsistent with Md. Rule 2-401(b), which governs the sequence and timing of discovery, and because Defendant has not shown good cause for the entry of a protective order under Md. Rule 2-403. Consequently, the Court should enter an order permitting only the agreed-upon discovery deposition of Dr.

[redacted] and denying Defendant's Motion for Protective Order as to Ms. [redacted]'s deposition.

### ARGUMENT

I. **Defendant should only be permitted to take Dr. [redacted]'s deposition once.**

Defendant is engaging in a flawed process of statutory interpretation in an attempt to justify taking Dr. [redacted]'s deposition twice. Defendant argues that reading them together, some combination of Md. Cts. & Jud. Proc. Code Ann. § 3-2A-04(b)(ii) and Md. Rules 2-401(a) and 2-411 permits this. First, Defendant has pointed to nothing in the language or legislative history of § 3-2A-04(b)(ii) that indicates that the legislature intended to depart from the

**MILLER & ZOIS**

ATTORNEYS AT LAW  
SUITE 1001  
7310 RITCHIE HWY  
GLEN BURNIE, MD 21061

410-553-6000

traditional rule that Maryland courts permit an individual to be deposed only once in a matter absent a showing of good cause.

Second, Defendant is picking and choosing which parts of the Maryland Rules it wishes the Court to consider in light of the result it wishes the Court to reach. For example, Defendant cites Md. Rule 2-411 for the proposition that "any party may conduct the deposition of a witness 'for the purpose of discovery or for use as evidence in the action or for both purposes.'" Defendant's Motion at ¶ 9. However, Defendant ignores the portion of Md. Rule 2-411 stating that "[l]eave of court must be obtained to take a deposition... (d) of an individual who has previously been deposed in the same action unless further deposition is permitted under Rule 2-415 (i) because substantive changes have been made to the deposition transcript." This has been interpreted to mean that "Rule 2-411 effectively limits a party to one deposition of the same individual." Paul V. Neimayer & Linda M. Schuett, *Maryland Rules Commentary*, p.266-67 (3d Ed. Lexis-Nexis 2003).

"Leave of court is obtained to protect individuals from the harassment of giving numerous depositions in the same action." Melnick v. New Plan Realty Trust, 89 Md.App. 435, 438, 598 A.2d 787, 789 (1991). Md. Rule 2-411 presumes that more than one deposition of the same witness in an action is oppressive and burdensome; as a consequence the party seeking leave of court may only obtain it upon a showing of good cause:

Leave of court must also be obtained to depose an individual who has previously been deposed in the same action. This built-in safeguard presumes that a second "crack" is oppressive and burdensome and will not be permitted without good cause and a court order.

Neimayer & Schuett, supra, at p. 292.

Since Maryland's discovery rules are patterned after the federal rules, Maryland courts will look to decisions interpreting the federal rules for guidance. Androutsos v. Fairfax

**MILLER & ZOIS**

ATTORNEYS AT LAW  
SUITE 1001  
7310 RITCHIE HWY  
GLEN BURNIE, MD 21061

410-553-6000

Hospital, 323 Md. 634, 637, 594 A.2d 574, 575 (1991). In considering what constitutes good cause to permit a second deposition of the same individual, the Hon. Roger Titus of the U.S.

District Court for the District of Maryland has described the analysis as follows:

Federal Rule of Civil Procedure 30(a)(2)(A)(ii) requires a party to seek leave of court in order to depose the same person for a second time. In deciding whether a party may depose a witness for a second time, a court must consider whether (1) the discovery sought is unreasonably cumulative or duplicative or can be obtained from some other source that is more convenient, less burdensome or less expensive; (2) the party seeking discovery has had an ample opportunity to obtain the information by discovery; and (3) the burden or expense of the discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of discovery in resolving the issue.

EEOC v. Aggregate Industries, 2010 U.S. Dist. LEXIS 42833. Exhibit 1.

Here, Defendant cannot show good cause to permit Dr. [redacted] to submit first to a deposition limited in scope to his Certificate of Merit and Report, and then to again submit at a later time to a "discovery" deposition. Dr. [redacted] is both Plaintiffs' certifying and testifying expert in this case. The subject matter of his opinions in both of those roles is identical, as are the reasons underlying those opinions. A simple comparison of the Certificate of Qualified Expert, Plaintiff's Designation of Experts and Dr. [redacted]'s Exprt Report shows this to be true. Exhibits 2, 3 & 4. Subjecting Dr. [redacted] to two depositions that will explore substantially identical opinions based upon substantially identical facts is both unreasonably cumulative and duplicative. Certainly it will be more convenient, less burdensome and less expensive to explore all of Dr. [redacted]'s opinions and the bases therefore in one deposition, particularly given the overlap between the opinions he expresses in the Certificate of Qualified Expert and those he is expected to give at trial.

Defendant's reliance on a selection of *nisi prius* opinions from other Circuit Courts on this issue is irrelevant and unpersuasive. First, the resolution of a discovery dispute is within the

**MILLER & ZOIS**

ATTORNEYS AT LAW  
SUITE 1001  
7310 RITCHIE HWY  
GLEN BURNIE, MD 21061

410-553-6000

Court's discretion. "Maryland law is well settled that a trial court has broad discretion to fashion a remedy based on a party's failure to abide by the rules of discovery." Klupt v. Krongard, 126 Md.App. 179, 193, 728 A.2d 727, 734 (1999). A trial court has "considerable latitude" in imposing discovery sanctions. Id. "[W]here the record so reveals, a failure to consider the proper legal standard in reaching a decision constitutes an abuse of discretion." Aventis Pasteur, Inc. v. Skevofilax, 396 Md. 405, 433, 914 A.2d 113, 130 (2007). "A clear example of an abuse of discretion exists where the trial court fails to consider the applicable legal standard or the facts upon which the exercise of its discretionary judgment is based." Id. (quoting Ohlander v. Larson, 114 F.3d 1531, 1537 (10<sup>th</sup> Cir. 1997)). As long as the Court fairly considers the facts of this dispute in light of the applicable legal standard, it has unfettered discretion in resolving this discovery dispute, regardless of what other courts may have done when faced with similar issues. Without additional factual context or reasoning, a collection of orders showing how some trial courts have used that discretion offers very little guidance to this Court in using its discretion to resolve this dispute.

Moreover, Plaintiffs have already agreed to produce Dr. [redacted] for deposition on May 14, 2012. Defendants have served a Notice of Deposition Duces Tecum for that discovery deposition that also commands production of a broad range of documents. Exhibit 5. Defendant's Notice of Deposition Duces Tecum does not limit the scope of the deposition in any way. Defendant has noted a deposition of Dr. [redacted] that will encompass both the Certificate of Merit as well as any opinions he may offer at trial. Defendant has not shown good cause as to why the Court should limit that deposition solely to the Certificate of Merit, and permit Defendant to then take a later discovery deposition that will be burdensome, cumulative,

**MILLER & ZOIS**  
ATTORNEYS AT LAW  
SUITE 1001  
7310 RITCHIE HWY  
GLEN BURNIE, MD 21061

410-553-6000

duplicative and wasteful. Consequently Defendant's Motion to Compel the deposition of  
 , M.D. should be denied.

**II. Defendant has failed to show good cause for a protective order precluding Ms.  
's deposition from taking place until after Dr. has been deposed.**

Md. Rule 2-403 governs the circumstances under which the Court may grant a protective  
order. The rule states:

On Motion of a party or of a person from whom discovery is sought, and for good cause  
shown, the court may enter any order that justice requires to protect a party or person  
from annoyance, embarrassment, oppression, or undue burden or expense...

Md. Rule 2-403(a). Only after a finding of good cause may a court enter an order "that the  
discovery not be had until other designated discovery has been completed, a pretrial conference  
has taken place or some other event or proceeding has occurred..." *Id.* The only rationale  
offered by Defendant for the entry of its requested order is that Ms. is not a defendant,  
and Defendant's belief that it is somehow entitled to avoid participating in discovery until after  
Dr. 's deposition. Even assuming that Defendant has a right to take a separate  
deposition of Dr. limited to the contents of his Certificate of Qualified Expert,  
Defendant cannot show good cause to preclude Ms. 's deposition until after it has taken  
place.

The Maryland Rules specifically contemplate that discovery may be conducted by any  
approved method and in any order. "Unless the court orders otherwise, methods of discovery  
may be used in any sequence and the fact that a party is conducting discovery, whether by  
deposition or otherwise, shall not operate to delay any other party's discovery. Md. Rule 2-401

(b) (emphasis added).

Before the revision of [the Maryland Rules], depositions had to take place in the order  
noticed. These rules expressly abolish any notions of priority. Discovery may be taken  
in any order, and parties may use discovery methods in any sequence. One party's

discovery, whether by deposition or otherwise, does not delay another's, unless the court rules otherwise after, for example, a motion for protective order is filed pursuant to Rule 2-403. One party need not wait until another party's discovery is finished. On the contrary, the rule anticipates that all discovery take place during the same period by all parties, with scheduling to be agreed upon by counsel.

Paul V. Neimayer & Linda M. Schuett, *Maryland Rules Commentary*, p.267 (3d Ed. Lexis-Nexis 2003). The Hon. Paul W. Grimm's opinion in Keller v. Edwards, 206 F.R.D. 412 (2002) is instructive. There, the federal court was considering a plaintiff's motion to compel the deposition of a defendant physician. Id. at 413. The defendant physician argued that he should not be compelled to appear for deposition until his attorneys had taken the deposition of the plaintiff's certifying expert. Id. Part of his rationale was that the the plaintiffs' certificate did not provide him with sufficient detail to fairly apprise him of the substance of his alleged breach of the standard of care. Id. at 417. Even though Judge Grimm found that the certificate was "completely conclusory and substantively worthless as a method of informing the defendants of the particulars regarding their alleged negligence," he nonetheless ordered the defendant physician's deposition to proceed before the deposition of the plaintiffs' certifying expert, as long as in advance the plaintiffs answered an interrogatory detailing the specifics of the alleged malpractice. Id. at 413, 418. The federal court found that the defendant physician had not demonstrated that he would suffer any prejudice by being deposed before the plaintiffs' standard of care expert. Id. at 417.

The same reasoning applies here. Defendant has made no showing that it would be prejudiced in any way by the deposition of Ms. . going forward, or that proceeding with Ms. 's deposition on April 12, 2012 will cause either her or Defendant to suffer "annoyance, embarrassment, oppression, or undue burden or expense" that would provide good

**MILLER & ZOIS**

ATTORNEYS AT LAW  
SUITE 1001  
7310 RITCHIE HWY  
GLEN BURNIE, MD 21061

410-553-6000

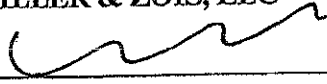
cause for the entry of a protective order under Md. Rule 2-403. Consequently, Defendant's motion should be denied and Ms. [redacted]'s deposition should proceed as scheduled.

**CONCLUSION**

Defendant's Motion should be denied. Defendant has produced no statutory or appellate authority to support its contention that Md. Cts. & Jud. Proc. Code Ann. § 3-2A-04(b)(ii) entitles it to a deposition of Dr. [redacted] limited to the Certificate of Qualified Expert, with a second, duplicative discovery deposition of the same witness to be taken at a later time. Indeed, existing law better supports the opposite view- Defendant is entitled to one deposition of Dr. [redacted] which may include the certificate as well as any other topics Defendant wishes to explore. Second, Defendant has not shown good cause for the entry a protective order preventing the deposition of Ms. [redacted] from going forward as scheduled. For these reasons, Defendant's Motion should be denied in its entirety.

Respectfully submitted,

**MILLER & ZOIS, LLC**

  
\_\_\_\_\_  
Rodney M. Gaston  
Empire Towers, Suite 1001  
7310 Ritchie Highway  
Glen Burnie, Maryland 21061  
(410)553-6000  
(410)760-8922 (facsimile)  
*Attorney for the Plaintiffs*

**MILLER & ZOIS**

ATTORNEYS AT LAW  
SUITE 1001  
7310 RITCHIE HWY  
GLEN BURNIE, MD 21061

410-553-6000