IN THE TWELFTH DISTRICT COURT OF APPEALS
BROWN COUNTY, OHIO

STATE OF OHIO, ex rel DENNIS J. VARNAU,	**CASE NO. CA2009-02-10**
Relator/Petitioner,	
-vs-	**RELATOR'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION FOR PROTECTIVE ORDER (RESPONDENT'S DEPOSITION)**
DWAYNE WENNINGER,	
Respondent/Defendant.	

Now comes the Relator, by and through counsel, and as his Opposition to the Respondent's Motion for a Protective Order, submits the following Memorandum.

I. FACTS AND PROCEDURAL POSTURE

On July 6, 2009, the undersigned sent to opposing counsel a letter requesting deposition dates, and gave several dates to choose from.[1] As is apparently opposing counsel's chosen course of action, no response was received at all, again.[2] This Court on July 20, issued its Order relating to preparation of pending summary judgment related proceedings. Having heard no response from opposing counsel, on August 10 they were sent a notice for the deposition of the Respondent, with an invitation to contact the undersigned should scheduling be inconvenient. The response was only the Motion for Protective Order.

II. LAW AND ARGUMENT

[1] See R. Gov. Bar, Appx. V, "Statements on Professionalism," "A Lawyer's Aspirational Ideals": "As to opposing parties and their counsel, I shall aspire: . . . (a) To cooperate with opposing counsel in a manner consistent with the competent representation of my client. I should . . . (3) Consult with opposing counsel in the scheduling of appearances, meetings, and depositions."

[2] See R. Gov. Bar, Appx. V, "Statements on Professionalism," "A Lawyer's Aspirational Ideals": "As to opposing parties and their counsel, I shall aspire: . . . (a) To cooperate with opposing counsel in a manner consistent with the competent representation of my client. I should . . .(b) To treat opposing counsel in a manner consistent with his or her professional obligations and consistent with the dignity of the search for justice. I should . . . (3) Respond promptly to all requests of opposing counsel."

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A. The Motion to Compel is Premature and is in Violation of the Civil Rules.

The Respondent's Motion to Compel is deficient for at least two reasons. The Motion itself fails to comply with the Ohio Rules of Civil Procedure. Although a trial court maintains the discretion to regulate discovery, see, *e.g.*, State ex rel. The V. Cos. vs. Marshall (1998), 81 Ohio St.3d 467, 469, that discretion must be exercised within the express limitations of the Civil Rules. Anderson vs. A.C. & S., Inc. (1992), 83 Ohio App.3d 581, 584. A necessary prerequisite to filing a motion for protective order is compliance with Civil Rule 26(C), requiring not only a demonstration of *exhaustion* of extra-judicial efforts to resolve the dispute, but a statement in the Motion demonstrating and certifying that has occurred. The Motion for Protective Order reflects no attempts to resolve the dispute informally or outside of the Court's presence, and no extrajudicial efforts of any kind to do so. Movant simply sought the preemptive action of filing a motion with the Court, directly and immediately, in violation of the Civil Rules. Civil Rule 26(C) provides:

> Before *any person* moves for a protective order under this rule, that person shall make a reasonable effort to resolve the matter through discussion with the attorney or unrepresented party seeking discovery. A motion for protective order shall be accompanied by a statement reciting the effort made to resolve the matter in accordance with this paragraph.

See also, Unglesby vs. Fenwick (2006), 167 Ohio App.3d 408, 413, 2006-Ohio-2630, ¶ 10-11 (Compliance with analagous Civil Rule 37(E) construed as a condition precedent to involving the trial courts in discovery).

These are not options for a party to disregard at a whim. Respondent's Motion not only does not do that, but does nothing. Granting such a Motion, even when discovery has not been fully completed, establishes a precedent discounting the importance of those "extra-judicial" efforts before subjecting either party -- or the Court -- to actions of the

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Court. The Motion should be dismissed for that reason alone. See also, Hudson v. United Serv. Auto Ass'n Ins., 150 Ohio Misc.2d 23, 39-40, 2008-Ohio-7084, ¶ 49-50 (discussing appropriate sanctions for failure to exhaust attempts to resolve discovery disputes before applying for court orders).

Respondent's counsel having engaged in no effort to attempt to bring these perceived deficiencies to counsel's attention, before involving the Court, instead seeking judicial relief prematurely, the Motion should be denied.

B. The Court's Orders do not preclude discovery

A party opposing discovery -- here the Respondent -- has the burden of establishing that the discovery should not be had. See State ex rel. Fisher vs. Rose Chevrolet, Inc. (1992), 82 Ohio App.3d 520. Although the trial court maintains the discretion to regulate discovery, see, *e.g.*, State ex rel. The V. Cos. vs. Marshall (1998), 81 Ohio St.3d 467, 469, that discretion must be exercised within the express limitations of the Civil Rules. Anderson vs. A.C. & S., Inc. (1992), 83 Ohio App.3d 581, 584. It is for example an abuse of discretion to cutoff pre-trial discovery, simply to expedite the conclusion of a case. See Rossman vs. Rossman (1975), 47 Ohio App.2d 103.

The Court will find no provision in the Rules prohibiting a party from being deposed after a court has directed that summary judgment be filed and briefed -- regardless of trial dates -- and this Court's order has not done that, either.

The grounds for a protective order under Civ. R. 26(C) are only for "good cause," which is stated as "annoyance, embarrassment, oppression, or undue burden or expense . . . ." The "undue" burden has been described as "great inconvenience," such that is "exceeding or violation of propriety or fitness; EXCESSIVE, IMMODERATE, UNWARRANTED; . . . contrary to justice, right, or law: UNLAWFUL." Insulation Unlimited v. Two J's Properties,

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Ltd. (C.P. 1997), 95 Ohio Misc. 2d 18, 27-28 (emphasis in original). "It is the defendants' burden to establish these grounds." *Id.* The Defendant's Motion is in terms that there is *undue* burden or expense to make him submit to a deposition while summary judgment is pending, although no trial date has been set, and erroneously misreading this Court's orders as "closing" discovery. This Court's Entry, July 20, 2009, states (in relevant part):

> Pursuant to previous orders issued by the court, the parties are scheduled to *complete discovery and file affidavits, evidence and memoranda in support of or in opposition to a motion for summary judgment* on or before July 10, 2009. . . . Accordingly, the discovery period is hereby EXTENDED to and including August 10, 2009. The parties are granted until that date *to conduct discovery and file affidavits, evidence and memoranda in support of or in opposition to the motion for summary judgment.*

Entry, July 20, 2009 (emphasis added). The order says nothing about concluding discovery, completely, or permanently. There is no comma after "complete discovery," and before the reference to preparing for summary judgment. There is no "all" before "discovery". Common sense if not common construction rules means, discovery" relates to "summary judgment," not to "all" discovery.[3] The Order therefore only speaks to discovery for summary judgment (and even that was requested to be extended, by motion filed earlier).

In the meantime, Respondent has done essentially everything possible to oppose and obstruct discovery, including ignoring requests for dates, although required, and then rely upon his disregard of any response as grounds to avoid discovery completely. That strategy only rewards those that do nothing, act unprofessionally, disregard opposing counsel and the court, and encourages excessive litigation and involvement of the court in discovery.

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[3]The last-antecedent rule states that "referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent . . . ." Indep. Ins. Agents of Ohio v. Fabe (1992), 63 Ohio St.3d 310, 314, quoting Carter v. Youngstown (1946), 146 Ohio St. 203, 209. A corollary to that rule is that "the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one." In re Sehome Park Care Ctr., Inc. (Wash. 1995), 903 P.2d 443, 450. See Wohl v. Swinney, 118 Ohio St.3d 277, 279, 2008-Ohio-2334, ¶ 12. Therefore, "discovery," with no "all" before it or comma after it, applies, as does "affidavits, evidence, and memoranda," to "summary judgment." Construing the Entry to mean "all" discovery, whether related to summary judgment or not, is an unreasonable

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There is no rule or order protecting Respondent from submitting to a deposition as scheduled, and he gives none, other than a tortured and unreasonable reading of this Court's Entry. It would be inappropriate to foreclose discovery, just because summary judgment has been filed or is pending.

Therefore, the motion for protective order is unsupported, either procedurally or substantively, and should not only be denied, and appropriate financial sanctions including costs and expenses and attorney's fees should be imposed. See Hudson v. United Serv. Auto Ass'n Ins., 150 Ohio Misc.2d 23, 39-40, 2008-Ohio-7084, ¶ 49-50 (imposing appropriate sanctions for failing to cooperate with discovery).

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon Gary A. Rosenhoffer, 302 E. Main St., Batavia, OH 45103, and Patrick L. Gregory, 717 W. Plane, Bethel, OH 45106, Attorneys for Respondent, by ordinary U.S. mail this 14th day of August 2009.

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interpretation, when no trial date is even set, and presupposes this case will necessarily be resolved on summary judgment.