

IN THE SUPREME COURT OF OHIO

DONALD TEMPLEMAN, Executor of the	)	Case No. 2014-0649
Estate of Willow Templeman,	)	
Deceased,	)	
	)	On Appeal From the Cuyahoga County Court
Plaintiff/Appellee,	)	of Appeals, Eighth Appellate District
	)	
v.	)	Court of Appeals Case No. CA-14-101028
	)	
KINDRED HEALTHCARE, INC., et al.,	)	Trial Court No. CV-12-792299
	)	
Defendants/Appellants.	)	

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APPELLEE'S MEMORANDUM IN OPPOSITION  
TO THE MEMORANDUM IN SUPPORT OF JURISDICTION

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EXPLANATION OF WHY THIS CASE IS NOT ONE  
OF PUBLIC OR GREAT GENERAL INTEREST

This case does not present issues that are of public or great general interest. This case never revolved around the question of whether Ohio should adopt the “Apex doctrine”; Appellants dedicated just one paragraph and two out-of-state citations to the issue in their trial court brief. Rather, it is about an interlocutory discovery order rendered after Appellants filed an untimely response to a Motion to Compel; the third such untimely response to that point in discovery. Appellants cannot take an issue as mundane and straightforward as a trial court’s decision to grant a technically unopposed motion and make it worthy of review. Appellants missed the deadline for filing their response to the underlying Motion to Compel and are left to suffer the consequences.

The failure of a party to file a timely brief does not create an issue of great public importance for the State of Ohio. A careful and detailed review of the trial court docket tells the story of why this is not an appropriate case for this Court. The trial court granted a Motion that was technically “unopposed.” Nowhere in the Appellant’s arguments to this Court does it mention the fact that it was late in filing a Brief in Opposition to Plaintiff’s Motion to Compel the corporate depositions. Nowhere in the Appellant’s arguments does it mention the admonishment that the trial court issued via an Entry on the same date as granting the Motion to Compel relative to Appellant’s pattern of untimely filings.

As this Court has stated time and time again, trial courts have inherent power to manage their own dockets and the progress of the proceedings before them. *State ex rel. Charvat v. Frye*, 114 Ohio St.3d 76, 868 N.E.2d 270, 2007-Ohio-2882, ¶ 23; *Basha v. Ghalib*, 10th

Dist. No. 07AP-963, 2008-Ohio-3999, ¶ 28. Whether to grant or deny a motion to extend a court-ordered deadline or a motion to strike an untimely filed motion is a decision committed to the trial court's sound discretion. Civ.R. 6(B).

This Court should not lose sight of the fact that the trial court below properly used its discretion to manage the docket of the case before it. The story of what was going on with the progress of this case should become readily apparent upon review of the docket and the trial court's Entry(s) on February 12, 2014, set forth below.

Even if Appellants' general lack of timeliness were not the issue, this case does not present issues that are of public or great general interest because Appellants seek to have this court adopt a standard without basis or need under the Ohio Rules of Civil Procedure. The Ohio Rules of Civil Procedure are adequate as written and the relief Appellants sought, if timely pled, can already be granted in appropriate circumstances based upon those time-tested rules.

Furthermore, adopting an entirely new standard in the trial court for determining whether certain executives should be deposed has nothing to do with the Court of Appeals' determination that the appeal did not involve a final appealable order. The Court of Appeals simply stated: "Discovery orders not involving discovery of confidential or privileged information are not final appealable orders under R.C. 2505.02(B)." See Journal Entry of March 14, 2014, attached as Exhibit C to the Memorandum in Support of Jurisdiction. No portion of the Memorandum in Support of Jurisdiction – not so much as a single sentence – advocates or explains why "apex" depositions should be treated any differently in the context of what does and does not constitute a final appealable order.

## STATEMENT OF THE CASE AND FACTS

This is a nursing home negligence case involving the death of Willow Templeman while she was a resident at The Greens Nursing & Assisted Living (“The Greens”), a Kindred facility. The underlying allegation is that the care and treatment Mrs. Templeman received at The Greens fell below the standard of care and, consequently, caused her death – however, this is not your typical nursing home negligence case.

In the fall of 2011, 76 year-old Willow Templeman was a resident at the Kindred Healthcare Facility in Lyndhurst, Ohio for skilled nursing and tracheotomy care. In addition to the standard allegations of below standard care contained in Count One of the Complaint and the wrongful death allegations contained in Count Three, Count Two of the Complaint alleges that prior to September 2011, the Kindred Healthcare Defendants were specifically put on notice of the below-standard nursing patterns and practices at the Lyndhurst, Ohio facility, including but not limited to those demonstrated by the nurses assigned to care for Ms. Templeman, i.e. Defendants Monique Harris, Anita Sutton and Susan Shepard. More specifically, the corporate defendants were made aware of repeated failures by its nurses to provide competent care: e.g. properly monitor, obtain vitals, administer medications as ordered, and follow Kindred Healthcare policies and procedures.

There is a critical back-story to this case founded in another – the case of *Jerome Zavadil, Executor, et al. v. Greens Nursing and Assisted Living LLC, et al.*, Cuyahoga Common Pleas Case No. CV 11 752984. Plaintiff-Appellee’s counsel represented the Estate of Mary Ann Zavadil in a strikingly similar wrongful death action in 2010-11, against nearly the same Kindred/Greens Defendants and defended by the very same counsel. Like Mrs. Templeman,

Mrs. Zavadil had one stay at the Greens, went to a nearby hospital, and then returned to the Greens where it was alleged that she ultimately died from their negligent care. The main nurses involved in the care of Mrs. Zavadil were the same nurses involved in the care of Mrs. Templeman. In fact, Plaintiff's counsel was actually at the Greens facility on November 8, 2011 from 1:00 to 2:30 p.m., the time when Mrs. Templeman returned to the facility, taking the deposition of Defendant Monique Harris for the *Zavadil* case. Mrs. Templeman went on to be admitted under Ms. Harris' care at approximately 3:00 p.m. that same day, meaning that Defendant Harris left the deposition with Attorney Petersen and went to work to care for Mrs. Templeman.

Of critical importance, this is a case where the Kindred Healthcare corporations were on direct notice that their staff members, these nurses in particular, were neglectful, incompetent, inadequately trained, and negligently retained. By the time Mrs. Templeman arrived, this facility's staff had already proven a conscious disregard to the rights and safety of its patients – to include at least one who had died as a result, i.e. Mary Ann Zavadil. In the case of Willow Templeman, Kindred Healthcare was in a position to have known better and to have done better in terms of patient care – no evidence has been shown that the negligent nurses had even been so much as retrained on patient care. On a much bigger level, this case aims at exposing the institutional deficiencies which existed at Kindred Healthcare – at a minimum, incompetent nursing care that resulted in at least one prior fatality that we're aware of, and when allowed to continue, resulted in yet another senseless death.

Important to these issues are the corporate leaders of Kindred Healthcare. The Complaint details the inextricably intertwined relationship of the four Kindred Corporate

entities: Kindred Healthcare Inc., Kindred Healthcare Operating Inc., Kindred Nursing Centers East, LLC and the Defendant Greens Nursing and Assisted Living. It also specifically details the knowledge/notice of the Kindred Defendants, including the two corporate officials ordered to be deposed.

This case was filed on September 26, 2012. It went through one appeal involving an attempt by the defense to force arbitration, ultimately returning to the trial court. Plaintiff filed her Motion to Compel the Depositions through the Electronic Docketing System with the trial court on January 13, 2014. Appellant received Plaintiff's Motion to Compel electronically that same day. However, Appellant did not file a responsive Brief within the seven days required by the Rules. Instead, their Opposition was filed late, on January 21, 2014.

This was not the first motion to compel filed against Appellants in this case – nor the first one that went technically unopposed. On the date of the Entry now being appealed, the trial court issued another Entry which is telling of the progress of the case:

THE COURT WOULD LIKE TO ADDRESS TWO ISSUES IN THE DEFENDANTS' BRIEF IN OPPOSITION. ON PAGE 3 OF THE BRIEF THE DEFENDANTS ALLEGE THAT THE COURT GRANTED A MOTION TO COMPEL NOTING THAT THE MOTION WAS UNOPPOSED AND THAT THIS RULING WAS SOMEHOW INACCURATE. THE DEFENDANTS ARE REMINDED TO FAMILIARIZE THEMSELVES WITH THE LOCAL RULES AND THE CIVIL RULES. THE MOTION TO COMPEL IN QUESTION WAS FILED ON 1/8/13. THE COURT MADE IT'S RULING ON 1/24/13, NOTING THAT IT WAS UNOPPOSED AS NO BRIEF IN OPPOSITION OR MOTION FOR EXTENSION OF TIME HAD BEEN FILED. THE COURT GAVE THE DEFENDANTS AMPLE TIME TO FILE A BRIEF IN OPPOSITION OR MOTION FOR EXTENSION. IN FACT, THE COURT GAVE THE DEFENDANTS NEARLY DOUBLE THE AMOUNT OF TIME PROVIDED FOR BY THE RULES. IT IS NOT THE COURT'S "MISTAKE" THAT IT LABELED THE MOTION UNOPPOSED. THE MOTION WAS UNOPPOSED AND A BRIEF IN OPPOSITION WAS FILED OUT OF TIME, SOME 17 DAYS AFTER THE INITIAL MOTION WAS FILED. THUS, THE COURT'S LABELING OF THE MOTION AS "UNOPPOSED" WAS IN FACT ACCURATE.

ADDITIONALLY, ON PAGE 4 OF THE BRIEF IN OPPOSITION THE DEFENDANTS NOTE THAT THE COURT GRANTED YET ANOTHER MOTION TO COMPEL FILED BY THE PLAINTIFF ON 11/26/13. AGAIN, THAT MOTION WAS FILED 11/26/13 AND WAS GRANTED ON 12/12/13. YET AGAIN, THE DEFENDANTS FILED AN UNTIMELY BRIEF FOR EXTENSION OF TIME ON 12/11/13.

See Trial Court's Judgment Entry denying Plaintiff's Motion for Default Judgment, 2/12/14.

## ARGUMENT IN OPPOSITION TO THE PROPOSITIONS OF LAW

Appellants' Proposition of Law I: Because Revised Code 2305.02 (sic) does not provide an exhaustive list of recognized provisional remedies, some interlocutory discovery orders not expressly referenced in the statute are, by their nature and circumstance, final and appealable.

Appellee's First Response in Opposition: The legislature entrusted appellate court's with applying R.C. 2505.02(B)(4) so that parties and non-parties alike may have decisions reviewed in compelling situations, but a corporate officer's "apex" status does not entitle that officer to special consideration under R.C. 2505.02(B)(4).

It is well established that an order must be final before it can be reviewed by an appellate court. See Section 3(B)(2), Article IV of the Ohio Constitution. See, also, *General Ace. Ins. Co. v. Insurance Co. of North American*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989).

Appellant did not cite a single case from any jurisdiction declaring the denial of a protective order involving an "apex" deposition a final, appealable order and, under Ohio law, it most certainly is not.

If an order is not final and appealable, then an appellate court has no jurisdiction to review the matter and must dismiss the appeal. *Lisath v. Cochran*, 4th Dist. No. 92CA25,1993 WL120627 (Apr. 15, 1993); *In re Christian*, 4th Dist. No. 1507,1992 WL 174718 (July 22,1992).

Generally, discovery rulings are interlocutory orders that are not final or appealable because any harm in an erroneous ruling is correctable on appeal at the conclusion of the entire case.

See *Walters v. Enrichment Center of Wishing Well, Inc.*, 78 Ohio St.3d 118,1997-Ohio-232, 676 N.E.2d 890, 893. R.C. 2505.02(B)(4) defines a final order as:

An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional

remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

R.C. 2505.02(A)(3) defines a "provisional remedy" as a remedy sought in a "proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, *discovery of a privileged matter*, \* \* \*." (Emphasis added.) Therefore, if a trial court orders a party to disclose privileged material, the entry is a final appealable order pursuant to R.C. 2505.02(A)(3) and (B)(4). See *Briggs v. ML Carmel Health Sys.*, 10th Dist. No. 07AP-251, 2007-Ohio-5558. Consequently, to be appealable, this Court would have to determine that the entry appealed from ordered the disclosure of privileged information. The trial court Order did not require the disclosure of privileged material. In fact, with respect to the two depositions at issue, the question of privilege was not even raised in the underlying Motion for Protective Order, the Brief of Appellant or the Memorandum in Support of Jurisdiction.

The Court of Appeals understood this threshold requirement, i.e. that privilege must be implicated before an Order compelling discovery will be considered final and appealable, citing this Court's decision in *Myers v. Toledo*, 110 Ohio St.3d 218 (2006), in support of that very proposition. Appellant, of course, asserts that *Myers* is factually distinguishable. The problem for Appellant is that the substantive ruling in *Myers* is directly on-point and nothing in R.C. 2505.02 suggests the definition of "privilege" differs when considering an order compelling

attendance at an independent medical examination (as in *Myers*) versus an order compelling attendance at a deposition.

Appellants' Proposition of Law II: Before the deposition of a high-ranking corporate officer may be taken, the deposing party must demonstrate both that the corporate officer possesses superior or unique information relevant to the issues being litigated and that the information cannot be obtained by less intrusive methods.

Appellee's Second Response in Opposition: Consideration of the "apex doctrine" by this Court is academic at best; the disposition of this case is very simple because Appellants' response at the trial court level was not timely.

The Appellant gave the trial court plenty of reasons for granting Plaintiff's Motion to Compel the corporate depositions and the fact that it failed to file a timely response again is among them. As with prior Motions to Compel, Appellant had ample time to file a brief in opposition or file a motion for extension of time, but failed to do either in a timely manner. Instead, it filed LATE again.

As specifically stated in Cuyahoga County Local Rule 11, Hearing and Submission of Motions --

(C) Each party opposing the motion, except a motion for summary judgment, shall serve and file within seven (7) days thereafter, a brief written statement of reasons in opposition to the motion and a list of citations of the authorities which are relied upon. If the motion requires the consideration of facts not appearing of record, the respondent shall also serve and file copies of all affidavits, depositions, photographs or documentary evidence which the respondent desires to submit in opposition to the motion.

By January of 2014, Cuyahoga County's Electronic Docket was in full swing and all the filings in this case were done via that system. The Local Rule on the Electronic Docket addressed Service on Parties and the Time to Respond --

**B. Service on Parties. Time to Respond or Act.**

Parties traditionally served with documents that have been electronically filed are entitled to respond as if the paper document had been traditionally filed with the Court. The time to respond shall be in accordance with the Ohio Rules of Civil Procedure, unless otherwise ordered by the assigned Judge. For the purpose of computing time to respond to documents received electronically by the Court, any document filed after 4:30 p.m. Eastern Standard Time or Eastern Daylight Time, shall be deemed filed on the next Court business day that is not a Saturday, Sunday, or legal holiday.

See Common Pleas Court of Cuyahoga County In re: Electronic Filing of Court Documents, Temporary Administrative Order. In a careful review of the docket as to the Motion to Compel at issue, there should be no question in this Court's mind that the Appellant failed to respond in a timely manner.

In reading the Court's February 12, 2014 Judgment Entries in conjunction with one another, it is apparent that the trial court had enough of the Appellant's late filings. In its discretion, it granted a Motion which was actually "unopposed" under the Rules.

Excusing Appellants' late filing is not a matter of great importance for the State of Ohio. Rules and deadlines for filing responsive pleadings exist for a reason. They provide order and efficiency to the legal process. Our trial courts must have discretion to enforce these rules. Otherwise, the rules are rendered meaningless.

Appellee's Third Response in Opposition: The adoption of a rule that is specific to "high-ranking corporate officers" is unnecessary as the Ohio Rules of Civil Procedure adequately address the issue.

By their express terms, the Ohio Rules of Civil Procedure include the ability to take the deposition of a corporate party's officers, directors, or managing members. Pursuant to Civil Rule 26(B), the scope of discovery is broad, and includes discovery of everything, not otherwise privileged, that is relevant to the subject matter of the pending suit. Civil Rule 30 provides that

“any party may take the testimony of any person, including a party, by deposition upon oral examination.”

Likewise, by their express terms, the Ohio Rules of Civil Procedure provide necessary limits upon this right of discovery and those limits are exercised by the trial court under the auspices of Civil Rule 26(C) and imposed as protective orders. Civil Rule 26(C) requires “good cause shown” before a court can make an order protecting a party or person from “annoyance, embarrassment, oppression, or undue burden or expense.” That order can altogether bar the discovery, specify the terms on which it will be had, the method by which it may be had, areas that may not be inquired into, who may be present, whether the discovery is sealed, whether and how it will be disclosed and even that it be provided simultaneously by both sides. Civ. R. 26(C).

The very protection Appellants seek is already available under Ohio’s civil rules, Appellant simply failed to seek it in a timely or complete manner; In its single paragraph argument below, Appellant did not offer one specific example of how the noticed depositions would annoy, embarrass, oppress or unduly burden the two deponents. Not a single word in the affidavits attached to Appellant’s trial court motion touched on those issues either.

Having failed to meet its standard under Ohio’s Civil Rules, Appellant now seeks to adopt and impose a new one. In support, Appellant trots out a veritable parade of impending doom, arguing that not adopting the new rule will lead to everything up to and including the end of Ohio’s economy. Appellant fails to explain, however, why no Ohio case has addressed this topic if the current system is so flawed.

Rather than the current effective rule which allows the trial court to manage discovery within the bounds of discretion, Appellant advocates a system which would require micro management by the appellate courts of this state, swelling dockets and significantly slowing the administration of justice. If, in fact, the current system were so fundamentally flawed as Appellant argues, one would expect a voluminous record of decisions from appellate courts, and from this Court. The truth is quite to the contrary. Despite the Civil Rules being in effect since 1970, Appellant cannot cite a single case under Ohio law suggesting that Civil Rule 26(C) is inadequate or that abuses exist which can only be prevented by discriminating between persons subject to discovery as those that are “protected” and those that are “more protected” – that is not the sort of “privilege” contemplated by R.C. 2505.02 or sanctioned by balanced scales of justice.

Appellee’s Fourth Response in Opposition: The rule proposed by Appellant is contrary to Ohio law which precludes disparate treatment between individuals and corporations and would inequitably shift the balance of discovery against the party seeking discovery.

Ohio’s Civil Rules are to be “construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.” Civ. R. 1.(B). The rules are intended to provide a party with access to anything relevant to the proceedings and not otherwise privileged. Civ. R. 26(B). That access is only to be denied or restricted upon a showing of “good cause” by the party resisting discovery that measures are necessary to avoid “annoyance, embarrassment, oppression, or undue burden or expense.” Civ. R. 26(C).

The rule proposed by Appellant would undeniably and inequitably shift the burden set forth in Rule 26(C) and slow the “expeditious administration of justice” by starting with the

presumption that depositions of executives are improper and requiring the party seeking discovery to exhaust numerous depositions before being allowed to question the person who actually has the information or testimony sought. In this case, not unlike so many others, that would require significant and costly expenditures by an injured party ill equipped to afford them, handicapping that party's opportunity to find justice. In a consumer class action, for example, each and every plaintiff would be laid bare on the field of battle, readily and immediately subject to deposition under the existing Rules of Civil Procedure, while the corporate officers would, from the very filing of the Complaint, start the fight inside the fort.

#### CONCLUSION

This case is wholly improper for consideration by this Court. The very idea behind accepting cases of public or great general interest is that it allows this Court to accept only those cases that will make a difference. Decisions from this Court are not merely for academic or advisory purposes, they are for guidance and implementation. Appellants propose an entirely new rule of discovery in a case where the real issue is a lack of timeliness, and do so without any suggestion why an order compelling an executive's deposition, as opposed to any other deposition, should automatically be considered a final appealable order.

In their efforts, Appellants propose to remove the discretionary power of experienced trial judges and replace this discretion with a maze of technicalities that is both unwise and unnecessary. Appellant does so without citing any evidence suggesting Civil Rule 26(C) has proven insufficient as a tool to combat discovery abuse. This Court should refuse to adopt a “fix” for a system which is not broken.

Respectfully submitted,



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CERTIFICATE OF SERVICE

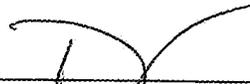
I hereby certify that on this 2<sup>o</sup> day of May, 2014, a true and accurate copy of the foregoing Memorandum in Opposition to the Joint Memorandum in Support of Jurisdiction was sent by regular U.S. mail, postage paid, to:

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