

- 1) The August 28, 2015, dismissal of the Texas Medical Board of the charges preferred by Glen Rose Medical Center against Plaintiff Albert Jackson Turk, M.D. (Exhibit A to the Second Amended Complaint, Document 32-3).
- 2) The August 24, 2015, dismissal by the Texas Board of Nursing of charges preferred by Glen Rose Medical Center against Plaintiff Shelley Raylene Turk, R.N. (Exhibit B to Second Amended Complaint, Document 32-4).
- 3) The July 27, 2015, dismissal by the Texas Board of Nursing of charges preferred by Glen Rose Medical Center against Dr. Turk's nurse, Donna Marie Anderson (Exhibit C to Second Amended Complaint, Document 32-5).
- 4) The Sworn Declaration of Justus Peters, M.D., former Chief of the Medical Staff of Glen Rose Medical Center attesting, among many other things, to the history of advocacy by Plaintiffs for patient safety improvement and patient care improvement, Dr. Peters' specific agreement with Dr. Turk's advocacy, the retaliation against the Plaintiffs, and the fact that Shelley Turk was the best nurse at Glen Rose Medical Center when she was terminated (Exhibit D to Plaintiffs' Second Amended Complaint, Document 32-6).
- 5) The November 23, 2015, letter on Glen Rose Medical Center letterhead from Defendant Ray Reynolds to Plaintiff Albert J. Turk, M.D., Document 25-1, advising Dr. Turk that in order to file a grievance related to his employment, Dr. Turk must follow the attached Glen Rose Medical Center Grievance policy. (Notably, neither Defendant Ray Reynolds' letter nor the attached Employment Grievance Policy was presented on behalf of Glen Rose Healthcare Inc., the entity Defendants claim is

Plaintiff Albert J. Turk's sole employer. Glen Rose Medical Center is operated by Defendant Somervell County Hospital District.)

- 6) In their Initial Disclosures (attached as **Exhibit "A"**) dated November 10, 2015, Plaintiffs identified over twenty (20) witnesses by name or category and eleven (11) documents by name or category.

Defendants' Disclosures were not made until January 14, 2016, at the insistence of Plaintiffs. In their Initial Disclosures dated January 14, 2016 (attached as **Exhibit "B"**), Defendants identified ten (10) witnesses and three (3) categories of documents. None of the identified documents have actually been provided to Plaintiffs by Defendants to date. Defendants have refused to produce them because of a dispute described below about the proper form for a Protective Order.

Further, Defendants have also refused to voluntarily provide dates for five (5) requested oral depositions because of the pending Motion to Dismiss.

II. PENDING MOTION TO DISMISS

Pending before the Court is Defendants' Partial Motion to Dismiss All of Dr. Albert Turk's Claims in Plaintiffs' First Amended Complaint (Document No. 21).¹ The matter has been extensively briefed in Plaintiffs' Reply (Document 25), Defendants' Response (Document 28), and Plaintiffs' Sur-Reply, Document 36. The sequence of pleadings with regard to the presently pending Motion to Dismiss commenced on November 25, 2015 and ended on January 27, 2016 with Plaintiffs' Sur Reply.

¹ Prior to filing that Motion to Dismiss on October 23, 2015, Defendants filed a Partial Motion to Dismiss Dr. Turk's Claims under the Texas Open Meetings Act, Document 9. Plaintiffs responded on November 16, 2015, Document 19. No part of Plaintiff Shelley Turk's claims is challenged in any Motion.

Defendants have repeatedly refused to schedule any oral depositions because this Motion to Dismiss is pending. Even the requested depositions of Donna Miller, Kelly Van Zandt and Elizabeth Morgan which relate primarily to the termination of Plaintiff Shelley Turk are not to be scheduled according to the Defendants because of the pending Motion to Dismiss Dr. Turk's Claims.

Plaintiffs respectfully seek an Order compelling Defendants to proceed with oral depositions despite the pending Motion to Dismiss. Plaintiffs also request a Status Conference about this intractable discovery dispute.

III. UNRESOLVED ISSUES ABOUT THE FORMAT FOR A PROTECTIVE ORDER

All parties agree that a Protective Order is appropriate in this case. Plaintiffs allege in this case that patient safety and patient care have been compromised at Glen Rose Medical Center by conditions so poor that at times avoidable adverse outcomes for patients have occurred, including premature deaths. Access to medical records will be relevant and needed to address the issue of Plaintiffs' advocacy about those matters. Plaintiffs recognize that the medical privacy of the involved patients and decedents must be protected and have offered to sign a Protective Order addressing that specific need.

Further, Plaintiffs recognize that information contained in personnel files is likely to be involved in this case. Plaintiffs assert that their own personnel files, grievances and related documents are likely to lead to admissible evidence. Plaintiffs have alleged that Defendant Ray Reynolds as the Chief Executive of Glen Rose Medical Center has no kind of medical license and lacks rigorous training as a healthcare professional. Plaintiffs have also alleged that the Quality Director Kelly Van Zandt suffers from lack of medical training and that she is not

qualified for her job .² Plaintiffs have thereby offered to sign a Protective Order addressing personnel files.

Defendants have asserted that only the standard Western District Protective Order is satisfactory in this case. All of the documents disclosed by Defendants in their Initial Disclosures are being withheld because of this issue.

Plaintiffs, through counsel, have attempted to no avail, to discuss with Defendants the fact that the standard Western District Confidentiality and Protective Order in the section addressing "Classified Information" is meant to address aspects of operations of private entities such as the "trade secrets," "confidential or proprietary information," or "competitive analyses." In this case, in contrast, the Somervell County Hospital District and its Glen Rose Medical Center are both public entities where essentially all information, except medical information and personnel files, is public.

Further, Defendants have refused to provide any documents or information in this case unless the "For Counselors and Attorneys Only" portion of the Western District standard Protective Order remains in place. This provision also does not make sense in this particular case. This case involves a physician and a nurse as Plaintiffs who will obviously need to communicate extensively with their counsel about numerous medical records, their meaning, and implications.

Plaintiffs seek an Order compelling Defendants to provide documents, with a Protective Order in place protecting both medical privacy and personnel information. Plaintiffs also respectfully request the Court to enter a Protective Order reflecting those parameters. Plaintiffs

² In the Sworn Declaration of Justus Peters, M.D. (Document 32-6), this former Chief of the Medial Staff at Glen Rose Medical Center, testified about Defendant Reynolds' lack of medical training and he flatly stated that Kelly Van Zandt, Quality Director of Glen Rose Medical Center is not qualified to hold her job.

also seek to discuss this additional pending discovery issue in a status conference.

IV. UNRESOLVED ISSUES INVOLVING THE ORDER FOR SCHEDULING DEPOSITIONS

In repeated conversations, Defendants, through their counsel, have stated that no oral deposition of any defense side witness will move forward with their agreement until Plaintiffs first give their depositions. Defendants assert vigorously that Defendants have an inherent right to depose the Plaintiffs in a lawsuit first. They cite no authority for this proposition.

There is no formal rule of civil procedure to determine the issue of primacy in depositions. However, this Court has the authority to control the timing and sequence of depositions pursuant to Fed. R. Civ. P. 26(d). By way of example, the issue of “who goes first” was addressed by Hon. Jeff Kaplan in *Owens v. Excel Management Services, Inc.*, Civil Action No-3002-0835-L (2002) where the Court held that the Plaintiff, having sought the deposition of Defendants’ witness first, was entitled to take that deposition prior to any other witness being deposed. A copy of the Magistrate Kaplan’s Order is attached as **Exhibit “C”** for the Court’s convenience.

State courts have followed this same pattern. For example, the Hon. Martin Hoffman reached the same conclusion in *Miller v. Hyundai Capitol America*, Cause No. 13-02597, (2013), holding that “...*Plaintiff’s initial request for depositions should take priority.*” Judge Hoffman’s Order is attached as **Exhibit “D.”**

Another example is *Hutchinson v. Greer*, where the Hon. Ken Molberg noted in Cause No. DC-11-13742-D (2012) (attached as **Exhibit “E”**) that “*With only rare exception, discovery must proceed on a first-come, first-served basis.*”

Plaintiffs believe that the above-cited authorities first are correct and should be followed

in this case as Plaintiffs asked first to schedule oral depositions. Specifically, the depositions of Defendant Ray Reynolds and Somervell County Hospital District Chairman, Chip Harrison, were the first requests and Plaintiffs specifically offered to follow next.

Regretfully, there are factual disputes between counsel related to the order of deposition issue. However, some points are not disputable, as follows:

1.) After Defendants furnished their Initial Disclosures, Plaintiffs' counsel thanked opposing counsel for the disclosures and made the first written reference to taking oral depositions in this case, specifically asking to schedule the depositions of Defendant Ray Reynolds and the Chairman of the Somerville County Hospital District Board of Trustees, Chip Harrison. Both gentlemen were identified as potential witnesses in Defendants' Initial Disclosures. The above-described request to schedule two specific oral depositions was made by email on January 14, 2016, at or about 8:22 p.m.

2.) There followed some discussion about the issue of, "Who asked first?" However, by January 21, 2016 in an email at or about 8:19 a.m., defense counsel conceded that she may have been "misremembering" about verbally asking for Plaintiffs' depositions the previous month in December. She asked to be advised if she was "misremembering," and then was so advised.

At the present time, the defense position has shifted back to a flat statement that defense asked first to take depositions in this case, with the alternative argument discussed above that the defense has something like an "inherent right" to proceed first.

V. PLAINTIFFS' REQUEST TO MODIFY SCHEDULING ORDER

Plaintiffs respectfully assert that the Scheduling Order (Document 11) which the Court entered, *sua sponte*, on October 27, 2015, needs to be considerably modified given the developments in the case discussed above. Plaintiffs seek at least a sixty (60) day extension on each of the items 3-8 from the Scheduling Order, which includes the trial date, as item 8.

VI. PLAINTIFFS' REQUEST FOR A STATUS CONFERENCE

Plaintiffs respectfully request the Court to order a Status Conference involving the United States District Judge or a Magistrate Judge and counsel for all parties. The purpose for the request is to create a problem-solving event where the parties will have the benefit of guidance by a federal judicial officer.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I hereby certify that I have conferred with opposing counsel. Defendants do not agree that Plaintiffs should be afforded any of the relief requested in the forgoing Motion. Defendants do not join in the request for a Status Conference. Defendants do not agree with the extensions sought as to items 3-8 of the Scheduling Order. Defendants assert that all discovery should be stayed in the case until a ruling is made on their pending Motion to Dismiss all of Albert J. Turk's Claims.

/s/John E. Schulman
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon all counsel of record in accordance with F.R.C.P. 5(b) on the 20th day of April, 2016, as follows:

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