IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 10-3843
Appeal from United States District Court
Case No. 3:09-CV-2560

JAMES E. PIETRANGELO, II,
Plaintiff-Appellant,

v.

SANDUSKY LIBRARY, et al.
Defendants-Appellees.

BRIEF OF DEFENDANTS-APPELLEES, THE LIBRARY ASSOCIATION OF SANDUSKY, D/B/A THE SANDUSKY LIBRARY AND TERRI ESTEL

Margaret M. Koesel (0041537)
Nicole J. Quathamer (0070893)
PORTER WRIGHT MORRIS & ARTHUR LLP
925 Euclid Avenue, Suite 1700
Cleveland, Ohio 44115-1483
(216) 443-9000/FAX (216) 443-9011
mkoesel@porterwright.com
tturnbull@porterwright.com

Attorneys for Defendants-Appellees, The Library Association of Sandusky, d/b/a The Sandusky Library and Terri Estel

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CASE NO. 10-3843

James E. Pietrangelo, II. v. The Sandusky Library, et al.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Circuit R. 26.1, The Library Association of Sandusky, Ohio dba The Sandusky Library makes the following disclosure:

1. Is said party a parent, subsidiary or other affiliate of a publicly owned corporation?

_____ Yes __X__ No

If the answer is Yes, list below the identity of the parent, subsidiary or other affiliate corporation and the relationship between it and the named party: N/A

2. Is there a publicly owned corporation, not a party to the case, that has a financial interest in the outcome? ___ Yes __X__ No

If the answer is Yes, list the identity of such corporation and the nature of the financial interest.

N/A

/s/Margaret M. Koesel January 17, 2011
(Signature of Counsel) (Date)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Rules

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendants urge this Court to hold oral argument in this case. This appeal raises issues regarding a district court's exercise of its sound discretion to impose civil contempt sanctions, including dismissal with prejudice, when a litigant willfully defies an order to answer relevant, non-privileged questions during a routine discovery deposition.

STATEMENT OF THE ISSUES

I. The district court conducted a civil contempt proceeding for which Plaintiff received adequate notice and an ample opportunity to be heard.

II. The district court's orders to appear at deposition and to answer relevant, non-privileged questions were valid.

III. The district court exercised appropriate discretion when it dismissed Plaintiff's Complaint, with prejudice, and awarded the Library Defendants their reasonable expenses, including attorneys' fees, where Plaintiff willfully and deliberately refused to comply with the court's valid orders.

STATEMENT OF THE CASE

Just days after being escorted from the Sandusky Library by local authorities for a violation of library rules, Plaintiff-Appellant James E. Pietrangelo, II[1] filed a Complaint against Defendants-Appellees, The Sandusky Library and Terri Estel (the "Library Defendants"), and two Sandusky police officers and the City of Sandusky (the "City Defendants").

The district court held a case management conference and discovery commenced. R-23. During discovery there were several disputes brought to the attention of the district court, including Plaintiff's motions for sanctions, R-26, to disqualify one of the Library Defendants' counsel, R-25, and for a protective order, R-32. The district court also held a Local R. 37.1 telephone hearing on discovery issues on January 27, 2010, R-63, on March 3, 2010, R-27, and two telephone hearings on March 5, 2010 during Plaintiff's deposition. R-65, at Attachment 1 ("R-65"), Transcript of the Deposition of James E. Pietrangelo, II, at 51-77; 78-83.

Following the March 5, 2010 Local R. 37.1 telephone hearings, Defendants each filed a motion to show cause. R-29 and 33. Ultimately, the district court dismissed Plaintiff's Complaint, following a two and one-half hour hearing where it gave Plaintiff an opportunity to show cause why he should not be held in

[1] Plaintiff is an attorney who chose to represent himself. R-85, June 14, 2010 Transcript of the Hearing on the Show Cause Motions, at 10-12.

contempt for his willful, deliberate and bad faith disobedience of the district court's clear and unequivocal order to answer questions during his deposition. R-66 at 1, 3.

Plaintiff appealed and this Court assigned the appeal Case No. 10-3843. Thereafter, the district court awarded Defendants their attorneys' fees and costs. R-79. Plaintiff then filed an amended notice of appeal challenging the amount of the fee award, which this Court treated as a second appeal and docketed as Case No. 10-4119. Plaintiff refused to pay the second filing fee. Consequently, the Court dismissed Case No. 10-4119 for failure to pay the filing fee.

STATEMENT OF FACTS

I. Plaintiff's Complaint

Plaintiff's Complaint alleged violations of 42 U.S.C. § 1983, and state law claims including, conversion, defamation, unlawful ejectment, and intentional infliction of emotional distress against all Defendants. R-1. Plaintiff sought injunctive, compensatory and punitive relief for, among other things, his "extreme emotional distress," injury to his "professional reputation," "great humiliation, embarrassment, and anxiety resulting in physical effects such as loss of appetite and sleep." R-1 at ¶¶ 30, 31, 39, 40, 41, and 47.

II. Plaintiff's Discovery

During the deposition of Defendant Terri Estel, Plaintiff contacted the district court to complain that, in an off-the-record discussion about lunch arrangements, defense counsel was "less than friendly," that one of the individual defendants had addressed him directly, and that one of the defense counsel used intemperate language. R-63 at 5. The district court heard from each party, instructed the parties to "be accommodating," and told Plaintiff to turn-off the video camera he was using to record the deposition because a certified court reporter had not been engaged to videotape the proceeding. R-63 at 12, 13. The district court offered each party a chance to raise additional issues. Plaintiff raised none. R-63 at 16. The deposition was concluded and discovery continued.[2]

III. Plaintiff's Deposition

Four days before his deposition, Plaintiff filed a motion to disqualify one of the Library Defendants' counsel and a motion for sanctions against all Defendants. R-24, 25, 26. Plaintiff then made a Local R. 37.1 request for a telephone conference with the district court seeking to avoid his deposition pending a ruling

[2] In general, Plaintiff refused to participate in discovery on anything other than his own terms. In addition to his willful contempt, he refused to 1) appear at deposition at the originally proposed location; 2) respond to most written discovery based on objections that would not withstand scrutiny; 3) respond to a Rule 37 request to discuss and resolve his objections to most interrogatories and/or document requests; and 4) respond to a second discovery request to inspect or copy a tape-recorded conversation between him and Defendant Estel. R-50 at 9.

on those motions. R-27. The district court overruled his objections and directed him to appear. R-27.

The district court also advised the parties that, "Under our local rule, counsel can call me and receive a ruling from The Court on the deposition. . . . I'll be available by cell phone for most of the day...." R-86, Transcript of the March 3, 2010 Local R. 37.1 Hearing, at 10. Plaintiff responded that, "[O]ne thing I don't want you to think, Your Honor, is I'm hard hooking you, I'm just being honest. I'm going to apply what I think are valid objections, and they may be calling you quite frequently during that deposition." R-86 at 12.

A. Plaintiff refuses to answer relevant questions

At the commencement of Plaintiff's deposition, defense counsel offered to stipulate that any objections Plaintiff had would be preserved for ruling at a later date, without Plaintiff having to make them. R-65 at 4. Plaintiff declined. R-65 at 5.

Within the first hour, Plaintiff began to object and refuse to answer questions regarding his claims for emotional distress damages. For example,

> Q. [BY MR. LANG] Please state the name of each medical practitioner, therapist or other health care worker who has treated you for the extreme emotional distress you allege to have suffered.
>
> A. [BY MR. PIETRANGELO] Objection. Not reasonably calculated to lead to the discovery of admissible evidence and oppressive. I'll be filing the appropriate motion.

R-65 at 22. After that question and for the next 25 minutes, defense counsel attempted to obtain information about Plaintiff's claimed damages and to determine the basis for Plaintiff's refusal to answer any question about his claimed emotional distress damage. R-65 at 22-35. Plaintiff offered no explanation for his objections consistent with the rules of civil procedure. *Id.* The City Defendants' counsel concluded his examination without receiving answers to his questions.

Then, the Library Defendants attempted to obtain some basic background information about Plaintiff. He refused to answer or explain the reason he would not answer the following questions: "Have you been deposed before?" "Where did you go to college?" "Do you have a college degree?" "Do you have a postgraduate degree of any kind?" "Are you married?" "Do you have any hobbies?" "Are there any things that you do that you enjoy?" ""Are there any things that you used to do that you enjoy that you no longer do?" "[W]hat statutory damages are you referring to?" R-65 at 45-48; 50-51.

B. The court orders Plaintiff to answer Defendants' questions

After Plaintiff's repeated refusal to answer these basic questions, defense counsel contacted the district court for assistance. R-65 at 51. The district court listened to the parties presentation of the issues, and then explained to Plaintiff:

> The point of this conversation is to. . . resolve discovery disputes without the necessity or the delay and expense of motions. That's the way we do it in our district.

> You're in your deposition. In effect, what you're asking is if the deposition, at least with regard to that line of inquiry, be adjourned so that you could file a motion to seek some sort of relief, and I'm telling you based upon what I have been told so far, there is no basis in law for you to refuse to answer those questions. It's the subject about which I know a good bit.
>
> * * *
>
> You showed up this morning with [an intentional infliction of emotional distress] claim. You can either dismiss it here and now or you can answer the question. There's no privilege. You have put your medical circumstances directly in issue by asserting that claim. If you want to maintain confidentiality, then now is the time to say, I dismiss that claim with prejudice, and at that point, I would assume that there would be no basis for inquiring about your medical background.

R-65 at 57-58. After some additional discussion, the district court explained:

> You're not listening to me. Unless you can say right now you know of some basis in law in which you can refuse to answer, it's contrary to my understanding of the law, I will order you to answer those questions. And if you do not do so, then that also might be a basis for dismissing that claim.

R-65 at 60.

The district court again directed Plaintiff to answer the questions about his emotional distress damages. The court anticipated that if Plaintiff failed to answer the damage questions that Defendants would bring a motion to dismiss the intentional infliction of emotional distress claim. It then repeated its order, "subject to the potential sanction of dismissal of that claim, to answer those questions." R-65 at 62. The district court also stated that Defendants were entitled

to obtain answers to questions regarding Plaintiff's "general background, education, occupational experience, and so forth…" R-65 at 64.

The district court also carefully explained to Plaintiff the appropriate manner in which to preserve his objections, R-65 at 69, ordered Plaintiff to respond in that manner, R-65 at 70, and confirmed that Plaintiff understood his order. R-65 at 70-71. In response, Plaintiff stated:

> MR. PIETRANGELO: . . . I just want to state for the record, because I don't want you to think I'm deceiving you in any way, I think a lot of this stuff is just not reasonably calculated, and I understand you've ordered me to not (*sic*) answer it, and I'm going to take my chances and not answer the stuff that I think is just – invasive.
>
> [THE COURT]: Well, if you do not answer and you violate my order, I expect that I will get another call. And if you are refusing to comply with the court order, I then will issue an order to show cause why your entire complaint should not be dismissed for failure to comply with my court order.
>
> Sir, you should understand something. A Federal Judge's court order is to be obeyed. You do not have the option of ignoring a Federal Judge's order. If you do so, and if upon my order to show cause, you fail to show adequate cause for disobeying a direct order from me, you can expect sanctions to be imposed. . . .

R-65 at 71-72. Plaintiff then suggested that the district court "sort of schedule some time for yourself, if I may humbly suggest that, because there are certain questions I'm going to go ahead and not – decline to answer – . . . ." R-65 at 74.

C. The court reiterates its order to answer Defendants' questions

After the parties concluded this telephone conference with the district court, the Library Defendants' counsel then re-asked the questions Plaintiff had been directed to answer. Plaintiff still refused to answer those questions. Defendants again contacted the district court. R-65 at 77. The district court reiterated its order to Plaintiff to answer the questions, R-65 at 79, and suggested that counsel continue the deposition "to the extent that you're able. . . ." R-65 at 83.

After this second telephone conference, Plaintiff continued to evade or refuse to answer questions about his background, R-65 at 84, 284, and about his statutory, consequential, compensatory damages and out-of-pocket losses, beyond the general response that he had increased travel expenses, R-65 at 48-49; 85-89. He refused to respond to questions about his claims for extreme emotional distress as alleged in Count Seven at Paragraphs 40 and 41 of the Complaint, R-65 at 91-96; for anxiety and related physical effects as alleged in Count One at Paragraph 30 of the Complaint, for his anxiety and physical effects such as loss of sleep as alleged in Counts Five and Six at Paragraph 38 of the Complaint, and for anxiety and related physical effects as alleged in Counts Eight and Nine at Paragraph 47 of the Complaint. R-65 at 282-83.

Beyond that, Plaintiff refused to answer dozens of other questions put to him on a variety of topics related to his damages, mitigation, his reputation and

background, including: Whether he had other options for doing the work he did at the library, *see e.g.,* R-65 at 101 (Do you have a home computer?), R-65 at 102 (Do you have access to the internet at home?); Whether he had a library card for any library outside Ohio, R-65 at 97; Whether he had been in the military, R-65 at 112, 176-77; Whether he was presently employed, R-65 at 169; and Why he wanted to use the library at a particular time of day, R-65 at 169-70.

Plaintiff generally responded to these inquires with an objection similar to the following statement: "Objection. Not reasonably calculated to lead to the discovery of admissible material, and I'll seek – I'll draft a motion either for a protective order or to dismiss the emotional claims in my complaint." R-65 at 299. He made this object so frequently that he used a short-form for it: "Same objection and same whole spiel. Objection, motion, declination." R-65 at 300. *See also* R-65 at 92-96. Sometimes Plaintiff refused to articulate his objection, or sat in silence and refused to respond altogether. *See e.g.,* R-65 at 84, 92-93, 112.

When asked for the name of the attorney he consulted that lead to his objection "attorney-client privileged" in his deposition and in his written discovery responses, he again refused to answer. Instead, he stated, "Objection. Attorney-client privilege. . . . And I'm telling you, I have stated an objection and if you think you can overcome it with a motion to compel, file a motion to compel." R-65 at 304-5.

IV. Defendants' Motion to Show Cause

Defendants suspended Plaintiff's deposition without answers to basic questions necessary to defend against Plaintiff's claims. They then moved the district court for an order requiring Plaintiff to show cause why he should not be held in contempt for violation of the district court's clear, unequivocal order to answer specific background, reputation, mitigation and damage questions. R-29 and 33.

On May 24, 2010, the district court entered an Order that: 1) overruled Plaintiff's motion for sanctions; 2) granted his motion to disqualify the Erie County Prosecutor's office as co-counsel for the Library Defendants; 3) stated that it would hold Plaintiff's motion for a protective order under Rule 30(d)(3) in abeyance pending its decision on the motions to show cause and for sanctions; and 4) set a hearing at which Plaintiff was ordered to appear and show cause why he should not be held in contempt as requested by Defendants. R-57.

V. The Show Cause Hearing

A. The district court finds Plaintiff disobeyed a lawful order

The district court opened the show cause hearing by asking Plaintiff to explain himself:

> [I]t appears to me, you disobeyed deliberately and willfully my clear and unequivocal instruction to you. . . to answer certain questions. . . . Its my understanding that you refuse to do so, thereby disobeying my

> order, and causing me to issue the order to show cause. What lawful cause did you have not to obey my order?"

R-85 at 4.

Plaintiff responded that he believed he had the right to suspend the deposition and file a motion for a protective order. He claimed that he "was in between a rock and a hard place because you had ordered to me attend the deposition in the first place, so [he] did, in good faith, tried to comply with that order. . . ," while still maintaining his rights under Rule 30(d)(3). R-85 at 7.

During the March 5, 2010 hearing the district court had already found Plaintiff's assertion that he had the right to file a protective order motion insufficient:

> [THE COURT]: . . . I have found that assertion to be insufficient for the reasons I tried to express, and I believe I did express clearly during the course of the deposition. I heard you out. I paid attention. I ordered you to answer the questions, and you did not answer the questions, correct?
>
> MR. PIETRANGELO: That's correct, Your Honor.

R-85 at 7.

The district court then discussed and ruled on Plaintiff's assertion that he was being denied due process because the court would not allow him to adjourn his deposition and seek a ruling before he had to answer questions.

> [THE COURT] You have other approaches you could take following the deposition. One would be to strike the questions and strike your answers. . . . That didn't occur. But you have due process to which

> you were entitled under the rules when I was contacted. I heard you out. I heard counsel out, and I believe I cited at least general principles of law in making my decision. I can only say that if I had any concern that anything you were being asked was in any way improper, I would not have allowed that line of inquiry and would not have ordered you to answer those questions. * * *
>
> You have had due process before we came here. * * * Of all people, an attorney should understand the fundamental obligation that we all have, whether we like it or not, whether we think it's wise or correct or not, to obey court orders.

The court then overruled Plaintiff's motion for a protective order. R-85 at 10-12.

Next, the district court found that it "it will be my factual finding that [Plaintiff] disobeyed [its] orders to answer certain lines of inquiry." R-85 at 13. Plaintiff then debated whether the district court had entered "specific orders" so that he could address "each particular order I'm alleged to have disobeyed." R-85 at 14.

The district court accommodated Plaintiff by reviewing portions of the transcript of the March 5 hearing where it had discussed the specific questions it ordered Plaintiff to answer. R-85 at 14-16. After hearing the court review the transcript, Plaintiff declined to address "each particular order," preferring to "just stand on all the reasons . . . in [his] briefs. . . ." R-85 at 16.

B. The district court finds Plaintiff had no lawful cause to disobey

Plaintiff had still not answered the district court's original question: "What lawful cause did you have not to obey my order?" R-85 at 4, 17-18. Again,

Plaintiff pointed to his briefs and stated that he believed the court had already made up its mind. R-85 at 18. The district court explained that it had yet to make a decision:

> THE COURT: No, I haven't. I'm baffled. You're an attorney, and that you deliberately, so far as I can tell, failed and refused to comply with clear express repeated court orders. And if there is some reason for that, that is acceptable in the law, that's fine. I haven't made up my mind. I want to know. That's why we're here today. * * *
>
> What I'm obligated to do is give you an opportunity to explain yourself and to justify yourself, say, wait a minute, Judge, you got that one wrong. * * * And I don't see you pointing to any event subsequent to the adjournment of the deposition that would justify your refusal at the deposition.

R-85 at 18; 22-23. Plaintiff offered no explanation beyond "what [he had] said before." R-85 at 23. The district court then found that Plaintiff's failure to obey its orders had not been adequately justified. R-85 at 23.

C. The district court's finding of contempt

The district court then gave Plaintiff an opportunity to explain why the court should not hold him in contempt and sanction him accordingly. R-85 at 23. Plaintiff responded that he did not believe that there had been any harm to the Defendants, that the had tried to comply with the order, and that Defendants had "unclean hands." R-85 at 24-26.

The district court reiterated its earlier ruling that it found no "unprofessional conduct" based on the actions Plaintiff attributed to counsel, and noted that the

alleged conduct of other counsel would not excuse Plaintiff from complying with the district court's orders. R-85 at 28-29, 31.[3] The court also noted that the question of "unclean hands" would relate to the appropriate sanction, rather than to whether Plaintiff's conduct was contemptuous. R-85 at 32.

After offering Plaintiff another opportunity to offer evidence or argument that would excuse him from complying with its orders, the district court then found Plaintiff in contempt of court. R-85 at 33.

D. Plaintiff declines to purge his contempt

The district court then asked whether Plaintiff would "answer the questions or not?" R-85 at 33. Plaintiff stated that he would not answer the questions if asked by defense counsel. R-85 at 33.

So, the district court gave Plaintiff an opportunity to purge himself of his contempt by reconvening the deposition in open court. "[L]et me see whether or not you answer the questions. If you think they're objectionable, I will hear you out and I will rule." R-85 at 34. The court observed that this was not an opportunity many judges would have given Plaintiff. R-85 at 35.

[3] The district court declined to make factual findings on Plaintiff's ancillary assertions about defense counsel, noting that Plaintiff's "contentions were vigorously disputed." R-85 at 31.

Plaintiff debated the propriety of this opportunity to purge himself with the district court. Plaintiff and the court also discussed the possible consequences of a willful and deliberate failure to purge himself of contempt. R-85 at 35-38.

Ultimately, the district court ordered Plaintiff to remain in the courtroom to answer questions as directed. R-85 at 41. Plaintiff stated he would not answer because he did not believe he had "committed contempt." R-85 at 41. Shortly thereafter, Plaintiff moved the district court to disqualify itself because he believed the district court had not "been impartial from the beginning of this case. . . . " The district court overruled the motion. R-85 at 48.

The district court then directed defense counsel to summarize the subjects on which they had questions. Again, Plaintiff "decline[d] to answer any question for the reasons previously given. . . ," even if the district court itself propounded the questions. R-85 at 50-55.

E. The harm Plaintiff caused

After Plaintiff's continued refusal to answer, the district court asked defense counsel to outline the consequences that resulted from Plaintiff's willful refusal to respond to relevant questions. Defense counsel pointed out that they were unable to defend the case because of lack of information, particularly damages information. And Defendants were unable to obtain information with which to assess the case for purposes of settlement. R-85 at 56, 57.

The district court then offered Plaintiff another opportunity to purge his contempt by waiving any claim to damages and limiting his claim to injunctive relief. R-85 at 60. Plaintiff declined, again. R-85 at 60.

After hearing further argument, the district court found that Plaintiff had:

> willfully, deliberately, knowingly, intelligently and voluntarily refused in open court to purge himself of the contempt which he [had] previously been found to have committed.

R-85 at 70-71. It also held that there was "clear, unequivocal, indisputable and manifest harm" to the Defendants. R-85 at 71.

F. The district court imposes sanctions

Next, the district court determined that further effort on its part to obtain Plaintiff's compliance with its order would be futile. R-85 at 72. It found no basis for a finding that Plaintiff had mitigated the harm he caused by acting in good faith. R-85 at 72. The district court then explained that it believed that dismissal was the only appropriate sanction:

> Quite candidly, I think I would be remiss in my duties as a Judge, in light of the clear and unequivocal and will also say rather astonishing and in my experience, absolutely unique contempt that you've committed and your persistence in that contempt, that I would be entirely remiss if I did not dismiss this case with prejudice and with costs and fees incurred by the defendants. . . . as a result of your adjournment of the deposition in the face of repeated orders to answer clearly lawful questions. And that will be the judgment of this court.

R-85 at 73.

SUMMARY OF ARGUMENT

Plaintiff came to a federal district court to seek a remedy for a harm he believed had been done to his civil rights. Yet, Plaintiff refused to abide by the rules of that court, or to comply with the orders of the district court judge.

The district court held four (4) Local R. 37.1 hearings to address issues raised by or caused by Plaintiff during discovery. The final two telephone hearings resulted from Plaintiff's repeated refusal to respond to patently relevant questions in deposition. The district court told Plaintiff of the potential consequences of his recalcitrance more than once. Yet, even though he knew those potential consequences and stated that he understood the district court's order to answer specific questions, Plaintiff refused to respond as ordered.

Despite his defiance, the district court took a significant amount of its time to give Plaintiff an opportunity to avoid being held in contempt of its clear and unequivocal orders. First, the district court gave Plaintiff an opportunity to show cause why he should not be held in contempt. During the hearing, the district court determined that Plaintiff had disobeyed a clear order of the court. Then, the court gave Plaintiff an opportunity to explain whether he had lawful cause for defying the court's orders and to show his conduct was not willful or deliberate. Only after Plaintiff failed to show he had a lawful cause, or that he had made a good faith

effort to comply with the its lawful orders did the district court find Plaintiff in contempt.

Next, the court gave Plaintiff two options for purging his contempt: answer Defendants' questions in open court; or withdraw his claims for money damages. Plaintiff refused to purge his contempt.

Thereafter, the district court determined that Plaintiff's conduct prevented Defendants from defending against his Complaint and indisputably caused them harm. It also found that further effort on its part to obtain Plaintiff's compliance with its orders would be futile.

The clarity of the district court's orders, Plaintiff's willful and deliberate actions, and the complete absence of any legal basis for his defiance of the court's order, left the district court with no alternative other than to find Plaintiff in contempt and to sanction him accordingly. Plaintiff made no legal or factual showing that would allow him to proceed with his lawsuit while defying a lawful court order. Therefore, the district court acted with sound discretion and its sanction, dismissing Plaintiff's Complaint, with prejudice, was the appropriate sanction for Plaintiff's flagrant civil contempt. The district court's judgment should be affirmed.

ARGUMENT

I. Standard of Review

"This Court reviews a district court's finding of contempt for an abuse of discretion." *Liberte Capital Group, LLC v. Capwill,* 462 F.3d 543, 550 (6th Cir. 2006). An abuse of discretion exists where a district court relies upon clearly erroneous findings of fact, or applies an incorrect legal standard. This Court should reverse "only if it is left with a firm and definite conviction that a mistake has been made." *Id.*

In a civil contempt proceeding, the movant "bears the burden of proving by clear and convincing evidence that the respondent 'violated a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order.'" *Id.* (quoting *Glover v. Johnson,* 934 F.2d 703, 707 (6th Cir.1991)). The prior order must be "clear and unambiguous to support a finding of contempt," and ambiguities will be resolved in favor of the alleged contemnor. *Id.* at 550-51 (quoting *Grace v. Ctr. for Auto Safety,* 72 F.3d 1236, 1241 (6th Cir.1996)).

The record shows that the district court gave a clear and unambiguous order for Plaintiff to respond to specific questions during his deposition. There were no ambiguities in the order. Rather, when given the order, Plaintiff stated that he understood it, but that he did not intend to obey it. This is classic contempt.

Plaintiff can point to no mistake of law or fact by the district court because it acted with appropriate discretion when it applied settled law to these undisputed facts of record. Accordingly, the judgment of the district court should be affirmed.

II. The district court conducted a civil contempt hearing for which Plaintiff received notice and an opportunity to be heard.

A. The district court held a civil contempt proceeding

The record shows that the district court held a civil contempt proceeding. So, Plaintiff's contention that the district court misclassified his contempt and that he was entitled to the due process afforded a criminal contemnor should be rejected. *See* Pl's Br. at 29.

Civil contempt is intended to either coerce future compliance with a court's order, or compensate for the injuries caused by non-compliance. *Jaques v. Reiss Steamship Co.,*761 F.2d 302, 305-06 (6th Cir. 1985). Distinguishing criminal from civil contempt, the Supreme Court has explained: "[T]he critical features are the substance of the proceeding and the character of the relief that the proceeding will afford." *Hicks v. Feiock*, 485 U.S. 624, 631 (1988). Unlike criminal contempt, where the punishment is punitive and any fine is paid to the court, in cases of civil contempt the sanction is remedial and any fine is paid to the injured parties. *Id.* at 632.

Further illuminating the distinction between civil and criminal contempt, the Supreme Court emphasized that civil contempt sanctions are avoidable through obedience:

> The paradigmatic coercive, civil contempt sanction. . . involves confining a contemnor indefinitely until he complies with an affirmative command. . . . In these circumstances, the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus, "carries the keys of his prison in his own pocket."

In'l Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 828 (1994) (citations omitted).

Here, Plaintiff himself had the power to avoid sanctions. Plaintiff could have purged his contempt by providing responses to questions about his background and damages, as ordered, or by waiving his claim for money damages. As the district court noted during the show cause hearing:

> You complain that you didn't have specific questions. I'm going to let them ask you where did you go to college. Answer that or not. *That's your choice.* I have told you the consequences. I have explained to you the consideration I believe I'm giving you before I proceed to the question of sanctions. *The choice is yours.*

R-85 at 40 (emphasis supplied). *See also United States v. Conces,* 507 F.3d 1028, 1043 (6th Cir. 2007) (holding that a contempt order addressing a party's refusal to comply with a court's discovery order is civil in nature). Thus, Plaintiff's sanction was avoidable with compliance.

Further, the sanction the district court ultimately imposed – dismissal of Plaintiff's Complaint and an award of attorneys' fees and costs to Defendants – was remedial in nature. Such an award is an appropriate remedy in a civil contempt proceeding. *McMahan & Co. v. Po Folks, Inc.*, 206 F.3d 627, 634 (6th Cir. 2000) ("We have previously recognized that an award of attorney's fees is appropriate for civil contempt in situations where court orders have been violated."); *Jacques,* 761 F.2d at 306 (finding where a fine does nothing more than compensate the injured parties for their damages, the contempt proceedings are "plainly civil"). Therefore, the district court appropriately treated this matter as a civil contempt proceeding. *See Bagwell,* 512 U.S. at 828, 114 S.Ct. at 2558.

B. Plaintiff knew the potential consequences of non-compliance

A civil contemnor is entitled only to "notice and an opportunity to be heard." *Conces,* 507 F.3d at 1043 quoting *Bagwell,* 512 U.S. at 827, 114 S.Ct. at 2557. As to notice, the district court gave Plaintiff notice that he faced a contempt sanction, dismissal of his claim or claims, and/or dismissal of his lawsuit, multiple times.

During the March 5, 2010 telephone hearing, Plaintiff inquired:

> MR. PIETRANGELO: Your Honor, may I respectfully ask, if I refuse to answer those specific questions, will you dismiss the claim *sua sponte*?
>
> [THE COURT] I would doubt that. What I would make clear, that if presented with a motion to that regard, I would consider that motion and go from there * * *

> I would warn you that that. . . unless you were able to show cause why you refused to answer, while concurrently wanting to maintain that claim, yes, indeed, I would expect to discuss it. * * * [A]nd I think it's fair that I at least put you on notice that you place your ability to maintain that claim in jeopardy.

R-65 at 58-59.

Later, the district court reiterated its warning of the potential consequences of continued failure to respond: "I am ordering you, subject to the potential sanction of dismissal of that claim, to answer those questions." R-65 at 62.

After some additional discussion regarding the appropriateness of Defendants' questions, the district court instructed Plaintiff about the manner in which he was to answer and to make any objections. Plaintiff responded, "I'm going to take my chances and not answer the stuff that I think is just – is invasive." R-65 at 71. The district court then warned Plaintiff about the potential consequences of that action:

> [THE COURT]: Well, if you do not answer and you violate my order, I expect that I will get another call. And if you are refusing to comply with the court order, I then will issue an order to show cause why your entire complaint should not be dismissed for failure to comply with my court order. * * *
>
> If upon my ordering you to show cause for disobeying a direct order from me, you can expect sanctions to be imposed. Among them will be, . . . dismissal of your entire lawsuit, with prejudice.

R-65 at 71-72. Plaintiff stated that he understood. R-65 at 72.

Shortly thereafter, the first telephone hearing ended and Defendants resumed questioning, repeating the earlier questions Plaintiff had been ordered to answer. R-65 at 77-78. Plaintiff refused to respond to the questions and Defendants again contacted the district court.

In that second hearing, the district court repeated its order to answer. Again, Plaintiff refused to answer the questions, stating that he thought the court's order "violate[d his] rights under the rules of civil procedure." R-65 at 79. The district court told Plaintiff again of the potential consequences:

> At this point, it's my considered judgment that you are deliberately disobeying a court order. * * * [T]he only reason for your doing so, so far that I can tell, is that you are attempting to frustrate the conduct in this deposition and to permit it to be conducted and completed in a lawful and efficient manner. I just want you to be aware that based on what has been presented to me so far, I see no other purpose to your conduct. * * *
>
> I warned you that if that is . . . so, then that constitutes contemptuous conduct and can and will be dealt with appropriately.

R-65 at 80. That was at least the third time that the district court told Plaintiff about the potential consequences of his actions. Plaintiff's refusal persisted.

C. Plaintiff had ample opportunity to be heard

The district court also provided Plaintiff with ample opportunity to be heard, both during his deposition, R-65 at 53-83, and during the show cause hearing, R-85. The district court held a two and one-half hour hearing in open court where it allowed Plaintiff repeated opportunities to:

1) show he had complied with the district court's valid order, R-85 at 4, 13;

2) demonstrate he had lawful cause to disobey the court's order, for instance, by showing he was unable to comply for a legally valid reason, R-85 at 17-23;

3) explain why his conduct was not willfully contemptuous, R-85 at 23-32;

4) purge his contempt, in one of two ways suggested by the district court, R-85 at 33-55, 60; and/or

5) show that Defendants were not harmed by his conduct, R-85 at 56-57, 70-71.

Plaintiff failed or refused to take any one of these opportunities. As the record shows, the district court provided Plaintiff with all the process he was due in this civil contempt proceeding. The court's decision was based on a complete factual record, the correct legal standards and sound judgment. Accordingly, the judgment of contempt should be affirmed.

III. The district court's orders to appear and testify and to answer relevant, non-privileged questions were valid

Plaintiff next attempts to avoid the consequences of his conduct with multiple attacks on the validity of the court's orders. These attacks lack merit.

A. Plaintiff violated a valid discovery order

Plaintiff claims that the district court's order to answer specific questions was an invalid discovery order. This claim lacks legal or factual support.

The scope of discovery is within the broad discretion of the trial court. *Ghandi v. Police Dep't of Detroit,* 747 F.2d 338, 354 (6th Cir. 1984). Under the Federal Rules of Civil Procedure discovery is broader than that permitted at trial and a line of questions is permissible when it is "reasonably calculated to lead to the discovery of admissible evidence." *See Mellon v. Cooper-Jarrett, Inc.,* 424 F.2d 499, 500-501 (6th Cir. 1970); *see also Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 351, 98 S.Ct. 2380, 2389-90, 57 L.Ed.2d 253 (1978). A discovery order will be reversed only if it was an "abuse of discretion resulting in substantial prejudice." *See, e.g, United States v. White,* 563 F.3d 184, 190 (6th Cir. 2009) ("We review the district court's discovery ruling for abuse of discretion."); *Green v. Nevers,* 196 F.3d 627, 632 (6th Cir.1999) ("Rulings concerning the scope of discovery are generally reviewed for abuse of discretion.").

As the Supreme Court explained, "discovery itself is designed to help define and clarify the issues," so the limits in Rule 26 must be "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case." *Oppenheimer Fund,* 437 U.S. at 351. Endorsing broad discovery, the Supreme Court suggested that discovery may be limited on grounds of relevance in few instances, for example, "[where] claims or defenses that have been stricken, or [where] events . . . occurred

before an applicable limitations period, unless the information sought is otherwise relevant to issues in the case." *Id.* at 351-52, 98 S.Ct. at 2390 (quotation omitted).

Here, Defendants sought discovery on Plaintiff's claimed damages and mitigation, and his reputation and background in a case where he brought claims for defamation and intentional infliction of emotional distress.[4] In three hearings, the district court determined these inquiries were "well within the permissible zone of pretrial discovery." R-66 at 1-2. That is, the questions were reasonably calculated to lead to the discovery of admissible evidence. *See* Fed. R. Civ. P 26(a)(1)(A)(iii) (requiring disclosure of damages-related material not subject to a privilege); Fed. R. Civ. P. 26(B)(permitting broad discovery of any non-privileged matter); *Maday v. Pub. Libraries,* 480 F.3d 815, 821 (6th Cir. 2007)(finding plaintiff waived therapist-patient privilege by placing her mental state at issue).

Plaintiff has failed to point to anything in the record showing that the district court abused its discretion when it ordered him to answer. Although he relies on *Holcomb v. Allis-Chalmers Corp.,* 774 F.2d 398 (10th Cir. 1985), it is inapplicable.

[4] Plaintiff also claimed that Defendants' questions were "oppressive." R-65. Defendants may have posed questions that Plaintiff did not want to answer, or that he deemed irrelevant, but that fact alone does not constitute the oppression contemplated by Rule 30(d)(3). *See e.g., Rivera v. Berg Electric Corp.,* No. 2-08-cv-01176-PMP-LRL, 2010 WL 3002000 (D.Nev. 2010).

There, the court made an *ex parte* discovery order that did not give the non-complying party notice or an opportunity to be heard.[5]

In contrast, in this case, the district court heard Plaintiff's objections and overruled them. Before ruling, the court gave Plaintiff all the process he was due. *See* discussion *supra* at 5 to 8.

The district court exercised sound discretion in permitting discovery of damage, reputation and background information. In fact, it showed extraordinary patience with a litigant who refused to answer questions and who was "deliberately disobey[ing] a court order. . . without lawful cause or justification." R-65 at 80.

B. The district court gave Plaintiff specific orders to answer

Plaintiff debates whether the district court gave a "specific order." He told the court that he needed "specific orders," so that he could address "each particular order I'm alleged to have disobeyed." R-85 at 13-14.

The district court accommodated Plaintiff by reviewing portions of the hearing where he had addressed the specific questions it had ordered Plaintiff to answer. R-85 at 14-16. Even when given this opportunity to show that he did not understand the order, or to show the order was not clear, Plaintiff did not take it.

[5] The *Holcomb* court invalidated an *ex parte* discovery order because the opposing party had not been given notice of a request for an order compelling discovery. It held that a statement by counsel that he might call the court was not the type of notice contemplated by Rule 37. It also found that "due process would additionally require some opportunity to be heard." *Id.* at 401.

Instead, he "just [stood] on all the reasons [he had] stated in [his] briefs." R-85 at 16.

C. Defendants' alleged conduct does not allow Plaintiff to retaliate

Plaintiff argues that the Defendants' "unclean hands" prevented the district court from sanctioning him. He insists that he should have been allowed to file a protective order motion based on the alleged "misconduct of Counsel." R-85 at 5-6.

The district court considered and overruled that request twice. R-61; R-65 at 53-54. The district court explained that Defendants' alleged misconduct did not allow Plaintiff to refuse to answer questions. R-65 at 54. That is, the district court did not "consider 'tit-for-tat' objections to discovery to be legitimate objections." *Lumbermans Mut. Cas. Ins. Co. v. Maffei,* No. 3:03-cv-262 JWS, 2006 WL 2709835 (D. Alaska Sept. 20, 2006). Rather, "the rules provide a mechanism for compelling responses and/or imposing sanctions. . . . [But t]he rules do not authorize one party to withhold discoverable material in retaliation for the opposing party's. . ." alleged misconduct. *Id.*

Later, when the district court ruled on Plaintiff's motion for sanctions, it found "nothing unprofessional" about defense counsel's conduct. R-57 at 3.

D. Neither the assistant prosecutor's participation, nor the pending motions invalidated the district court's order to appear and testify

Plaintiff also asserts that the participation of an assistant county prosecutor invalidated the district court's order to appear and to answer questions it determined were relevant.

First, the Library Defendants told Plaintiff during the March 3, 2010 hearing that the assistant prosecutor did not plan to attend his deposition. The record shows that he did not attend. R-65 at 2. So, there could be no harm in proceeding.

More significantly, Plaintiff never asked the parties or the district court to treat all or any portion of the transcript of his deposition as confidential. The local rules for the Northern District of Ohio have a Form Protective Order that can be used by any person for this purpose. *See* Local R. App. L. Plaintiff did not avail himself of this potential protection.

Plaintiff also challenges the assistant prosecutor's supposed review of the transcript of his deposition. But once a deposition has been completed and filed with the court pursuant to Rule 30(f)(1), the right of the general public to inspect these materials is governed by different standards. *Kimberlin v. Quinlan,* 145

F.R.D. 1, 2 (D.D.C. 1992).[6] That is, even if disqualified, the assistant prosecutor would have access to Plaintiff's deposition transcript after the Library Defendants filed it, *see* R-65, since it was a public record available for review by any one.[7]

Further, Plaintiff cites no authority that supports his claim that the alleged misconduct of Defendants' counsel, the then-pending motion for sanctions against them, or the motion to disqualify the assistant prosecutor, somehow invalidated the district court's order for him to respond to relevant questions. Therefore, his claim that the district court order was invalid should be rejected.

---

[6] Plaintiff cites three cases for support of his contention that discovery should be kept from the public. None are applicable here. *Gannett Co., Inc. v. DePasquale,* 443 U.S. 368 (1979), is a criminal case where the court held that a district court has a duty to minimize the effects of a public pretrial to safeguard the due process rights of the accused.

The remaining two cases involved efforts to overturn a protective order. *Seattle Times Co. v. Rhinehart,* 467 U.S. 20 (1984)(discussing whether parties to civil litigation have a first amendment right to use information gained in the discovery process and holding that a protective order preventing disclosure was not unconstitutional); *Howes v. Ashland Oil, Inc.,* 932 F.2d 968 (6th Cir. 1991)(finding that after dismissal, the court no longer had control over unfiled documents and that "the public has a presumptive right to inspect and copy [publically filed] documents, subject to the court's discretionary power to seal those for which there are privacy interests that outweigh the public's right to know.").

[7] The Library Defendants respectfully disagree with the district court's order disqualifying the Erie County prosecutor's office. Contrary to Plaintiff's assertion, there was nothing unusual about its representation of the Library, other than Plaintiff's objection to it. The prosecutor's office has a statutory duty to represent certain local agencies in civil matters and has represented the Library for years.

E. Fed. R. Civ. P 30(d)(3) was inapplicable

Plaintiff appears to claim the district court should have granted his post-deposition motion for a protective order under Rule 30(d)(3). But Fed. R. Civ. P. 30(c)(2) directly contradicts Plaintiff's assertion that he was entitled to refuse to answer and seek a protective order.

> An objection at the time of the examination – whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any aspect of the deposition – must be noted on the record, *but the examination still proceeds; the testimony is taken subject to any objections.*

Fed. R. Civ. P. 30(c)(2) (emphasis added). This rule also makes it clear that Plaintiff had no right to refuse to answer questions he deemed irrelevant. *Id.* Rule 30 allows a person to "instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)."

Plaintiff's recalcitrant position below made it obvious that he had no intent to answer inquiries about his background, reputation, causation, damages or mitigation, no matter what the district court told him. In deposition, Plaintiff chose to ignore the order and "to take my chances and not answer the stuff. . . ." R-65 at 71.

By the time Plaintiff filed his motion under Rule 30(c)(2), the district court had already ordered him multiple times to answer the questions Plaintiff deemed

"invasive." Plaintiff has offered not a shred of evidence that these questions were unreasonably burdensome. Nor has he cited any case law showing that the district court erred when it instructed him to answer the background, causation, damage and mitigation questions it determined were relevant. R-66.

Most of Plaintiff's objections were based on his belief that the requested information was "not reasonably calculated to lead to the discovery of admissible evidence." *See e.g.,* R-65 at 77. Rule 30(d)(3) honors objections based on the manner in which a deposition is being conducted, but not those based on the relevance of the questions. Fed. R. Civ. P. 30(d)(3). *See also Hopkins v. New Day Financial, LLC,* No. 07-3679, 2008 WL 4657822 (E.D. Pa. Oct. 17, 2008) (whether evidence is relevant is not grounds to terminate a deposition); *Edwards v. Center Morickes Union Free School Dist.,* No. 05-CV-2735, 2009 WL 604928 at n.5 (E.D.N.Y. Mar. 9, 2009) ("a relevance objection is not a proper ground on which to instruct a witness not to answer or to terminate a deposition."). That means, the protection of Rule 30(d)(3) was not available to Plaintiff to avoid answering questions based on his concept of relevance.

Plaintiff offered no support for his contention that he need not disclose information about the nature and scope of his physical and mental distress, despite his claimed entitlement to damages for those alleged injuries. As the district court advised him, by making a claim for emotional distress, Plaintiff waived any

therapist-patient privilege and any other confidentiality protection sometimes afforded medical records and information. *See Maday,* 480 F.3d at 821. Therefore, Rule 30(d)(3) did not shield Plaintiff from a finding of contempt and/or sanctions for refusing to answer unprivileged, relevant questions he was ordered to answer. The district court properly rejected Plaintiff's motion.

Plaintiff also claims that the district court made a "blanket order" for him to answer "all question posed to him. . ." even those to which he objected on grounds of "privilege and undiscoverability (*sic*)." Appellant's Br. at 51. This assertion is factually inaccurate.

The court ruled during the March 5, 2010 hearings and the show cause hearing that specific questions regarding Plaintiff's claimed damages, reputation, mitigation, background were relevant.[8] A finding that questions in these categories are appropriate is not a "blanket order" to answer "all questions." In fact, the district court made it clear that if Plaintiff had not made a claim that permitted questions about his emotional damages, it would not have permitted defense counsel to ask them. R-85 at 10-12.

Likewise, the district court ruled on Plaintiff's privilege objection and directed Plaintiff to answer. The court found that Plaintiff waived any therapist-

[8] Plaintiff contends that the district court sustained one of his objections to Defendants' questions. Appellant's Br. at 52 citing R-85 at 51-55. This record does not support that assertion.

patient privilege or other confidentiality applicable to medical records by making a claim for intentional infliction of emotional distress. R-65 at 59. The district reiterated that ruling in the show cause hearing. R-66 at 1-2.[9]

F. The district court based its judgment on knowledge obtained and opinions formed during the hearing

Disappointed with the direction of the show cause hearing, Plaintiff asked the district court to recuse itself claiming bias. R-85 at 48. The record does not support that groundless claim. To the contrary, the record shows that the district court kept an open mind until Plaintiff had exhausted all his opportunities to avoid sanctions.

A litigant should leave a proceeding feeling that he has been treated fairly and the issues were decided by a neutral and impartial judge. But a judge need not be gullible or refrain from forming opinions of the litigants based on what he learns during a hearing. *In re J.P. Linahan, Inc.,* 138 F.2d 650, 654 (2nd Cir. 1943).

Rather, upon completion of the evidence, a judge who presides at a hearing may be ill-disposed towards a party who has shown himself to be a reprehensible person. *Liteky v. U.S.,* 510 U.S. 540, 550-51, 114 S.Ct. 1147 (1994). But the judge is not biased or prejudiced when he properly and necessarily acquired his knowledge and the opinion it produced in the course of the proceedings.

[9] The district court did not direct Plaintiff to disclose information protected by the attorney-client privilege and Plaintiff did not raise the fifth amendment.

Sometimes acquiring that knowledge and forming an opinion are essential to completing his task. *Id.* quoting *In re J.P. Linahan, Inc.,* 138 F.2d at 654 ("Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions'").

The record is replete with evidence that the district court handled the issues in an unbiased manner, giving Plaintiff many opportunities to avoid an adverse ruling. For instance, the court calmly explained its decision to overrule Plaintiff's motion to disqualify:

> THE COURT: Sir, that will be overruled . . . And again, I'll tell you why. I think I have been extraordinarily patient in handling this ma[tt]er. I heard you out at some length during the deposition. I gave clear, unequivocal orders to answer questions which are entirely proper as a matter of law. I heard you out today. I considered your previous motions and I overruled it. Yet I've reconsidered various facts and circumstances. And I think most importantly, I'm giving you an opportunity to purge yourself of contempt, do so and we'll move on down the road.
>
> I'll be very candid with you, you do so and I may or may not require you to pay the costs incurred by these defendants for these proceedings. I will hold that question in abeyance in anticipation that there will be no further problems of any kind during the course of discovery. . . . [A]t which point I probably would say, hey, look, we've had a major bump in the road but we got past it, the case has proceeded as it should. Do you understand that?
>
> MR. PIETRANGELO: Yes, Your Honor, I understand. I still decline.

R-85 at 48-49. This exchange demonstrates how the district court handled the entire proceeding: fairly, neutrally and impartially. Plaintiff's claim that the district court's decision was infected by bias is lacks any merit whatsoever.[10]

G. Plaintiff otherwise failed to show that the district court abused its discretion.

Next, Plaintiff raises six challenges to the June 14, 2010 "reconvened deposition." He cites not a single legal authority in support of his arguments and mischaracterizes the record. Appellant's Brief at 57-60

First, the record shows that the district court offered Plaintiff the opportunity to purge himself of his willful contempt by allowing Defendants to ask the questions they had propounded in deposition. That allowed the court to hear the questions, to listen to Plaintiff's objections and to rule on those objections. When Plaintiff refused to answer, the district court moved on to the question of Defendants' prejudice. R-85 at 50-55. It did not hold Plaintiff in contempt a second time or even suggest it was contemplating that action. R-85.

Next, Plaintiff contends that the district court required him to answer questions while "fatigued" and without time to prepare. The district court correctly

[10] Contrary to Plaintiff's claim at page 57 of his Brief, there were no sidebar conferences or off-the-record discussions between the district court and the parties at any time during this proceeding. The district court even held the case management conference on the record.

observed, as a matter of common sense, that it does not take much preparation to respond to questions such as, "Where did you go to college?" R-85 at 41.

Plaintiff also argues that the district court abused its discretion when it ordered him to answer questions because defense counsel had such personal distain for him that he feared that they would misuse the information he would provide in his responses. R-85 at 42.[11] The district court advised Plaintiff that if counsel used that information to harm him that "some other judicial officer or some professional disciplinary body" would deal with such misconduct. R-85 at 42.

The district court itself asked some of the questions Plaintiff refused to answer when posed by defense counsel. Plaintiff still refused to answer.

Plaintiff also complains that the reconvened deposition was in open court where his testimony could be heard by spectators. So what. Plaintiff could have avoided that problem by answering questions in his deposition as directed. Or, he

---

[11] Counsel for the Library Defendants has no interest in any personal information about Plaintiff. Her only purpose in seeking this information was to allow her to properly defend her clients against Plaintiff's baseless claims.

Citing *Johnson v. Girards Mark Security,* 2007 U.S. Dist. LEXIS 979515 (N.D. Ohio Mar. 30, 2007), Plaintiff contends that Defendants may not discover his employment history because "the facts at issue in this case are specific and distinct to the allegations of the complaint." Appellant's Br. at 53. *Johnson* does not support this assertion. Rather *Johnson* held that an employee was not entitled to discover the personnel files from his supervisor's former employer because those files were "not relevant to the employer's practices in this case." *Id.* Moreover, Defendants did not request Plaintiff's social security number or his earnings in any employment he may have had.

could have asked the district court to reconvene the hearing in chambers, but he did not do that either. He simply refused to answer.

Plaintiff failed to demonstrate that the district court's orders were based on clearly erroneous findings of fact or application of an incorrect legal standard. Nothing in the record shows that the district court abused its discretion when ordering Plaintiff to respond to deposition questions, or by holding him in contempt and sanctioning him when he refused.

IV. The district court exercised appropriate discretion when it dismissed Plaintiff's complaint with prejudice

Fed. R. Civ. P. 37(b)(1) provides for sanctions when a deponent, like Plaintiff, fails to comply with a court order to answer a question:

> If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.

That failure allows the district court to impose sanctions, including dismissal of the action or proceeding. Fed. R. Civ. P. 37(b)(2)(A)(v). In addition to those sanctions, Fed. R. Civ. P 37(b)(2)(C) requires the district court to "order the disobedient party. . . , to pay reasonable expenses, including attorneys' fees, caused by the failure, unless the failure was substantially justified. . . ."

Dismissal is an appropriate sanction for refusing to answer questions in a deposition and failing to comply with a court order to do so because "it accomplishes the dual purpose of punishing the offending party and deterring

similar litigants from misconduct in the future." *Freeland v. Amigo,* 103 F.3d 1271, 1277 (6th Cir. 1997)(citing *Nat'l Hockey League v. Metro. Hockey Club, Inc.,* 427 U.S. 639, 642-43, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976)). That sanction is imposed only where, as here, "a party's failure to cooperate in discovery is due to willfulness, bad faith, or fault." *Reg'l Refuse Sys. v. Inland Reclamation Co.,* 842 F.2d 150, 153-54 (6th Cir.1988), *rev'd on other grounds*, (quoting *Patton v. Aerojet Ordnance Co.,* 765 F.2d 604, 607 (6th Cir.1985)).

This Court considers several factors when reviewing a district court's decision to impose Rule 37 sanctions,

> The first factor is whether the party's failure to cooperate in discovery is due to willfulness, bad faith, or fault; the second factor is whether the adversary was prejudiced by the party's failure to cooperate in discovery; the third factor is whether the party was warned that failure to cooperate could lead to the sanction; and the fourth factor in regard to a dismissal is whether less drastic sanctions were first imposed or considered.

Peltz v. Moretti, No. 07-3338, 292 Fed.Appx. 475, 2008 WL4181188 (6th Cir. 2008) citing *Freeland,* 103 F.3d at 1277 (citing *Reg'l Refuse Sys.,* 842 F.2d at 154-55). Applying these factors, it is obvious that the district court employed sound discretion when it sanctioned Plaintiff.

A. Plaintiff willfully violated a direct order of the court

Plaintiff's failure to comply with the district court's order was willful. During the first of two telephone conferences during his deposition, Plaintiff

acknowledged that he heard and understood the Court's order to answer Defendants' questions.[12] The district court directed Plaintiff to either answer the questions regarding his emotional distress claim or to immediately dismiss that claim. R-65 at 57-60 . Plaintiff then asked about the potential consequences of continued failure to respond to questions about his claimed emotional distress. R-65 at 58. ("if I refuse to answer those specific questions, will you dismiss the claim *sua sponte?*"). Knowing the potential jeopardy in which he placed himself if he continued to refuse to answer, Plaintiff decided that he was "going to take [his] chances. . . ." R-65 at 71.

After further discussion about the propriety of the questions and the potential for extreme sanctions if Plaintiff persisted in his refusal to respond, the district court told Plaintiff,

> [THE COURT]: And I'm telling you, the questions I've heard so far are entirely proper and permissible and shall be answered. Your failure to do so will be in a direct violation of my direct order to your to answer. You shall answer.
>
> MR. PIETRANGELO: I understand your order, Your Honor.

---

[12] Plaintiff contends that there was something improper about holding a hearing by cell phone. He points to nothing in the record to suggest that Plaintiff could not hear, that Defendants could not hear, or that the district court misunderstood the issues presented by the parties. *Cf. Kegode v. Ashcroft,* 64 Fed.Appx.446, 2003 WL 1949609 (6th Cir. 2003)(finding no violation of due process where transcript of a telephone hearing showed that a judge had some difficult hearing, but nothing suggested the parties had any such difficulty).

R-65 at 76. Notwithstanding this unequivocal order to answer, that Plaintiff understood, Plaintiff again refused to answer relevant questions. R-65 at 77-78.

This time the Court told Plaintiff that it in its judgment Plaintiff was "deliberately disobeying a court order," that he had no lawful basis for refusing to respond and that it appeared that Plaintiff was "attempting to frustrate the conduct [of] this deposition." R-65 at 80. Plaintiff reaffirmed his "deliberate and willful" refusal to answer. R-65 at 82.

After this conference, Plaintiff again willfully refused to answer questions regarding his alleged physical and emotional distress damages or to clarify in any meaningful way the nature and scope of his claimed compensatory and consequential damages. He also continued his willful refusal to provide relevant background or reputation information. *See e.g.,* R-65 at 84-96. And he refused to answer many other questions he deemed improper. *See e.g.,* R-65 at 97, 101, 102, 112, 169-70, 176-77, 301, 304-06. These facts are undisputed.

B. Plaintiff's willful conduct caused prejudice to Defendants

Equally indisputable is the fact that Plaintiff's conduct caused Defendants prejudice. R-66. Plaintiff's willful conduct prevented them from learning, among other things, the nature and scope of the alleged damages; whether other activities in Plaintiff's life may have contributed to Plaintiff's alleged injuries; whether his conditions are temporary or permanent; whether any one or more of his conditions

have improved or subsided; whether a doctor diagnosed Plaintiff with a physical or mental illness and, if so, did that health care provider prescribe any treatment; what efforts Plaintiff has made to mitigate his alleged damages; and whether any of the alleged conditions predated his removal from the library on October 28, 2009.

Likewise, Plaintiff's failure to respond to background questions has prevented Defendant from learning about, among other things, his reputation, which he claims in Count 4 and 5 has been damaged by alleged defamatory remarks about him, and about other resources available to him for mitigation of damages. Plaintiff's outright refusal to provide this information prevented Defendants from developing this evidence and caused them "substantial prejudice." R-66 at 2.

C. The district warned Plaintiff of the potential consequences

During the telephone hearings and in the show cause hearing, the district court repeatedly warned Plaintiff of the potential consequences for his failure to comply with its order. *See* discussion *supra* at 22-24 and R-85 at 35-38. At first, the Court explained that failure to respond could lead to dismissal of Plaintiff's claim for emotional distress. As Plaintiff persisted, the Court also explained that he was potentially placing his entire case in jeopardy. Still later, the district court warned him that upon Defendants' motions he would be required to appear and show cause why he should not be held in contempt. At that point, the court warned

that possible sanctions could include having his case dismissed and being held liable for Defendants' costs and expenses.

At the show cause hearing, the district court also advised Plaintiff of the potential consequences if Plaintiff persisted in his willful contempt. R-85 at 35-38. Despite these repeated warnings, Plaintiff refused to obey the court's order.

D. The district court considered less drastic sanctions

Now faced with the dismissal of his case, Plaintiff argues that the appropriate sanction would have been dismissal of his emotional distress claim.

The record plainly demonstrates that the district court considered less drastic alternatives to dismissal. First, the district court gave Plaintiff that opportunity during the March 5, 2010 hearing, but he rejected it. R-65 at 57-59; 62; 71-72; 77-80.

Next, at the show cause hearing, the court considered reconvening the deposition. But the court observed that if Plaintiff refused to answer deposition questions in open court, "[i]ts unimaginable to me that further reconvening outside my presence would serve any useful purpose. In fact, I think that you have indicated that by urging me not to even go through this exercise." R-85 at 58. Therefore, a continued deposition was not an appropriate alternative sanction.

The district court also suggested that, if Plaintiff insisted on not answering damages question, then he should consider dismissing his claims for money

damages and pursuing only injunctive relief. Plaintiff rejected that alternative, as well. R-85 at 64-65. Thus, Plaintiff's own recalcitrance left the district court with little alternative but to dismiss his complaint, with prejudice. R-66 at 3. Accordingly, the district court exercised sound discretion when it imposed the sanction of dismissal.[13]

V. The district court exercised appropriate discretion when it awarded the Library Defendants the reasonable expenses caused by Plaintiff's failure to comply with a valid order.

A. An award of attorneys' fees was mandated

Rule 37(b)(2)(C) mandates that a "disobedient party" pay the reasonable expenses, including attorneys' fees, caused by the failure of that party to comply with an order to provide discover, unless "the failure was substantially justified or other circumstances make an award unjust." *See Cunningham v. Hamilton County*, 527 U.S. 198, 209 119 S.Ct.1915, 144 L.Ed.2d 184 n. 5 (1999)(observing that the rule was written "to encourage the awarding of expenses wherever applicable").

Plaintiff failed to show his actions were justified or that there were other circumstances that made an award unjust. As demonstrated above, Plaintiff's actions were willfully and deliberately unlawful. Accordingly, an award of fees

[13] Plaintiff cites *Carter v. City of Memphis, Tennessee*, 636 F.2d 159 (6th Cir. 1980), as support for his position that sanctions were not warranted. *Carter* is inapplicable. Unlike the recalcitrant litigant in *Carter,* here, the district court specifically found that Plaintiff acted in bad faith and that Defendants were substantially prejudiced. R-66 at 2.

and expense, including attorneys' fees, was warranted. *McMahan & Co.,* 206 F. 3d at 634.

B. This Court lacks jurisdiction to review the amount of any properly awarded costs and expenses

Plaintiff challenges the amount of the costs and expenses awarded to defense counsel as a sanction for his contempt of the district court's discovery order. It would appear that this Court lacks jurisdiction to hear this appeal because it was dismissed when Plaintiff refused to pay the filing fee. Court of Appeals Case No. 10-4119, November 5, 2010 order.

C. The district court used sound discretion in determining the amount of the award.

If this Court considers the amount the district court awarded, it reviews a district court's award of attorneys fees for abuse of discretion. A district court's award should be affirmed unless its ruling is based on "an erroneous view of the law or a clearly erroneous assessment of the record." *Johnson v. City of Clarksville*, 256 Fed.Appx. 782 (6th Cir. 2007), citing *Isabel v. City of Memphis,* 404 F.3d 404, 415 (6th Cir.2005). Here, the district court made no such error.

The district court used the "lodestar" amount for determining the amount of a reasonable attorney fee. R-70 at 3. The lodestar amount is determined by multiplying the number of hours reasonably expended by a reasonable hourly rate. *Imwalle v. Reliance Med. Prods., Inc.,* 515 F.3d 531, 551-52 (6th Cir. 2008).

The district court examined the hours worked by counsel for the Library Defendants. It found them reasonable. R-79 at 5. The district court also determined that a reasonable hourly rate in the Toledo, Ohio area was $150.00 per hour, which was the same as the rate charged by the City Defendants' counsel. The district court then exercised its discretion to reduce the rate requested by the Library Defendants' counsel and the total fees requested, accordingly.

Plaintiff points to no erroneous view of the law. Nor has he demonstrated that the district court made a clearly erroneous assessment of the record. Accordingly, its award of costs and expenses should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Margaret M. Koesel
Margaret M. Koesel (0041537)
Nicole J. Quathamer (0070893)
PORTER WRIGHT MORRIS & ARTHUR LLP
925 Euclid Avenue, Suite 1700
Cleveland, Ohio 44115
(216) 443-9000/Fax (216) 443-9011
mkoesel@porterwright.com
nquathamer@porterwright.com

Attorneys for Defendants, The Library Association of Sandusky, d/b/a The Sandusky Library, and Terri Estel

CERTIFICATE OF COMPLIANCE

Pursuant to 6th Cir. R. 32(a), I, Margaret M. Koesel, hereby certify that the Brief of for Defendants-Appellees, The Sandusky Library and Terri Estel. complies with the 14,000 word type-volume limitation set forth in Fed. R. App. P. 32(a)(7), 6th Cir. R. 32(a)(7)(B). The word-processing system used to prepare this Brief indicates that the word count for this Brief is 11,547, excluding those sections that do not count toward the limitation pursuant to Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Margaret M. Koesel
Margaret M. Koesel
Attorney for Defendants-Appellees, The Sandusky Library and Terri Estel

DESIGNATION OF CONTENTS

Pursuant to FRAP 30(b)(1), Defendants-Appellees, Terri Estel and the Sandusky Library, designate the following portions of the record in the district court:

Docket No.	Date	Description of Docket Item
1	11/02/09	Complaint
19	01/07/10	Answer to Complaint filed by Terri Estel
20	01/07/20	Answer to Complaint filed by Sandusky Library
27	03/03/10	Order: Plaintiff's opposition to deposition scheduled for March 5, 2010, proceeding overruled
57	05/24/10	Order: Plaintiff's motion for a discovery order is overruled as moot. Plaintiff's motion for entry of default is overruled. Plaintiff's motion to disqualify, etc. is granted. Plaintiff's motion for sanctions is overruled. Plaintiff to appear before the undersigned on June 14, 2010, at noon, to show cause why he should not be held in contempt and sanctioned as requested by defendants' motions to show cause and for sanctions. Ruling on plaintiff's motion for protective order under Rule 30(d)(3) held in abeyance pending adjudication of defendants' motions to show cause and for sanctions.
63	06/11/2010	Transcript of Phone Conference held on January 27, 2010 before Judge James G. Carr
65	06/16/2010	*Notice of Filing of Deposition Transcript* filed by Terri Estel, Sandusky Library. (Attachments: #1 Appendix March 5, 2010 Deposition of James E. Pietrangelo II with attached Exhibit)

66	06/22/2010	Order of Show Cause Hearing held on 6/14/2010. Ordered that the complaint in this case is dismissed with prejudice; and plaintiff bear defendants' costs as directed.
67	06/22/2010	Judgment Entry: For the reasons stated in the Order filed June 22, 2010, ordered that the complaint in this case is dismissed with prejudice
79	08/23/10	Order: Defendants' Motions for Attorneys' fees and costs be and the same hereby granted as provided herein
84	09/13/2010	Order: Plaintiff's objection is deemed to be a motion for reconsideration, motion overruled for the reasons stated in defendant's opposition
85	10/15/2010	Transcript of Show Cause Hearing held on June 14, 2010
86	10/15/2010	Transcript of Phone Conference held on March 3, 2010

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2011 a copy of foregoing Brief of Appellees-Defendants, Terri Estel and The Sandusky Library, was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's system.

/s/ Margaret M. Koesel

Margaret M. Koesel
925 Euclid Avenue, Suite 1700
Cleveland, OH 44115
Phone: (216) 443-9000
Fax: (216) 443-9011
E-mail: mkoesel@porterwright.com
[0041537]