RECEIVED
JAN 31 2011
LEONARD GREEN, Clerk

FILED
JAN 31 2011
LEONARD GREEN, Clerk

Appeal No. 10-3843

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES E. PIETRANGELO, II,

Plaintiff-Appellant,

vs.

SANDUSKY LIBRARY, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
No. 3:09-cv-2560, Honorable James G. Carr Presiding

COMBINED REPLY BRIEF OF JAMES E. PIETRANGELO, II TO APPELLEES' BRIEFS

JAMES E. PIETRANGELO, II
P.O. Box 548
Avon, OH 44011
(802) 338-0501

January 28, 2011

Dockets.Justia.com

TABLE OF CONTENTS

Table of Authorities.......ii
1. The issue of the specific award of attorneys' fees and costs is properly before the Court.......1
2. Appellees' various arguments that the adjudged contempt was civil ignore the rules for classifying contempt.......6
3. Contempt for disobedience of a discovery order is not always civil.......8
4. Judge Carr's dismissal and award of fees and costs were not remedial.......9
5. Appellant is not complaining about any ol' telephone hearing, but one conducted driving down the highway and using a hand-held cell phone.......11
6. FRCP 30(d)(3)(A)'s specific provision could not be overruled by FRCP 16's more general provision.......13
7. Pietrangelo did not waive his right to suspend the deposition.......17
8. Pietrangelo never argued "tit for tat" retaliation.......18
9. Pietrangelo did not come up with the "oppression" defense after-the-fact.......19
10. The evidence showed oppression.......21
11. Pietrangelo did answer regarding his damages.......21
12. Appellees improperly argue the merits of the *Complaint*.......22
13. Appellant did not misleadingly attach the felony-conviction sheet.......22
14. Appellees make several false statements.......25
15. Appellees' assertions do not prove contempt.......28

TABLE OF AUTHORITIES

Cases

Bank of Nova Scotia v. United States, 487 U.S. 250 (1988)....15
Cunningham v. Hamilton County, Ohio, 527 U.S. 198 (1999)....4
Exact Software North America, Inc. v. Infocon, Inc., 479 F.Supp.2d 702 (N.D. Ohio 2006)....15-16
Hopkins v. New Day Financial, LLC, 2008 U.S. Dist. LEXIS 83510 (E.D.Pa. Oct. 17, 2008)....26
Howes v. Ashland Oil, Inc., 932 F.2d 968 (6th Cir. 1991)....26
International Union, UMW v. Bagwell, 512 U.S. 821 (1994)....7-9
Jacques v. Reiss Steampship Co., 761 F.2d 302 (6th Cir. 1985)....9-11
Kegode v. Ashcroft, 64 Fed.Appx. 446 (6th Cir. 2003)....12
Lonchar v. Thomas, 517 U.S. 314 (1996)....14
MacEvoy Co. v. United States, 322 U.S. 102 (1944)....13
McMahan & Co. v. Po Folks, Inc., 206 F.3d 627 (6th Cir. 2000)....9-10
Owen v. Harris County, Texas, Nos. 09-20479/10-20063, 2010 U.S. App. LEXIS 17850 (5th Cir. Aug. 26, 2010)....3
Perotti v. Wilkinson, 90 Fed. Appx. 884 (6th Cir. Feb. 4, 2004)....5
Rivera v. Berg Electric Corp., 2010 U.S. Dist. LEXIS 87874 (D.Nev. July 28, 2010)....18
Starcher v. Correctional Med. Sys., 144 F.3d 418 (6th Cir. 1998)....4
Thompson v. Caruso, Nos. 05-2681/06-1385, 2006 U.S. App. LEXIS 32794 (6th Cir. Oct. 10, 2006)....5
United States v. AMR Corp., No. 99-1180-JTM, 2000 U.S. Dist. LEXIS 22646 (D. Kan. May 9, 2000)....21
United States v. Conces, 507 F.3d 1028 (6th Cir. 2007)....8-9
Weyant v. Okst, 198 F.3d 311 (6th Cir. 1999)....5
Wilcher v. City of Akron, 498 F.3d 516 (6th Cir. 2007)....12

Statutes & Rules

FRAP 4(a)(1)(A)....5
FRAP 4(a)(4)(A) & (B)....3-4,6
FRCP 16....13
FRCP 30(c)(2)....13
FRCP 30(d)(3)(A)....13, 14, 17
FRCP 37(b)....8
FRCP 83(a)(1)....13
Northern District of Ohio Local Rule 37.1....13,18-19

REPLY

Appellant replies both to the *Brief of Appellees, City of Sandusky, Rick Braun, and Kris Parsons* ("*BOCA*" ("*Brief of City Appellees*")) and *Brief of Defendants-Appellees, The Library Association of Sandusky, d/b/a The Sandusky Library and Terri Estel* ("*BOLA*" ("*Brief of Library Appellees*")). Appellant generally[1] denies their *Briefs* and refers the Court back to his own *Appellant Brief*, and specifically denies their *Briefs*, as follows.

1. Appellees falsely argue (*BOCA* at 10; *BOLA* at 46) that the August 23, 2010 specific award of attorneys' fees and costs is "*not* an issue in the instant appeal" and "this Court lacks jurisdiction to hear" it. In making their argument, Appellees falsely state that "[a]n appeal of that judgment and order was timely filed with the Clerk of this Court under Case Number 10-4119; however, the appeal was dismissed on November 5, 2010 . . . for want of prosecution."

Pietrangelo did *not* file his appeal of the specific award with the *Circuit Clerk* or under number *10-4119*. He filed an amended appeal, specifically

---

[1] It is impossible for Appellant to fully specifically reply to both sets of Appellees' briefs in one limited reply-brief, which, according to the Clerk's office, Appellant must do—even though FRAP 28(c)'s language seemingly indicates that Appellant is entitled to one reply-brief *per* each Appellee brief. The unfairness of having to respond to two principal-briefs with one limited reply-brief is manifest, particularly since Appellees newly question the jurisdiction of the Court to review the specific award, and that question would not have occurred had the Clerk's office not committed error. Appellant's silence as to any particular point in Appellees' briefs, therefore, should not be taken as acceptance.

including the August 23, 2010 order by *name*, with the *District Clerk*, for review by this Court and docketing by the Circuit Clerk under the same docket number, *10-3843*, as his original appeal which already included the specific award by nature and reference. See *Notice of Appeal* (district-court docket # 72) and *Amended Notice of Appeal* (# 81). The Circuit Clerk then erroneously docketed the amended appeal as a separate appeal, No. 10-4119.

Furthermore, Pietrangelo did *not* then fail to prosecute his appeal, but did *everything* required to prosecute it. He timely filed his *Appellant Brief*. Before that, he had filed both *Notices* and paid—at the time of the filing of his original *Notice*—the single $455.00 filing fee that covered his entire appeal (*i.e.*, both *Notices*). When the Circuit Clerk erroneously docketed Pietrangelo's *Amended Notice* as Appeal No. 10-4119, Pietrangelo timely informed the Clerk's office of their error, and then, when they refused to correct their error, he filed a motion with the Court to lodge the *Amended Notice* under Appeal No. 10-3843. The *Circuit Clerk's office* then improperly *sua sponte* dismissed Appeal No. 10-4119 *without* lodging Pietrangelo's *Amended Notice* under Appeal No. 10-3843.[2] They dismissed because Pietrangelo refused to pay a second $455.00 fee, *i.e.*, a filing fee

[2] Thereafter, there was nothing left for Pietrangelo to do but to wait for Appellees to raise the issue if at all in Appeal No. 10-3843 and then to reply. If Pietrangelo had paid a $455.00 fee for Appeal No. 10-4119 or further appealed the Clerk's *sua sponte* dismissal within Appeal No. 10-4119, he would have suffered the very harm anyway that he meant to and was entitled to avoid in seeking to have the *Amended Notice* lodged properly under Appeal No. 10-3843: piecemeal appeals.

for Appeal No. 10-4119. But, of course, this was not a failure to prosecute on Pietrangelo's part, because he did not owe a second $455.00 fee, because his *amended* appeal should not have been docketed as a separate appeal.

Pietrangelo's amended appeal should not have been docketed as a separate and new appeal with its own $455.00 filing fee, for several reasons. First, FRAP 4(a)(4)(B)(iii) expressly states that "[n]o additional fee is required to file an amended notice." As a separate provision within FRAP 4, FRAP 4(a)(4)(B)(iii) is not limited to the post-judgment motions of FRAP 4(a)(4)(A).[3] *Cf.* Owen v. Harris County, Texas, Nos. 09-20479/10-20063, 2010 U.S. App. LEXIS 17850 at * 5 (5th Cir. Aug. 26, 2010) ("More significantly, although the placement of the prohibition within rule 4(a)(4) is curious, the absolute and plain language of the subsection—"[n]o additional fee is required to file an amended notice" of appeal—is both compelling and difficult to avoid. We conclude, therefore, that no fee can be required for any amended notice of appeal, irrespective of whether it pertains to a post-judgment motion.").

Second, even if FRAP 4(a)(4)(B)(iii) is limited to one of FRAP 4(a)(4)(A)'s enumerated motions, Pietrangelo's amended appeal was based on one of those enumerated motions—FRAP 4(a)(4)(A)(ii)'s motion "to amend or make additional

---

[3] The motions listed in FRAP 4(a)(4)(A) *toll* the time for an appeal and thus do not require appeal-amendment.

factual findings under Rule 52(b)." Defendants' post-June 22, 2010-Order/Judgment applications (motions) for specific attorneys' fees and costs were motions for the district court to make findings regarding the amount of attorneys' fees and costs Defendants had allegedly incurred as a result of Pietrangelo's alleged contempt.

Third, the Supreme Court itself has repeatedly held that piecemeal appeals should be avoided, including because of "the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment," and because of "promoting efficient judicial administration." Cunningham v. Hamilton County, Ohio, 527 U.S. 198, 203-204 (1999), *affirming sub. nom.* Starcher v. Correctional Med. Sys., 144 F.3d 418 (6th Cir. 1998). Requiring Pietrangelo to separately appeal, and to pay for the separate appeals of, two necessarily related, really identical issues (the general award and the specific award) from the same case—merely because the district court failed to issue its specific award within thirty days of its general award—would violate the piecemeal-appeals prohibition. Indeed, it would be the paradigm of piecemeal appeals, since if Pietrangelo had paid the $455.00 fee for Appeal No. 10-4119 the Court simply would have consolidated the appeals in the end, or if the

district court had timely issued its specific award within thirty days of its general award, there would have only been one appeal to begin with.[4]

Decisions of this Court support the argument that an amended appeal—particularly as to the separate issue of fees—should not be treated as a new appeal, to avoid piecemeal appeals. In Weyant v. Okst, 198 F.3d 311, 314 (6th Cir. 1999), the Court stated:

> There is, however, a "historic federal policy against piecemeal appeals," Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1, 8, 64 L. Ed. 2d 1, 100 S. Ct. 1460 (1980) (quoting Sears, Roebuck & Co v. Mackey, 351 U.S. 427, 438, 100 L. Ed. 1297, 76 S. Ct. 895 (1956)), and " 'piecemeal' appeals of merits and fee questions generally are undesirable," White v. New Hampshire Department of Employment Security, 455 U.S. at 452 n.14.

See, also, Thompson v. Caruso, Nos. 05-2681/06-1385, 2006 U.S. App. LEXIS 32794 at *7 (6th Cir. Oct. 10, 2006) and Perotti v. Wilkinson, 90 Fed. Appx. 884, 886 (6th Cir. Feb. 4, 2004) (both[5] citing FRAP 4(a)(4)(B)(iii) for the general rule that "[i]f an amended notice of appeal is filed, '[n]o additional fee is required.'"

---

[4] Appellees use circuitous language (*BOCA* at 10) to deceptively suggest that Pietrangelo somehow was at fault in the timing of his appeal sequence, either filing the original appeal too early or the amended appeal too late. But Pietrangelo was not at fault and did his appeal by the book. He had to file his original appeal—which included the specific award by nature and reference—well before August 23, 2010, because the final order/judgment that triggered the thirty-day appeal clock were the June 14, 2010 verbal and June 22, 2010 written Order/Judgment of dismissal with prejudice and general award of attorneys' fees and costs.

[5] In each of these two cases, the Court nonetheless found there was a separate appeal and thus a separate filing fee required because there was no *amended*

Finally, even without Pietrangelo's *Amended Notice of Appeal*, the issue of the specific award is still squarely before this Court by virtue of Pietrangelo's original *Notice of Appeal* which included the specific award by nature and reference:

> Any pending or future order and entry of judgment of a specific award of fees and costs to Defendants based on or connection with the above and Defendants' applications for same. Plaintiff specifically reserves the right to amend this notice to include same.

July 9, 2010 *Notice of Appeal* (# 72) at ¶ 4.

2. To persuade the Court that Pietrangelo was adjudged of civil rather than criminal contempt, Appellees make several arguments, including that the show-cause hearing was not an actual criminal trial (*BOCA* at 21); that Judge Carr never discussed or threatened imprisonment (*BOCA* at 22); and that Judge Carr repeatedly warned Pietrangelo of dismissal (*BOCA* at 22; *BOLA* at 21). But all of these arguments are wrong and acts of misdirection.

Appellees' first argument is simply a tautology. The nature of the relief afforded and of the proceeding determines whether the contempt is criminal or civil, not the formal nomenclature of the case as criminal or civil. The Bagwell case was a civil case, yet the Supreme Court found the adjudged contempt criminal.

---

appeal, *i.e.*, there was no amended notice and/or the original appeal had been dismissed—contrary to the instant case.

Likewise that any particular sanction colloquially considered criminal is not threatened or imposed is not determinative, but rather whether any sanction *actually* imposed is, under the circumstances, punitive. Indeed, civil contempt can involve imprisonment.

Nor was the adjudged contempt civil because Judge Carr warned of or threatened dismissal before actually imposing it, which Appellees argue (*BOLA* at 21) means "Plaintiff himself had the power to avoid sanctions" and therefore the sanctions were coercive. A warning or threat is *not* a sanction, and therefore, it *cannot* be a coercive sanction. A sanction is a punishment which is actually imposed, and therefore a coercive sanction is a sanction which, once actually imposed, may be then ended or lifted by the contemnor by finally doing the ordered act. Pietrangelo could not end or lift the dismissal and award once Judge Carr had imposed them, even if he had later answered Defendants' questions under oath. Therefore, the dismissal and award were punitive. See Bagwell, 512 U.S. at 828-829 (A sanction is "punitive and criminal if it is imposed retrospectively for a 'completed act of disobedience'...such that the contemnor cannot avoid or abbreviate the [sanction] through later compliance.") ("When a contempt involves the prior conduct of an isolated, prohibited act, the resulting sanction has no coercive effect.").

Indeed, Appellees' argument is untenable because it would make *any* contempt proceeding civil as long as, and by virtue of the fact that, the court *threatened* a sanction before imposing it. Under Appellees' absurd theory, Judge Carr could, in addition to dismissal and the award, have given Pietrangelo a year in jail and Pietrangelo would not have been entitled to the protections of a criminal trial as long as Judge Carr had threatened the imprisonment first.

3. Appellees argue (*BOCA* at 23, *BOLA* at 21) that contempt for disobedience of a discovery order is always civil. But this is wrong as well. A sanction for disobedience of a discovery order may be criminal if it is punitive.[6] Indeed, discovery sanctions *cannot* never be criminal, because then a district court could levy excessive discovery sanctions without proper due process. Under Appellees' absurd argument, Judge Carr could have ordered Pietrangelo to pay $10 million dollars, and he would not have been entitled to the due process of a criminal trial including assistance of counsel.

Appellees' cases, Bagwell and Conces, do not support Appellees' arguments above. In Bagwell, the Supreme Court ruled criminal what had previously been

[6] Indeed, on its face FRCP 37 has two different mechanisms for treating discovery disobedience. A district court may treat disobedience as a contempt of court (see FRCP 37(b)(1)), in which case the rules pertaining to how contempts are classified and treated apply; or, a district court may treat disobedience as a discovery violation (see FRCP 37(b)(2)), in which case the rules of FRCP 37(b)(2)(A)-(C) apply, including the "substantially justified" safe-harbor provision for attorneys' fees. Judge Carr opted for contempt of court.

considered civil. See 512 U.S. at 830 ("Lower federal courts and state courts such as the trial court here nevertheless have relied on *Mine Workers* to authorize a relatively unlimited judicial power to impose noncompensatory civil contempt fines."). In Conces, the sanction imposed was not dismissal and an award, but incarceration until the contemnor answered discovery. Thus, the contemnor could lift his sanction. Pietrangelo could not lift his dismissal and award. Moreover, Conces actually narrowly held a "district court unquestionably has the power to hold a litigant in civil contempt for failure to comply with a discovery order," 507 F.3d at 1041, not that a district court unquestionably does not have the power to hold a litigant in criminal contempt for failure to comply with a discovery order. Indeed, Conces itself noted that "the district court properly classified its sanction as civil contempt, because Conces could 'purge the contempt and obtain his release' at any time by providing discovery responses in compliance with the court's orders[.]'" *Id.* at 1043, *citing* Bagwell, 512 U.S. at 827. This indicates there was an alternative, criminal sanction for discovery disobedience that the district court in Conces could have imposed.

4. Appellees, citing McMahan and Jacques, argue (*BOLA* at 22) that "dismissal of Plaintiff's Complaint and an award of attorneys' fees and costs to Defendants[] was remedial in nature" and therefore civil. But Judge Carr's dismissal and award were *not* remedial, because unlike the monetary sanctions in Appellees' cited

cases, they did not compensate Appellees for an *underyling economic loss* as is the test for remedial sanctions.

McMahan, which did not involve a dismissal,[7] involved an underlying business debt of $288,763.14 which the defendant owed the plaintiff and most of which the contemnor, by its disobedience, had prevented the plaintiff from recovering from the defendant's bank accounts. The Court in McMahan awarded the plaintiff attorneys' fees, and the attorneys' fees were remedial, only because the plaintiff "was forced to expend a significant amount of money in attorney's fees to recover monies clearly owed to it [the business debt]; an undertaking that was made arduous solely through the conduct of Po Folks' and the Bank." 206 F.3d at 634. The plaintiff was thus *not* awarded attorneys's fees and costs *merely* for presenting the contempt to the district court.

Likewise, Jacques, which did not involve dismissal either, involved an underlying economic loss occasioned solely by the contemnor's disobedience: the costs of the aborted trial. The Court in Jacques specifically stated that its award was "fashioned . . . so as to do no more than compensate" for the "twenty two member venire panel plus the opposing counsel's hotel and attorney's fees for [the aborted trial], an amount totaling $1804.87." 761 F.2d at 305. The award was thus

[7] Dismissal can never be remedial, at least when there is no underlying economic issue to be litigated out, because a dismissal only punishes the plaintiff by ending his or her claims without reaching the merits.

not for the cost of opposing counsel's later having to present the contempt to the district court, but for the aborted trial.

There was no equivalent "aborted trial" and thus associated economic loss in the instant case. Pietrangelo's deposition was not aborted—it went forward, and Defendants obtained answers regarding the underlying events of the *Complaint.* Defendants' costs of the deposition would have been incurred even without the alleged contempt.[8] Judge Carr thus awarded the attorneys' fees and costs solely for Defendants' having to present the alleged contempt, and thus they were punitive.

Jacques, moreover, indicates that Judge Carr's $20,084.35 award against Pietrangelo was indisputably punitive. The court in Jacques awarded only $1804.87 for an entire aborted trial, involving not only opposing counsel but 22 additional "victims." Judge Carr awarded *ten times* that amount for really a single act of alleged disobedience by Pietrangelo so simple as to be, according to Judge Carr himself, allegedly "manifest" at the time of the deposition itself.

5. Appellees argue (*BOCA* at 25; *BOLA* at 41 fn. 12) that Appellant's argument—that the district court could not conduct a telephone hearing on the record—is wrong. Appellees cite FRCP 16 in conjunction with Local Rule 37, and

[8] Indeed, it should be separately noted that Judge Carr did not award Pietrangelo the costs of defendant Estel's improper evasiveness, non-responsiveness, and outright perjury during her deposition.

this Court's decisions in Wilcher and Kegode. However, *Appellees' argument* is what is wrong.

Appellant never argued that the district court could not conduct an on-the-record hearing via telephone (either land line or cell phone). See *Appellant Brief, passim*. What Appellant argued was that Judge Carr could not conduct a hearing *while driving down the highway and using a hand-held cell phone.* Indeed, it is one thing for a judge to be in chambers or on the bench, at his or her desk, *undistracted*, unconstrained by bad/ending reception, with the case file open before him/her, and with an official court reporter, and then under those conditions talking on the telephone to parties, but quite another thing for a judge to be driving down the road, without benefit of those attributes, endangering the public and possibly committing a crime as well, while talking on the telephone to the parties. Such a modus operandi is by definition an intolerably un-judicial act—neither allowed nor cured by FRCP 16, Local Rule 37, *any* other Federal or Local Rule, or Appellees' cases.

Indeed, neither Wilcher nor Kegode even addressed the issue of a hearing by any type of telephone. Appellees just misleadingly[9] represent judicial approval

[9] Indeed, Appellees falsely state (*BOLA* at 41 fn 12) that in Kegode there was a "finding [of] no violation of due process where transcript of a telephone hearing showed that a judge had some difficult[y] hearing"—as if the Court ruled on the due-process constitutionality of a judge having trouble hearing during a telephone call, or of the constitutionality of a telephone hearing under a specific

from the fact that *a* telephone communication was tangentially involved or mentioned *in passing* in each case. Nor did either case involve the type of telephone situation—a hand-held cell phone while driving down the highway—at issue in the instant case.

6. To the extent that Appellees' above argument suggests that under FRCP 16/Local Rule 37.1 Judge Carr did not have to allow Pietrangelo to have his deposition suspended to file a motion for protective order, it is also wrong. FRCP 30(d)(3)(A) *specifically* gave Pietrangelo the automatic right to suspend to file,[10] and no more *general*[11] Federal Rule and no inconsistent[12] Local Rule could take it away. Indeed, the Rules Framers knew how to draft, and could have drafted, a rule either allowing a judge to—during an objected-deposition itself—summarily decide the deponent's request for protective order, or limiting the deponent to such an in-deposition resolution, but they chose not to and did not. Indeed, FRCP

---

circumstance. In fact, Kegode was simply about whether the plaintiff had received constructive notice of her hearing date, which the Court ruled she had by virtue of written notice sent to her current attorney and the mention of the hearing date during the telephone hearing.

[10] Subject to review of any filed motion as frivolous.

[11] A specific rule (FRCP 30(d)(3)(A)) overrides a general rule (FRCP 16) when in conflict. See MacEvoy Co. v. United States, 322 U.S. 102, 107 (1944) ("However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment"). Indeed, Appellees egregiously again ignore basic canons of statutory interpretation when they wrongly argue (*BOLA* at 32) that FRCP 30(c)(2) prevented Pietrangelo from doing what FRCP 30(d)(3)(A) expressly says he could.

[12] See FRCP 83(a)(1).

30(d)(3)(A) has no meaning or purpose other than the purpose assigned to it by Appellant.

The Rules Framers obviously recognized that a deposition is a different animal than all other discovery devices such as interrogatories and requests for production, because the discovery is taking place in person immediately, and thus any harm from oppression during the deposition is irreparable. The Rules Framers also obviously recognized—as much as if not more than Judge Carr, respectfully—the different competing interests—including the judicial efficiency that Appellees cite—involved in the procedure for a deponent extricating himself or herself from an allegedly burdensome deposition, and they obviously decided that the due-process interests of the deponent being able to fully and freely develop and articulate a proper request for protection in a motion outweighed any benefit of an immediate summary decision by a court without the benefit of a proper motion.

Indeed, the Rules Framers certainly could even have concluded that judicial efficiency is best *served* by allowing a deponent to file a proper motion, because a proper motion eliminates the waste that comes from appellate review of an unsupported summary decision. Neither Appellees nor Judge Carr could second-guess that conclusion. See Lonchar v. Thomas, 517 U.S. 314, Syllabus ¶ 2 (1996) ("the balancing of interests undertaken by Congress and the Rule's Framers, . . . courts may not undermine through the exercise of background equitable powers");

Bank of Nova Scotia v. United States, 487 U.S. 250, 254-255 and Syllabus ¶ 1(a) (1988) ("In the exercise of its supervisory authority, a federal court may, within limits, formulate procedural rules[,]" "[n]evertheless, it is well established that [e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions.") ("To allow otherwise would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing.") ("The balance struck by the Rule between societal costs and the rights of the accused may not casually be overlooked because a court has elected to analyze the question under the supervisory power.") (internal quotation marks and citations omitted).

In an apparent attempt to have Judge Carr vicariously vouch for his own challenged "shortcut" procedure, Appellees discuss and quote (*BOCA* at 26-27) Judge Carr's 2006 decision in the unrelated case, Exact. But that case does not help Appellees. That case involved stand-off discovery devices, and not an oral deposition. That case involved actual motions to compel, and not a "shortcut." That case involved corporate parties represented by numerous counsel, and not a *pro se*. That case involved a party with "clean hands" moving for contempt against a party who had engaged in "persistent and egregious" misconduct—including "disregard[ing] [several orders] without any explanation, excuse, or request for extension"; tardily and incompletely complying with an order to file a stipulation;

falsely telling the court that certain documents did not exist; and twice lying to opposing counsel about discovery. In contrast, Pietrangelo simply and honestly maintained a position of refusing to submit to illegal and oppressive discovery by Defendants—even though ordered by Judge Carr to do so.

Moreover, Exact shows the malignancy of Judge Carr's "shortcut." In truth, when a party refuses to let Judge Carr paternalistically "informally" resolve a legitimate discovery dispute and instead insists on formal process under the Federal Rules, Judge Carr takes it personally and holds it against the party as discovery "bad faith."[13] Judge Carr then makes it his mission to punish the party, even to the point of ignoring or not determining relevant facts, *cf.* Exact at 710 fn 17 and *Appellant Brief* at 37-38.[14] Exact also shows just how biased Judge Carr was in the instant case. In Exact, Judge Carr fervently held that verified allegations trump "conclusory allegations of counsel." *Id.* at 708 fn 11, at 709 fn 13. Yet, in the instant case, Judge Carr effectively accepted Defendants' and their

---

[13] *Cf.* Exact at 705 ("I have followed the practice of requiring the parties to contact me forthwith [for informal resolution of] discovery problems for about twenty-five years.*** This approach did not work in this case, despite extensive effort on my part to see to it that it would.") and # 85 at 22 ("... I can't recall in 30 years . . . where a lawyer has . . . refus[ed] [my procedure.]").

[14] Indeed, the very paragraph that Appellees cite (*BOCA* at 30) as "putting the [instant] case into perspective" in their favor shows Judge Carr's taking personal offense that Pietrangelo had opted to exercise his rights rather than let Judge Carr paternalistically run Pietrangelo's offense for him: "You have deliberately and willfully not heeded my *suggestions*, my *recommendations*, any *encouragement*, my instructions and my orders."

counsel's conclusory allegations over Pietrangelo's verified allegations about Defendants' and counsel's oppression and anti-Gay animus towards Pietrangelo, including Estel's confrontation.

7. Appellees state (*BOCA* at 12-13) that during Pietrangelo's deposition, "he refused to suspend the deposition and seek a protective order"—as if to suggest that Pietrangelo waived his rights under FRCP 30(d)(3)(A). But Appellees' statement/argument is obviously wrong. As shown in his *Appellant Brief*, Pietrangelo *repeatedly* demanded to suspend the deposition to seek a protective order, and the Court refused those requests and *ordered* him to remain. The one instance Appellees cite was before these other repeated instances. And Plaintiff was—at the time of this one instance—already under the force of the Court's prior March 3, 2010 order to attend the deposition.

Pietrangelo thus did not waive. He simply did his best to navigate what was a judicial minefield. FRCP 30(d)(3)(A) allowed him to suspend the deposition "any time."

8. Appellees deceptively argue (*BOLA* at 29) that the basis for Pietrangelo's pre-deposition and in-deposition requests to file a motion for protective order were his belief in a "tit-for-tat" principle that "Defendants' alleged misconduct did [] allow Plaintiff to refuse to answer questions." Pietrangelo had *no* such belief, and Appellees cite to *no* evidence of such a belief. The basis for Pietrangelo's requests

to file a motion for protective order was not *retaliation* by him of past misconduct by Defendants and their counsel, but *protection* from actual ongoing *oppression* of him by Defendants and their counsel through their misconduct—including oppression during Pietrangelo's deposition that was predicted by their misconduct prior to that.

Pietrangelo separately and properly raised Defendants' past misconduct as "unclean hands" and therefore mandatory grounds for the district court to deny their requests for discovery remedies. The well-established "unclean hands" doctrine is not a "tit-for-tat" doctrine.

9. In an attempt to gloss over Defendants' oppression of Pietrangelo during his deposition, Appellees deceptively characterize (*BOLA* at 23, 32, 41, repeatedly quoting "I'm going to take my chances and not answer the stuff that I think is just – invasive"; 7, 33) Pietrangelo's objections during his deposition as limited to a "not reasonably calculated" objection—as if he then, *after the fact* in the show-cause-hearing and here on appeal, pulled his "oppression" defense from thin air. Similarly, Appellees deceptively characterize (*BOLA* at 27 fn 4[15]) Pietrangelo's

---

[15] Appellees' case, Rivera, actually supports Appellant, as it holds that "Rule 30(d)(3)" does allow a deponent to *suspend* a deposition for oppression, such as the deposing counsel's "belittling" the deponent, see 2010 U.S. Dist. LEXIS 87874 at * 4 and * 7, as Defendants' counsel did to Pietrangelo numerous times, see ## 32, 41, 44, 52.

"oppression" defense as merely being that he "did not want to answer [Defendants' questions or questions] he deemed irrelevant."

In fact, as *Appellant's Brief* and the evidence shows, Pietrangelo indisputably raised the "oppression" defense long before his deposition even began, and then raised it throughout—including before Judge Carr's interaction—his deposition; and the "oppression" defense included 1) that Defendants and their counsel *would* act and *were* acting unprofessionally toward Pietrangelo during the deposition, improperly frustrating his ability to answer; 2) that, additionally, Defendants' and their counsel's personal disdain for Pietrangelo—as evidenced by their past pre-deposition misconduct and disdain and their current intra-deposition misconduct and disdain—made otherwise unobjectionable questions[16] improperly humiliating and invasive for Pietrangelo, also improperly frustrating his ability to answer; and 3) that the same history of oppression and attitude of disdain meant Defendants and their counsel would misuse Pietrangelo's personal information should he answer personal information. See, *e.g.*, March 1, 2010 Letter to Judge Carr (Addendum 4) at 1 ("If you ultimately agree with me that the *misconduct* and frustration occurred [as described in my pending *Motion for Sanctions*], any

---

[16] Appellees misleadingly give the impression (*BOLA* at 27) that Pietrangelo took/takes the position that otherwise not objectionable questions about a person's medical history are not discovery-relevant to a claim of emotional distress. Pietrangelo never took such a position. His position was that such questions, though relevant, were otherwise objectionable.

discovery of me now by Defendant's counsel would be iniquitous. If you further ultimately agree with me that such *misconduct* and frustration warrants establishment of my claims, any discovery of me by Defendants' counsel now would be *unduly burdensome* on me[.]") (Emphasis added.); # 26 (*Motion for Sanctions*) *passim* and at 28-30 (mentioning instances of Defendants' and their counsel's acting out their personal disdain for Pietrangelo both long before and during Estel's deposition); ## 31, 40; # 65 attachment 1 (Pietrangelo Depo. Tr.) at 14 lines 12-13 and 19-20; at 22 line 7 ("oppressive"); at 28 line 25 ("oppressive"); at 32 line 10 ("oppressive"); at 33 lines 7-15 (Q: On what basis are you going to file a motion for a protective order on a claim [of] . . . emotional distress? A: . . . The argument is that I think both you and Ms. Koesel are unprofessional attorneys and I think you're going to use that claim to harass me.")

Moreover, Pietrangelo's deposition simply was oppressive under both a FRCP 26(c) standard and Judge Carr's "comfort" standard. See # 32 (verified *Motion for Protective Order*) and # 52 (verified *Supplement*), *passim*. And Appellees know it—which is why they do not even discuss the undisputed fact that defendant Estel made a derogatory comment directly to Pietrangelo during his deposition despite a previous order by Judge Carr not to do so.

10. For the same reasons, Appellees' contention (*BOCA* at 23, 29-30) that Pietrangelo "imagined," "perceived," "fabricat[ed]," "conject[ed]," and "deluded" about the oppression and anti-Gay animus towards Pietrangelo is obviously false.

11. Appellees also dissemble (*BOLA* at 8, 15, 42) on the issue of statutory damages, falsely stating that Pietrangelo "continued to evade or refuse to answer questions about his [non-emotional-claim] . . . statutory, consequential, compensatory damages and out-of-pocket losses, beyond the general response that he had increased travel expenses." In fact, Pietrangelo truthfully, specifically, and fully (to the best of his current knowledge) answered what his out-of-pocket and statutory damages were. See # 65 attachment 1 at 48-49, 85-86, 87-89. He additionally raised a proper "premature" objection,[17] see, *e.g.*, United States v. AMR Corp., No. 99-1180-JTM, 2000 U.S. Dist. LEXIS 22646 at * 4 (D. Kan. May 9, 2000) (plaintiff properly raised "premature" objection to place defendants "on notice that plaintiff reserved right to supplement its answers as discovery and expert testimony developed"), to preserve any continuing damage[18] in fact that he would suffer due to Defendants' constitutional torts, and any additional legal theory he might develop as to damages, after the deposition. See *id.*

---

[17] Defendants themselves had raised the exact same objection in discovery.

[18] Such as mileage to and from a different library.

That Appellees falsely[19] state this particular issue, is proven by the fact that Pietrangelo informed Judge Carr—during the deposition hearing—that he had so answered, see # 65 attachment 1 at 55-56, and Judge Carr—during the show-cause hearing—accepted his answer(s), see # 85 at 67.

12. Appellees self-servingly and scandalously recite (*BOCA* at 11-12; *BOLA* at 1) their version of the underlying allegations of Pietrangelo's *Complaint*, as if Appellees were on motion for summary judgment before the Court. But since the district-court decision(s) in review on appeal do not involve summary judgment, such a recitation is plainly improper, not to mention contradicted by the allegations and evidence below, see *Complaint* (# 1) *passim*; Pietrangelo Depo. Tr. (# 65 attachment 1) *passim*, at 8-9, 18-19, 36, 40, 244-282. Pietrangelo was *not* disorderly at the library and *was* wrongfully arrested and ejected from the library by the library and the police for impermissible reasons.

13. Appellees state (*BOCA* at 28 fn. 1) that "Mr. Pietrangelo has attached a copy of a common pleas court record of a felonious assault conviction of the individual who allegedly put a cigarette out on Mr. Pietrangelo's face without commenting upon same, implying that the conviction arose from the alleged assault upon Mr.

[19] Representative of a general dishonesty throughout their brief. Appellees also falsely state (*BOLA* at 38) that "Defendants did not request Plaintiff's social security number or his earnings in any employment he may have had." They not only asked about Pietrangelo's SSN and earnings in discovery, see attached Exhibit 1 hereto, but Judge Carr himself even thought they were asking about earnings during Pietrangelo's deposition, see # 65 at 69 line 1.

Pietrangelo" but the "misdemeanor charge that did stem from the alleged assault upon Mr. Pietrangelo was filed in Sandusky Municipal Court and was dismissed." Appellees further state that "[t]his attempt to mislead this Court is outrageous, but consistent with Mr. Pietrangelo's disingenuousness throughout these proceedings." Appellees' statements are false and wrong.

First, it is quite "rich" that Appellees and their counsel, Lang, accuse *Appellant* of disingenuousness and of misleading the Court. These are the same people who filed a frivolous paper in the district court, and later submitted fraudulent billing to the district court.

Second, Appellant did not attach Robert Faulkner's felony-conviction sheet to imply that Faulker had been convicted of assault on Pietrangelo. The felony-conviction sheet and misdemeanor-charge sheet, on their face, obviously concern different crimes. Rather, Appellant attached the two documents because each demonstrated a different relevant point on the subject: the misdemeanor-charge sheet to demonstrate that the assault indeed had occurred on the day in question, June 12, 2010; and the felony-conviction sheet to show *in part* how the assault evidenced Defendants'/counsel's personal malice towards Pietrangelo and the extent to which they would take that malice and harm him. See *Appellant Brief* at 18.

As the Court will easily note and Appellees ignore, Appellant *circled* Prosecutor Hayberger's name on the felony-conviction sheet. Appellant's point—which would have come out re the show-cause hearing had Judge Carr not ignored the issue—is that it was extremely suspicious that the very man being prosecuted by Prosecutor Hayberger—the same Prosecutor Hayberger whom Pietrangelo had just previously got disqualified from the case for illegally being in the case—should not only be out of jail pending a serious felony charge but should be by *Pietrangelo's home* of all places and assault Pietrangelo, calling Pietrangelo a "faggot"[20] in the process, and thereafter be allowed by Hayberger to plead guilty to a considerably lesser felony.[21] It is even more suspicious given that the defendant Sandusky Police should then fail to properly respond after the assault,[22] and that

[20] Of course, "faggot" is a notorious anti-Gay slur.

[21] Faulkner was originally charged with felony assault for knocking a *disabled* man unconscious, and then continuing to pummel the man while unconscious so viciously that the man ended up in a life-threatening coma.

[22] Had Judge Carr not ignored the issue, he would have heard sworn testimony from Pietrangelo and his brother (who is a physician) that the Sandusky Police intentionally delayed responding to Pietrangelo's 911 call, allowing Faulkner to flee; that when the Police finally did arrive and Pietrangelo complained about their "slow-going," they refused to investigate the crime and to look for the assailant—even though Pietrangelo had an obvious burn mark on his face (later documented by ER personnel); that, while Pietrangelo was peacefully walking on a public street looking himself for the assailant, the Sandusky Police stopped Pietrangelo and threatened to arrest him without legal cause; that when Pietrangelo and his brother finally located the assailant and called the Police and then peacefully demanded to the Police that they arrest the assailant, the Police again threatened to arrest Pietrangelo and his brother without legal cause; and that the Police initially refused to arrest the assailant, even though the assailant was under the influence of alcohol

the defendant City of Sandusky should then, after finally charging Faulkner with assault on Pietrangelo, fail to prosecute the charge despite Pietrangelo's insistence it be tried.

14. Appellees falsely state several more things, including that (*BOLA* at 3 fn 2) Pietrangelo was otherwise improperly responsive to discovery, see # 56 at 1; that (*BOLA* at 5) Pietrangelo "offered no explanation for his objections consistent with the rules of civil procedure," see # 65 at 22-35; that (*BOLA* at 5) Pietrangelo refused to explain his objections to certain questions, see *id.* at 45-48 and 50-51; that (*BOLA* at 5) Pietrangelo "refused to articulate his objection, or sat in silence and refused to respond altogether, see *id.* at 84, 92-93, 112; that (*BOLA* at 12, 28) Pietrangelo asked Judge Carr what "each particular order" was that he allegedly had disobeyed and that when Judge Carr "discussed the specific questions" Plaintiff merely folded onto his brief defenses, see # 85 at 14-16 (Judge Carr did *not* review specifically propounded questions, only particular orders to answer types of questions, which was consistent with Pietrangelo's briefs-arguments already); that (*BOLA* at 12) Pietrangelo "had still not answered the district court's original question," see # 85 at 18 (answer); that (*BOLA* at 17, 18, 25) Pietrangelo

---

(as acknowledged by the Police themselves in their police report) and even though the Police knew (as admitted to Pietrangelo and his brother at the time) that Faulkner was well known to them (as it turns out because Faulkner had a long criminal-record of arrests and convictions for drunken violence, including the felony assault on which he was out on and to which he was allowed to plead guilty to a lesser version).

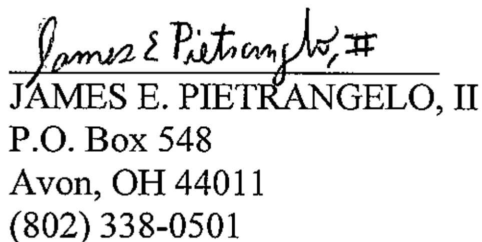
"failed to show he had a lawful cause . . . and that Defendants were not harmed," see ## 32, 53, and 85, *passim* and # 85 at 17-23, 56-57, and 70-71 (lawful cause/lack of harm shown; that (*BOLA* at 19, 24, 34) Judge Carr gave an order to Pietrangelo to respond to "specific questions," see *supra*; that (*BOLA* at 25) Pietrangelo "claims that the district court's order to answer specific questions was . . . invalid," see *supra* (no specific questions ordered); that (*BOLA* at 5) Pietrangelo "never asked the parties or the district court to treat [his deposition transcript] as confidential" against Hayberger, see # 86 at 6 (Defendants' counsel and Judge Carr refusing to treat transcript as confidential against Hayberger); that (*BOLA* at 31) because Hayberger even as non-counsel could have viewed the transcript after it was filed *if* it was filed, it was okay for him as illegal counsel to see the transcript before it was filed anyway, see Howes v. Ashland Oil, Inc. (rule of no public access to unfiled discovery materials, which would be eviscerated if the Court accepted Appellees' argument that because the public could have access to any filed material, all unfiled material is automatically accessible because all unfiled material could be filed at some later point); that (*BOLA* at 33) discovery-non-relevance is not unduly burdensome and therefore not a grounds to suspend under FRCP 30(d)(3)(A), see Appellees' own case, Hopkins, 2008 U.S. Dist. LEXIS 83510 at * 9 ("if deponent's counsel remains substantially unsatisfied, he may request that he and opposing work quickly to reframe the question. If the attorneys

cannot reach accord and deponent's counsel still strongly objects and has substantial grounds to believe that the question is outside the limited scope of discovery, then and only then may he instruct the deponent not to answer."); that (*BOLA*) Judge Carr "did not hold Plaintiff in contempt a second time," see # 85 at 73 lines 3-4 (Judge Carr stating that Pietrangelo, by refusing to purge himself, "persisted in the contempt"; # 66 at 2, 3 (same)); and that (*BOLA* at 44) Judge Carr "considered less drastic alternatives to dismissal" because he "gave Plaintiff that opportunity during the March 5, 2010 hearing," see # 85 (first time Judge Carr found Pietrangelo in contempt, so Judge Carr could not have considered lesser sanctions before then).

Equally false is Appellees' argument (*BOLA* at 19) that there "were no ambiguities in [Judge Carr's] order" because "when given the order, Plaintiff stated that he understood it, but that he did not intend to obey it." A person can understand what has been said to him or her, and what was said still be legally vague. Indeed, it happens all the time in depositions—that is the purpose behind the "vague" objection. Pietrangelo may have understood that Judge Carr ordered him to answer types of questions, but that still left a question in Pietrangelo's mind as to whether any specific question actually propounded to him in the future fell within the type of question and Judge Carr's blanket order regarding that type.

15. Appellees assert (*BOLA* at 9) the alleged propriety of a list of questions they asked (*e.g.*, "Do you have a home computer?") and the alleged impropriety of a list of Pietrangelo's objections (including the attorney-client privilege) in allegedly refusing to answer the questions. However, Judge Carr never ruled on these specific questions and objections, see # 85 *passim*, and the objections were not only valid, but Pietrangelo at the time also actually did answer to some degree, see, *e.g.*, # 65 at 122-125 (answering he had a home computer). Thus, Appellees' assertion does not prove contempt.

January 28, 2011 Respectfully submitted,



JAMES E. PIETRANGELO, II
P.O. Box 548
Avon, OH 44011
(802) 338-0501

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type volume limitation imposed by Federal Rule of Appellate Procedure 32(a). The brief was prepared using Microsoft Word 2007 and contains no more than 7,000 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

JAMES E. PIETRANGELO, II

PROOF OF SERVICE & ACKNOWLEDGEMENT OF FILING

I declare under penalty of perjury of the laws of the United States of America that I served the foregoing brief on all known parties by mailing two copies of same via Priority U.S. Mail on January 28, 2011, to William P. Lang, Ste. 1301, 1300 W. 9th St., Cleveland, OH 44113, Counsel for City Appellees; and to Margaret Koesel, Porter Wright Morris & Arthur LLP, Ste. 1700, 925 Euclid Ave., Cleveland, OH 44115, Counsel for Library Appellees; and that on that same day and by Express Overnight U.S. Mail, I mailed the original of the foregoing brief for filing to Office of the Clerk, U.S. Court of Appeals for the Sixth Circuit, Potter Stewart U.S. Courthouse, 100 E. Fifth St., Cincinnati, OH 45202-3988.

JAMES E. PIETRANGELO, II

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

JAMES E. PIETRANGELO, II	)	
	)	
Plaintiff,	)	JUDGE JAMES G. CARR
	)	
v.	)	Docket 3:09-cv-02560
	)	
SANDUSKY LIBRARY, *et al.*	)	
	)	
Defendants.	)	

PLAINTIFF'S RESPONSES & OBJECTIONS TO DEFENDANT CITY OF SANDUSKY'S INTERROGATORIES

Plaintiff responds and objects to Defendant City of Sandusky's Interrogatories propounded on January 29, 2010, as follows:

GENERAL RESPONSES AND OBJECTIONS

1. No objection stated in this paper is to the prejudice of any other objection. The objections stated in this General section are incorporated in each specific response as applicable.

2. Plaintiff objects to the Interrogatories on the grounds that they exceed 25 in number and he has no obligation to respond to those beyond the first 25. See FRCP 33(a)(1). Plaintiff counts 25 at Interrogatory No. 5, and so will not respond to those after 5, but will—without waiver of his number objection, yet object to preserve his objections.

EXH 1
(#65 att.1 ex.1)

3. Plaintiff objects to the Interrogatories and their provisions and instructions to the extent that they impose obligations beyond those imposed by applicable law and the Federal Rules of Civil Procedure and the Local Rules, including but not limited to Rule 26.

4. Plaintiff objects to the Interrogatories to the extent that they seek information protected by the attorney-client privilege or the attorney work-product doctrine or any other applicable privilege.

5. Plaintiff objects to the Interrogatories on the grounds that they were virtually all partially obstructed, forcing Plaintiff to guess what they said.

5. Plaintiff reserves the right to supplement his responses and objections with or based on additional information.

SPECIFIC OBJECTIONS

<u>INTERROGATORY 1</u>: State your full name, date of birth, street address of your residence or any other place you have lived, either as a permanent residence or temporary abode, in the past 10 years, and social security number.

RESPONSE: Except as answered below, Plaintiff objects to this Interrogatory on the grounds that it is improperly propounded as compound, it is vague and ambiguous and unclear, it is not reasonably calculated to lead to the discovery of admissible evidence, it is unduly burdensome and oppressive, it is premature, and it lacks proper foundation and form. James Emidio Pietrangelo, II, 401 W. Shoreline Dr., Sandusky, Ohio 44870.

SSN

<u>INTERROGATORY 2</u>: Have you ever been convicted of a felony or a crime of dishonesty, such as, but not limited to, theft, receiving stolen property, forgery, and passing bad checks? If so, state the name and address of the Court where the proceedings took place, the date and nature of the original charge against you, the nature of the charge of which you were convicted, and whether your conviction was based on a guilty plea or after trial.

INTERROGATORY 10: Are any of the injuries or conditions, including psychiatric or psychological, which you claim are caused by the Incident, an aggravation of a pre-existing condition? If so, state which of the injuries or conditions were aggravated and the nature of the preexisting condition.

RESPONSE: Plaintiff objects to this Interrogatory on the grounds that it exceeds 25 interrogatories, it is improperly propounded as compound, and it lacks proper foundation and form.

INTERROGATORY 11: Provide the full name and address of each medical and/or psychological practitioner who treated the pre-existing conditions, including therein the date of such treatments and the nature thereof.

RESPONSE: Plaintiff objects to this Interrogatory on the grounds that it exceeds 25 interrogatories, it is improperly propounded as compound, and it lacks proper foundation and form.

INTERROGATORY 12: Have you had a physical or mental examination by a medical and/or mental health care practitioner within ten (10) years from the date of the Incident? If so, state the date of the examination, the name and address of the medical and/or mental health care practitioner, and the reason for each such examination.

RESPONSE: Plaintiff objects to this Interrogatory on the grounds that it exceeds 25 interrogatories, and it is improperly propounded as compound.

INTERROGATORY 13: List each job or position of employment, held by you for the 20 years before the incident described in the complaint, stating as to each the address of the employer, date of commencement and date of termination, place of employment, nature of employment, duties performed, name and address of immediate supervisor, rate of pay or compensation received, and reason for termination.

RESPONSE: Plaintiff objects to this Interrogatory on the grounds that it exceeds 25 interrogatories, it is improperly propounded as compound, it is not reasonably calculated to lead to the discovery of admissible evidence, it is unduly burdensome and oppressive, it is premature, it lacks proper foundation and form, and it is attorney-client and attorney-work product privileged.