HEATHER WEBB and ROBERT WEBB, Plaintiffs vs. SCRANTON QUINCY HOSPITAL COMPANY, LLC d/b/a MOSES TAYLOR HOSPITAL; APOLLOMD BUSINESS SERVICES, LLC; PENNSYLVANIA PHYSICIAN SERVICES; and JOHN J. HABER, D.O., Defendants	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY NO. 2021 CV 4073

ORDER

In anticipation of this medical professional liability action that is scheduled to commence trial on March 25, 2024, plaintiffs, Heather Webb and Robert Webb (the "Webbs"), filed a motion *in limine* on February 26, 2024, seeking leave of court to use "admissible excerpts of videotaped depositions" of unidentified defense witnesses during the opening statement by the Webbs' counsel. (Docket Entry No. 95). Defendants, John J. Haber, D.O. ("Dr. Haber"), Pennsylvania Physician Services, LLC ("PPS"), and ApolloMD Business Services, LLC ("ApolloMD"), and defendant, Scranton Quincy Hospital Company, LLC d/b/a Moses Taylor Hospital ("Moses Taylor"), have filed briefs in opposition to the Webbs' motion *in limine*. (Docket Entry Nos. 116, 120). A party may display tangible evidence to the jury during an opening statement only if that evidence is admissible at trial, and since the video deposition testimony of parties, their officers, directors, managing agents, and designated witnesses, and non-party medical witnesses and expert witnesses "may be used against any party" at trial "for any purpose" pursuant to Pa.R.Civ.P. 4017.1(g) and 4020(a)(2) and (5), "any part or all" of the

video depositions of defendants, their officers, directors, managing agents, or designated witnesses, and any non-party medical or expert witnesses may be shown to the jury during the Webbs' opening statement to the extent that those "excerpts" are admissible at trial. But, inasmuch as the Webbs have not identified which portions of what video depositions they intend to exhibit during their opening statement, they will be ordered to do so within the next five days so that defense counsel may assert any reserved evidentiary objections to those excerpts so that any required rulings may be made prior to opening statements.

The Webbs submit that their counsel is permitted "to verbally describe, in detail, the evidence he intends to prove" during his opening statement, and that "[t]he videotaped deposition is by far the most accurate representation of the witnesses' testimony." (Docket Entry No. 95 at ¶¶ 6, 8). They posit that "videotaped excerpts are less prejudicial, less argumentative, and more accurate than counsel's outline of what a witness will later say at trial" and "will not consume more time than describing this evidence in detail will." (Id. at ¶¶ 9-10). Citing Pa.R.Civ.P. 4017.1(g) and 4020(a)(2), the Webbs maintain that their counsel should be permitted to utilize videotape deposition excerpts of the defense medical witnesses, managing agents, and corporate designees during his opening statement. (Id. at ¶¶ 13-16).

Dr. Haber, PPS, and ApolloMD claim that "there is no due process right at issue in denying [the Webbs'] request on this issue" since they "are permitted to describe the evidence they intend to introduce at trial" during their opening statement, and that "evidence can later be introduced during the course of the trial." (Docket Entry No. 116 at p. 4). They reference Lackawanna County Rule of Civil Procedure 223 which states that "[o]pening remarks shall consist only of a succinct statement, without argument of the positions and contentions of the

party represented by the speaker, and a brief recital of the evidence intended to be introduced in support of the same." Lacka. Co. R.C.P. 223(b)(2). In addition to advocating the denial of the Webbs' motion *in limine*, Dr. Haber, PPS, and ApolloMD alternatively request that the Webbs be required to identify in advance of trial those videotaped deposition excerpts that they intend to play during the Webbs' opening statement, so that Dr. Haber, PPS, and ApolloMD may determine whether they object to certain testimony on evidentiary grounds or wish to present other excerpts in their opening statement. (Id. at p. 4).

Moses Taylor cites the Pennsylvania Suggested Standard Civil Jury Instruction "Outline of Trial" in arguing that "it is improper for counsel to present facts to the jury that are not in evidence" during an opening statement. (Docket Entry No. 120 at p. 2). It states that "[i]f [the Webbs'] counsel is permitted to show clips from videotaped deposition testimony, [the Webbs] would be improperly presenting direct evidence to the jury before such evidence has even had the opportunity to be deemed admissible or inadmissible at trial by the Court." (Id.). Moses Taylor suggests that "it could result in a mistrial, as well as a waste of judicial time and resources, if videotaped deposition testimony was shown during opening statements but was subsequently deemed inadmissible." (Id. at p. 3).

Trial judges in civil cases retain broad discretion "to regulate addresses by counsel to the jury." Daddona v. Thind, 891 A.2d 786, 798 (Pa. Cmwlth. 2006), *app. denied*, 589 Pa. 732, 909 A.2d 306 (2006). *See also* Burish v. Digon, 416 Pa. 486, 490, 206 A.2d 497, 499 (1965) (observing that "it has long been established that the addresses of counsel to the jury are especially subject to the regulatory powers of the trial judge"). Nevertheless, "the right to present an opening statement in a civil case is part of a party's constitutional right to be represented by

an attorney." Butler v. Flo-Ron Vending, 383 Pa. Super. 633, 649-650, 557 A.2d 730, 738 (1989), *app. denied*, 523 Pa. 646, 567 A.2d 650 (1989); Horst v. Union Carbide Corporation, 68 Pa. D. & C.5th 194, 204 (Lacka. Co. 2017). "The purpose of an opening statement is to apprise the jury of the background of the case, how the case will develop, and what counsel will attempt to prove." Com. v. Howard, 749 A.2d 941, 955 (Pa. Super. 2000), *app. denied*, 564 Pa. 726, 766 A.2d 1244 (2001). The Supreme Court of Pennsylvania has "acknowledged that 'as a practical matter the opening statement can often times be the most critical stage of the trial, because here by the jury forms its first and often lasting impression of the case.'" Com. v. Parker, 591 Pa. 526, 537, 919 A.2d 943, 950 (2007) (quoting Com. v. Montgomery, 533 Pa. 491, 498, 626 A.2d 109, 113 (1993)).

An opening statement "must be based on evidence that [counsel] plans to introduce at trial," and "may refer to facts that [counsel] reasonably believes will be established at trial." Id. (citing Com. v. Begley, 566 Pa. 239, 274, 780 A.2d 605, 626 (2001)). The Pennsylvania Suggested Standard Civil Jury Instruction entitled "Outline of Trial" provides that an "opening statement is not evidence but is simply a summary of what the lawyer expects the evidence will show," and is "designed to highlight for [the jury] the disagreements and factual differences between the parties in order to help [the jury] judge the significance of the evidence when it is presented." Pa. SSJI (Civ) §1.170 (5th ed.). However, "counsel is permitted to use visual aids during opening . . . statements to assist the jury in understanding the evidence." Risperdal Litigation W.C. v. Janssen Pharmaceuticals, Inc., 174 A.3d 1110, 1117 (Pa. Super. 2017). Moreover, the Supreme Court has concluded that where "a tangible piece of evidence" is "within the scope of the evidence" that a party "intends to introduce at trial," and there is "no question as

to its admissibility," the "display of the piece of evidence is wholly proper" during an opening statement provided that its display "does not inflame the passions of the jury." Parker, 591 Pa. at 538, 919 A.2d at 950.

Consequently, a party may show excerpts of videotaped deposition testimony during an opening statement only to the extent that those testimonial passages will be admitted into evidence at trial. Rule 4007.1(e) of the Pennsylvania Rules of Civil Procedure permits a party to compel "a public or private corporation or a partnership or association or governmental agency" to designate "one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf," in order to be deposed "as to matters known or reasonably available to the organization."[1] Pa.R.Civ.P. 4007.1(e). Rule 4020(a) authorizes the use, in certain identified circumstances, of "any part or all of a deposition" against a party at trial if that party "was present or represented at the taking of the deposition" or "had notice" of the deposition. Pa.R.Civ.P. 4020(a). Subsection (a)(2) of Rule 4020 addresses the use of deposition testimony of a party or its designated deponent, and states that the deposition "of a party," "an officer, director, or managing agent of a party," or "a person designated" under Rule 4007.1(e) to testify on its behalf "may be used by an adverse party *for any purpose*." Pa.R.Civ.P. 4020(a)(2) (emphasis added).

Rule 4020(a)(5) governs the use of non-party medical witnesses' depositions, and provides that "[a] deposition upon oral examination of a medical witness, other than a party, may be used at trial *for any purpose* whether or not the witness is available to testify." Pa.R.Civ.P. 4020(a)(5) (emphasis added). It is reversible error for a trial court to deny a party's request to

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[1] "The Explanatory Comment to Rule 4007.1 clarifies that the 'consent to testify' requirement in Pa.R.Civ.P. 4007.1(e) does not apply to 'officers, directors, or managing agents' of the corporate deponent since 'their position requires them to testify.'" Healey v. Wells Fargo, N.A., 47 Pa. D. & C.5th 214, 219 (Lacka. Co. 2015).

use relevant portions of the deposition transcript of an opposing party's medical witness under Rule 4020(a)(5). Wiley v. Snedaker, 765 A.2d 816, 817 (Pa. Super. 2000) (trial court erred by granting defendants' motion to prohibit plaintiff "from reading portions of Dr. Snyder's deposition transcript into evidence during [plaintiff's] case-in-chief" on the basis that "Dr. Snyder was retained by [defendants] as a defense expert" and his testimony was purportedly inadmissible under Pascone v. Thomas Jefferson University, 357 Pa. Super. 524, 516 A.2d 384 (1986)). Rule 4017.1(g) discusses the use of a video deposition of a non-party medical or expert witness, and directs that "[i]n addition to the uses permitted by Rule 4020, a video deposition of a medical witness or any witness called as an expert, other than a party, may be used at trial *for any purpose* whether or not the witness is available to testify." Pa.R.Civ.P. 4017.1(g) (emphasis added). By virtue of these procedural rules, the oral and video depositions of parties and their officers, directors, managing agents, and designated witnesses, *see* Pa.R.Civ.P. 4020(a)(2), and any non-party medical or expert witnesses, *see* Pa.R.Civ.P. 4017.1(g), 4020(a)(5), may be used at trial "for any purpose" regardless of whether the witness is available to testify in-person.[2]

The Webbs' motion *in limine* does not identify the deponents whose videotaped testimony the Webbs wish to display during their opening statement. The only named defendant who presumably was deposed is Dr. Haber, and his relevant deposition testimony is clearly admissible at trial pursuant to Pa.R.Civ.P. 4020(a)(2). Christina Lynch, R.N. was originally

[2] Subsection (a)(1) of Rule 4020 concerns a party's use of a deposition "for the purpose of contradicting or impeaching the testimony of a deponent as a witness" at trial. Pa.R.Civ.P. 4020(a)(1). Rule 4020(a)(3) discusses the use of a deposition of other witnesses not addressed by subsections (a)(2) and (5) quoted above, and states that such a deposition may be used if the witness is (a) dead, (b) outside the Commonwealth, or (c) more than 100 miles from the place of trial, (d) unable to attend or testify because of age, sickness, infirmity, or imprisonment, or (e) could not be subpoenaed for trial, or (f) "exceptional circumstances exist" making it "desirable" to use the deposition "in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court." Pa.R.Civ.P. 4020(a)(3).

named as a defendant, but was voluntarily dismissed as a party on March 6, 2024. (Docket Entry No. 131). Nevertheless, since the term "medical witness" in Pa.R.Civ.P. 4017.1(g) and 4020(a)(5) is not confined to a "physician" or "medical doctor" and instead includes a non-party "registered nurse," her video deposition testimony likewise may be introduced at trial pursuant to Rules 4017.1(g) and 4020(a)(5). Russell v. Albert Einstein Medical Center, Northern Div., 543 Pa. 532, 536-537, 673 A.2d 876, 878 (1996) ("We hold that the trial court was correct in interpreting the term 'medical witness' in Rule 4020 to include a registered nurse, and the court's quoted rationale is a succinct, helpful summary of the justification. . . . Medical personnel involved directly in the treatment of patients should not be forced to make time-consuming courtroom appearances unnecessarily.") The Webbs' submissions also do not indicate whether PPS, ApolloMD, or Moses Taylor produced any managing agents or designated witnesses for depositions under Rule 4007.1(e), such that a determination may be made as to the use of the depositions of identified managing agents or designated witnesses. *See* El v. Murzyn, 831 A.2d 724, 727 (Pa. Super. 2003) (holding that "[t]he term 'managing agent' as used in Pa.R.Civ.P. 4020(a) and 4007.1(e) . . . 'is to be answered pragmatically on an *ad hoc* basis,'" and "that where an individual's interests are identified with those of his principal, and the nature of the individual's functions, responsibilities, and knowledge pertain to the subject matter of the deposition and litigation, that individual is an appropriate 'managing agent' and his deposition may be introduced at trial, pursuant to Pa.R.Civ.P. 4020(a)(2)."") (quoting Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc., 326 Pa. Super. 509, 474 A.2d 605, 616 (1984)); Healey, 47 Pa. D. & C.5th at 220 (same).

Nor does the Webbs' motion *in limine* identify which portions of the video depositions they wish to use during their opening statement so as to enable defense counsel to determine whether they object to that testimony on good faith evidentiary grounds. Subsection (c) of Rule 4020 states that "[s]ubject to the provisions of Rule 4016(b), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying." Pa.R.Civ.P. 4020(c). Rule 4016(b) provides that objections "to the competency of a witness or the competency, relevancy, or materiality of the testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which was known to the objecting party and which might have been obviated or removed if made at that time." Pa.R.Civ.P. 4016(b). Our appellate courts have addressed the relationship of Rules 4020(c) and 4016(b) in that regard, and stated:

> Read together, Pa.R.Civ.P. 4020(c) and 4016(b) provide that, while an objection may be made at trial to the introduction of any part of a deposition in the same manner as if the deponent were then testifying, the failure to object during the taking of the deposition will preclude an objection at trial if "the ground of the objection is one which was known to the objecting party and which might have been obviated or removed if made" at the time of the deposition.

Talmadge v. Ervin, 236 A.3d 1154, 1160 (Pa. Super. 2020) (quoting Starner v. Wirth, 440 Pa. 177, 182-183, 269 A.2d 674, 677 (1970)).

But lawyers typically stipulate at the outset of discovery depositions that all objections, except as to the form of the question, are reserved until the time of trial. *See, e.g.*, Fiduciary Trust Company International of Pennsylvania v. Geisinger-Community Medical Center, 2022 WL 672386, at *2, 11 (Lacka. Co. 2022); Howarth-Gadomski v. Henzes, 2019 WL 6354235, at *2, 10 (Lacka. Co. 2019); Ezrin v. Hospice Preferred Choice, Inc., 2018 WL 4778396, at *5

(Lacka. Co. 2018). "Common objections to 'the form of the question' are that the question is leading, compound, asks a substantially identical question that was previously answered, requires pure speculation, is unintelligible or argumentative, or misstates the witness' earlier testimony." Fiduciary Trust Company International of Pennsylvania, supra, at *2 n.1 (citing Honorable Daniel J. Anders, *Ohlbaum on the Pennsylvania Rules of Evidence*, §103.20 at pp. 41-43 (2022 ed.)). Notwithstanding the provisions of Rule 4020(c) and 4016(b) governing the waiver of objections at trial that were not asserted during a discovery deposition, the parties' stipulation regarding the reservation of objections will be honored when determining the use of that deposition testimony at trial. *See* Starner, 440 Pa. at 183, 269 A.2d at 677 (stating that the stipulation of counsel concerning the reservation of objections "is controlling and gives full effect to the timely objection at trial" since "[t]he total weight accorded by the courts to private agreements between counsel is too well established to be doubted," such "that the objection at trial to the proffered opinion was not only proper but timely."); Talmadge, 236 A.3d at 1160 ("Where, however, the parties stipulate to reserve all objections until trial, the court will honor the stipulation."). In that event, "the test of admissibility of a deposition under Rule 4020(a)(2) is the same as that for the admissibility of like testimony offered by a witness on the stand in open court." Jistarri v. Nappi, 378 Pa. Super. 583, 595-596, 549 A.2d 210, 216 (1988).

It is unclear from the parties' filings whether counsel entered into the common stipulation to reserve all discovery deposition objections, except as to the form of the question, until the time of trial. Assuming that counsel did so stipulate, it is imperative that the Webbs promptly identify the specific excerpts of those video depositions that they seek to display during their opening statement so that defense counsel may determine whether they wish to lodge any preserved

objections to that proffered testimony. Additionally, Rule 4020(a)(4) states that if a party presents "only part of a deposition" at trial, any other party "may introduce any other parts" of the deposition that has not been offered. Pa.R.Civ.P. 4020(a)(4). Depending upon the excerpts of the video depositions that the Webbs intend to utilize during their opening statement, counsel for Dr. Haber, PPS, ApolloMD, and Moses Taylor may choose to play "other parts" of those depositions during their own opening statements. *See* Brodowski v. Ryave, 885 A.2d 1045, 1063 n.3 (Pa. Super. 2005), *app. denied*, 587 Pa. 680, 897 A.2d 449 (2006).

In sum, parties may display actual evidence during their opening statements if that material will be admitted into evidence at trial. "Any part or all" of the video depositions of (1) parties, (2) their officers, directors, managing agents, or designated witnesses under Rule 4007.1(e), and (3) non-party medical and expert witnesses may be used at trial "for any purpose," and may be shown to the jury during opening statements provided that the video deposition testimony will be admissible at trial. To enable defense counsel to determine whether they object to the use of any "excerpts of videotaped depositions" on recognized evidentiary grounds, or to decide if they wish to show "any other parts" of those depositions under Rule 4020(a)(4) during their opening statements, the Webbs will be directed to identify the specific portions of the video depositions that they intend to use so that any necessary rulings may be made prior to the parties' opening statements.

AND NOW, this 8th day of March, 2024, upon consideration of "Plaintiffs' Motion *In Limine* to Use Relevant and Admissible Excerpts of Videotaped Depositions During Opening Statement" and the memoranda of law submitted by the parties, and based upon the foregoing reasoning set forth above, it is hereby ORDERED and DECREED that:

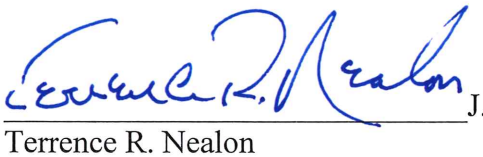
1. By no later than March 13, 2024, plaintiffs shall advise defendants in writing as to the specific "excerpts" of identified video depositions that they intend to show during their opening statement on March 25, 2024;

2. In the event that defendants assert evidentiary objections to the "excerpts" identified by plaintiffs, they shall file and serve their objections, together with citations to appropriate authority, on or before March 18, 2024. If defendants intend to use "any other parts" of the identified video depositions under Pa.R.Civ.P. 4020(a)(4) during their opening statements, they shall advise plaintiffs in writing of the specific portions of the video depositions that they intend to display in their opening statements;

3. By no later than March 21, 2024, plaintiffs shall file and serve their responses to any evidentiary objections asserted by defendants, and shall also file and serve any objections that plaintiffs assert to those "other parts" of the video depositions that defendants have indicated that they intend to use pursuant to Pa.R.Civ.P. 4020(a)(4) during their opening statements; and

4. In the event that the parties file any objections pursuant to paragraphs (2) and (3) above, those objections will be decided prior to the presentation of opening statements on March 25, 2024.

BY THE COURT:



J.

Terrence R. Nealon

cc: *Written notice of the entry of the foregoing Order has been provided to each party pursuant to Pa. R. Civ. P. 236 (a)(2) and (d) by transmitting time-stamped copies via electronic mail to:*

Joseph L. Messa, Jr., Esquire — jmessa@messalaw.com
Megan M. Kwak, Esquire — mkwak@messalaw.com
Messa & Associates, P.C.
123 S. 22nd Street
Philadelphia, PA 19103
Counsel for Plaintiffs

Stuart T. O'Neal, Esquire — soneal@burnswhite.com
Kimberly M. Funaro, Esquire — kmfunaro@burnswhite.com
Burns White LLC
1001 Conshohocken State Road, Suite 1-515
Conshohocken, PA 19428
Counsel for Defendants, Scranton Quincy Hospital Company, LLC d/b/a Moses Taylor Hospital and Christina Lynch, R.N.

Andrew H. Foulkrod, Esquire — afoulkrod@c-wlaw.com
Cipriani & Werner, P.C.
Suite 201, 1011 Mumma Road
Lemoyne, PA 17043
Counsel for Defendants, John J. Haber, D.O., Pennsylvania Physician Services, and Apollo MD Business Services