DONALD J. EZRIN, Administrator of the Estate of Sidney Ezrin,	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
Plaintiff	:	CIVIL ACTION – AT LAW
vs.	:	
HOSPICE PREFERRED CHOICE, INC. d/b/a AseraCare HOSPICE, 100 EDELLA ROAD OPERATIONS, LLC, d/b/a ABINGTON MANOR and GENESIS HEALTHCARE, LLC,	:	NO. 16 CV 7103
Defendants	:	

MEMORANDUM AND ORDER

NEALON, J.

In this wrongful death litigation asserting negligent and reckless nursing home and hospice care, the deposition of the nursing home's charge nurse was recessed after her anxiety disorder reportedly became exacerbated, and after a dispute later arose regarding the conclusion of her deposition, the nursing home filed a motion for a protective order seeking to bar the continuation of the nurse's deposition. More than 40 days ago, the nurse's physician indicated in his brief report that the nurse did "not feel at [that] time" that she could complete her deposition, and he requested that any further questioning be postponed, not prohibited, to "allow us to help better control her anxiety." The record also reflects that the nurse is currently employed full-time by the nursing home where she is responsible for 30 nursing home patients each shift. Based upon the materials submitted and Pa.R.C.P. 4012 governing protective orders, the nursing home has not satisfied its

burden of demonstrating "good cause" to permanently preclude the resumption of the nurse's deposition due to unreasonable burden, oppression, or annoyance. Thus, the request for a protective order will be denied, and the nursing home will be required to produce the nurse for the continuation and conclusion of her deposition prior to the expiration of the discovery deadline on October 31, 2018.

I. FACTUAL BACKGROUND

Plaintiff, Donald J. Ezrin ("Ezrin's Administrator"), the Administrator of the Estate of Sidney Ezrin ("Ezrin"), has instituted this wrongful death action against defendant, Hospice Preferred Choice, Inc. d/b/a AseraCare Hospice ("AseraCare"), and defendants, 100 Edella Road Operations, LLC, d/b/a Abington Manor and Genesis Healthcare, LLC ("Abington Manor"). (Docket Entry Nos. 1, 11). Ezrin's Administrator alleges negligence and recklessness by Abington Manor and AseraCare in connection with their treatment of Ezrin that reportedly resulted in his death on January 27, 2015. (Docket Entry No. 11 at ¶¶ 41, 48, 65, 69-97, 127-151). The negligence and recklessness claims are primarily premised upon the nursing home and hospice care that Ezrin received, or failed to receive, "between the evening of December 25, 2014, and the morning of December 26, 2014," with respect to "a severe, large skin tear to his right forearm." (Id. at ¶¶ 69-84).

"C.N." was Abington Manor's charge nurse during the eight-hour shift for Ezrin's floor from December 25, 2014, at 11:00 PM to 7:00 AM on December 26, 2014. (Docket Entry No. 82 at ¶ 5; Docket Entry No. 83 at ¶ 5). Ezrin's Administrator maintains that Abington Manor's records reflect that "the only people to have contact with Mr. Ezrin during the time he was injured were [C.N.], Mollie Grimm, a [certified nursing assistant]

CNA employed by Abington Manor and supervised by [C.N.], and Kathleen Fauerbach, [an AseraCare] hospice worker." (Docket Entry No. 81 at p. 2). He further submits that "[C.N.] was the person who had the most contact" with Ezrin during the critical time period, and that "Abington Manor intends to rely on the records that [C.N.] made in defending this case." (Docket Entry No. 81 at ¶ 18).

When C.N. was questioned during her discovery deposition regarding her treatment of Ezrin on December 26, 2014, the following transpired:

Q: Was there any reason that morning that you didn't go to help the hospice CNA when she requested assistance?

A: I just had, like, a time limit to do my meds, so I didn't know what to do because I had to get all my meds out by a certain time.

Q: Was there anyone other than Mollie Grimm that you could have requested to assist the hospice CNA when she asked?

A: I don't remember. I don't remember if there was another aide on the floor. There was another nurse's aide, but the nurse's aide was on the other side, on the East side.

Q: Was that individual assigned to the East wing?

A: Yeah, yeah.

Q: Could you have called that individual to assist the hospice CNA?

A: I don't know, I guess I could have, I just had - - I had probably people falling at the same time.

[Abington Manor's counsel]: Just answer the question, alright?

[C.N.]: Yes.

Q: Was there any reason that you didn't?

[AseraCare's counsel]: Objection to form. You can answer it.
[Abington Manor's counsel]: If you know.

[C.N.]: I feel I don't want to do this job anymore. That's just how I feel.

Q: No. I'm just asking you if you could think of any…

[Abington Manor's counsel]: First of all, do you remember anything about that?
[C.N.]: A lot of this I don't even remember.
[Abington Manor's counsel]: Alright. You asked Mollie to help, correct?
[C.N.]: Yeah.
[Abington Manor's counsel]: Alright.

Q: And then we talked about there being a CNA assigned to the East wing. And I asked, could you have asked her to assist the hospice CNA, and I think you answered you could have. My question simply is, do you recall any reason why you didn't?

[Abington Manor's counsel]: If you don't recall, you can say that.
[C.N.]: I don't recall. I mean honestly I feel like I don't even want to do this stuff anymore.
[Abington Manor's counsel]: Alright, let's take a break. Let's take a break.
[C.N.]: I don't even want to work in this field anymore.
[Abington Manor's counsel]: Okay. [C.N.], let's take a break.

(Transcript of Deposition of C.N., dated August 23, 2018, attached to Docket Entry No. 83 as Exhibit B, at pp. 41-43). After a recess was taken, Abington Manor's counsel stated on the deposition record that C.N. was "very upset" and "it's my judgment that she's not in an appropriate state of mind to go forward." (Id. at p. 43).

Facing an impending discovery deadline of October 31, 2018, (Docket Entry No. 86 at ¶ 1), counsel for Ezrin's Administrator has attempted to reschedule and resume the deposition of C.N., but Abington Manor's counsel has declined to produce her for further questioning. (Correspondence from Susan L. Luckenbill, Esquire, to Judge Terrence R. Nealon dated September 12, 2018; Correspondence from Robert E. Dillon, Esquire to Judge Terrence R. Nealon dated September 123, 2018). Pursuant to a court directive on

September 18, 2018, Abington Manor filed an "Emergency Motion for Protective Order" on September 24, 2018, seeking "to preclude the continuation deposition" of C.N. (Docket Entry No. 83 at p. 1). In support of that request, Abington Manor has produced a six-sentence report from Satish Mallik, M.D., indicating that as of August 23, 2018, C.N. "is currently under [his] care for generalized anxiety disorder." (Docket Entry No. 85). Dr. Mallik states that "[C.N.] reports that she had a deposition that caused her increased anxiety and panic," and that "[s]ince she was not able to compose herself, she was unable to finish and the deposition had to be stopped." (Id.). Although Dr. Mallik does not opine that C.N. is incapable of ever testifying due to a mental or emotional condition, he reports that "[C.N.] does not feel at this time she can complete the questioning due to her anxiety and panic," and requests that the court and counsel "please consider postponing the questioning for another time and allow us to help better control her anxiety." (Id.).

In opposing Abington Manor's request for a protective order, Ezrin's Administrator notes that "most witnesses find the process of being deposed a stressful and unpleasant experience, especially when their conduct is being called into question for bringing harm to someone," and argues that Dr. Mallik's brief report is "based solely on the subjective complaints that [C.N.] made to him on the same day as the deposition." (Docket Entry No. 81 at pp. 5, 6). He emphasizes that "Dr. Mallik does not state that [C.N.] is incapable of understand[ing] the questions being asked of her, perceiving the events accurately, remembering the events, expressing herself in such a way that she can be understood, that she has an impaired memory, or that she does not understand the duty to tell the truth." (Id. at p. 5). After referencing that "[C.N] continues to be gainfully employed full-time as an LPN at Abington Manor caring for 30 patients per shift, supervising CNAs, and interacting

with other staff and patients' families on a daily basis," Ezrin's Administrator states that Dr. Mallik merely requested that C.N.'s deposition be continued, not that it be precluded in its entirety. (Id. at pp. 4-5). He further submits that since C.N. is such a pivotal witness in this case, he "would suffer irreparable harm and prejudice if [C.N.'s] deposition is not completed." (Id. at p. 5).

II. DISCUSSION

(A) STANDARD OF REVIEW

Under Pa.R.C.P. 4003.1, "discovery is liberally allowed with respect to any matter, not privileged, which is relevant to the cause being tried." Berg v. Nationwide Mutual Insurance Company, Inc., 44 A.3d 1164, 1178 n. 8 (Pa. Super. 2012), *app. denied*, 619 Pa. 719, 65 A.3d 412 (2013). Information is relevant "if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact." Klein v. Aronchick, 85 A.3d 487, 498 (Pa. Super. 2014), *app. denied*, 628 Pa. 632, 104 A.3d 5 (2014). The relevancy standard applicable to discovery is necessarily broader than the standard used at trial for the admission of evidence. Com. v. TAP Pharmaceutical Products, Inc., 904 A.2d 986, 994 (Pa. Cmwlth. 2006); George v. Schirra, 814 A.2d 202, 205 (Pa. Super. 2002). Any doubts regarding relevancy are to be resolved in favor of discovery. Ario v. Deloitte & Touche, LLP, 934 A.2d 1290, 1293 (Pa. Cmwlth. 2007); Sharp v. Travelers Personal Sec. Ins. Co., 36 Pa. D. & C. 5th 521, 532 (Lacka. Co. 2014).

Pursuant to Rule 4012(a), a trial court may bar certain discovery by issuing a protective order "for good cause shown" in order to "protect a party or person from unreasonable annoyance, embarrassment, oppression, burden or expense." Pa.R.C.P.

4012(a). The party seeking a protective order under Rule 4012 bears the burden of establishing that the requested discovery is objectionable. Arvonio v. PNC Wealth Management, 35 Pa. D. & C. 5th 213, 220 (Lacka. Co. 2013); Chrysler v. Zigray, 7 Pa. D. & C. 4th 408, 410 (Lacka. Co. 1990). The moving party does not sustain that burden by demonstrating mere annoyance, burden or expense from the discovery being sought. Arvonio, supra; Merrifield v. Gavern, 10 Pa. D. & C. 4th 541, 542 (Lacka. Co. 1991). Since litigants should expect that "[a]lmost any discovery request causes some annoyance, embarrassment, oppression, burden or expense," D. S. v. DePaul Institute, 32 Pa. D. & C. 4th 328, 334 (Alleg. Co. 1996), "the proper inquiry is whether the party objecting to discovery has established *unreasonable* annoyance, embarrassment, oppression, burden or expense associated with the discovery request." Yadouga v. Cruciani, 66 Pa. D. & C. 4th 164, 169 (Lacka. Co. 2004) (emphasis in original).

(B) PROHIBITING DEPOSITION FOR MENTAL HEALTH REASONS

"The trial court is responsible for overseeing discovery between the parties and therefore it is within that court's discretion to determine the appropriate measures to insure adequate and prompt discovery of matters allowed by the Rules of Civil Procedure." Rohm and Haas Company v. Lin, 992 A.2d 132, 143 (Pa. Super. 2010), *cert. denied*, 565 U.S. 1093 (2011). "The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders." Stenger v. Lehigh Valley Hospital Center, 382 Pa. Super. 75, 88, 554 A.2d 954, 960 (1989). The trial court must nevertheless remain mindful that "[r]ules relating to discovery generally are present to prevent surprise and unfairness and 'to allow a fair trial on the merits.'" Keystone Dedicated Logistics,

LLC v. JGB Enterprises, Inc., 77 A.3d 1, 12 (Pa. Super. 2013) (quoting Dominick v. Hanson, 753 A.2d 824, 826 (Pa. Super. 2000)).

The parties' submissions reflect that the deposition testimony of C.N. is highly relevant in that she was the charge nurse who was intimately involved with Ezrin's care during the crucial eight-hour window from the night of December 25, 2014, to the morning of December 26, 2014. Abington Manor appears to argue that C.N.'s mental condition renders her incompetent to testify under Pa.R.E. 601(b), as a result of which it has allegedly demonstrated "good cause" for the issuance of a protective order under Rule 4012.[1] Just as Abington Manor bears the burden of establishing the right to a protective order under Rule 4012 on the basis that the requested discovery is objectionable, Arvonio, 35 Pa. D. & C. 5th at 220, it is Abington Manor's obligation to establish C.N.'s lack of competence to testify due to her mental condition. Com. v. Boich, 982 A.2d 102, 109 (Pa. Super. 2009) ("Thus, in Pennsylvania, a witness is presumed competent to testify and it is incumbent upon the party challenging the testimony to establish incompetence.").

The parties have cited our earlier ruling in Cook v. Moses Taylor Hospital, 2015 WL 5453889 (Lacka. Co. 2015) which is instructive. In that medical negligence case, the plaintiff sought to compel the videotaped discovery deposition of the post-anesthesia care unit ("PACU") nurse who had limited involvement with the decedent's care more than three years earlier. The PACU nurse's treating physician submitted a medical report confirming that she was "suffering from a progressive neurologic disease" that affected

[1]Rule 601(b) of the Pennsylvania Rules of Evidence provides that a person is incompetent to testify because of a mental condition if the person: (1) is, or was, at any relevant time, incapable of perceiving accurately; (2) is unable to express himself or herself so as to be understood either directly or through an interpreter; (3) has an impaired memory; or (4) does not sufficiently understand the duty to tell the truth. Pa.R.E. 601(b).

"her cognitive abilities" and rendered her "neither physically nor mentally capable" of testifying by way of a deposition. Id. at *2. Because of her mental condition, the PACU nurse was also "on an indefinite medical leave of absence from her employment at Moses Taylor Hospital, with no expected return date," and her "husband ha[d] voiced such displeasure with the persistent request to depose her" that he "ha[d] ceased responding to the [Moses Taylor Hospital] risk manager's telephone inquiries regarding her possible deposition." Id. Relying upon Pa.R.E. 601(b) and persuasive federal case law addressing "those rare circumstances that may preclude the taking of a deposition" based upon the medical or mental incapacity of a witness, we held that Moses Taylor Hospital "ha[d] satisfied its burden of establishing good cause for the requested protective order by providing documented medical proof that the PACU nurse is physically and mentally incapable of testifying by deposition due to her progressive neurologic disease and diminished cognitive abilities."[2] Id. at *3-4.

In contrast to the PACU nurse in Cook who was on "indefinite medical leave of absence" with "no expected return date" because of her medical and mental incapacity, C.N. remains gainfully employed by Abington Manor where she is responsible for 30 nursing home patients each shift. Moreover, unlike the PACU nurse's treating physician who attested to her "progressive neurologic disease" that adversely affected "her cognitive

[2]In lieu of conducting the deposition of the PACU nurse, the plaintiff in Cook was directed to serve Moses Taylor Hospital "with written interrogatories to be answered by the PACU nurse with an appropriate verification in accordance with 18 Pa.C.S. § 4904." Id. at *4-5. The hospital was instructed to "arrange a review of those inquiries with the PACU nurse to determine whether she [wa]s capable of answering them," and if she was "able to formulate partial or complete responses to any of the interrogatories," those responses were to be "reduced to writing and attested by the PACU nurse pursuant to 18 Pa.C.S. § 4904." Id. at *4. "In the event that the PACU nurse [wa]s unable to provide any responses due to her neurologic and cognitive conditions, [Moses Taylor Hospital was to] file an attestation to that effect." Id.

abilities" and rendered her medically and mentally incapable of testifying, C.N.'s physician largely reports C.N.'s own subjective complaints and beliefs, and he merely requests a postponement, rather than a prohibition, of her continued questioning to "allow us to help better control her anxiety." As of August 23, 2018, Dr. Mallik was treating C.N. for generalized anxiety disorder, and antidepressants have proven to be effective in treating that condition after two weeks of their use. *See, e.g.*, Mercer v. Martin, 2016 WL 4183337, at *2 (W.D. Ark. 2016), *app. dismissed*, 2016 WL 9709517 (8th. Cir. 2016). Since 41 days have elapsed from the date that Dr. Mallik requested consideration of "postponing the questioning" to "allow us to help better control her anxiety," an adequate treatment period has passed such that the requisite "good cause" does not exist for barring the resumption of C.N.'s discovery deposition.

Based upon the parties' submissions, Abington Manor has not satisfied its burden of demonstrating that the recommencement of C.N.'s deposition will cause unreasonable oppression or burden. As such, it has not demonstrated "good cause" for the issuance of a protective order prohibiting the continuation of her questioning pursuant to Pa.R.C.P. 4012. Consequently, Abington Manor will be directed to produce C.N. for further questioning under oath at a mutually convenient time prior to the expiration of the discovery deadline on October 31, 2018.

From review of the transcript of C.N.'s aborted deposition, it appears advisable to caution counsel concerning the remaining questioning of C.N. The transcript of C.N.'s deposition reflects that counsel stipulated at the outset "that all objections, except as to the form of the question, [were] reserved until the time of trial." (Docket Entry No. 83, Exhibit B at p. 2). Notwithstanding the fact that counsel is entitled to pose leading questions to the

employee or agent of an adverse party, *see* Pa.R.E. 611(c)(1)-(2) and 42 Pa. C.S. § 5935, defense counsel objected to certain questions as leading. (Id. at pp. 24, 42). After AseraCare's counsel thrice interjected "[d]on't guess" while C.N. was attempting to answer questions, he was admonished by Abington Manor's counsel "[y]ou keep saying that," "[she's] my witness," and "[l]et her be." (Id. at pp. 21-23). During the above-quoted colloquy when C.N. was simply being asked why she did not direct or ask the East wing nurse's aide to assist the hospice CNA who had requested help, Abington Manor's counsel intervened before C.N. could respond and preemptively queried whether she knew or recalled the solicited answer. (Id. at pp. 41-43). The transcript indicates that those interruptions and remarks influenced the ensuing responses provided by C.N. (Id.)

While it is true that counsel is obliged to properly prepare a client for deposition, "once the deposition has begun, the preparation period is over and the deposing lawyer is entitled to pursue the chosen line of inquiry without interjection by the witness's counsel." Daley v. Lansdowne, 2014 WL 7174370, at *3 (Franklin Co. 2014) (quoting Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993)). Of the various discovery procedures, available to litigants, depositions provide the most effective means of investigating a claim or defense via spontaneous responses to unscripted questions since "as the inquiry proceeds, the framing of each question is dependent upon the answers to preceding questions." Arvonio, 35 Pa. D. & C. 5th at 222-223 (quoting Nardell v. Scranton-Springbrook Water Service Co., 24 Pa. D. & C. 2d 663, 667 (Luz. Co. 1961)). "A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness," and "[t]here is no proper need for the witness's own lawyer to act as an

intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness formulate answers." Daley, supra (quoting Hall, supra). For that reason, other Lackawanna County judges have required parties and witnesses to submit to repeat depositions because of unnecessary objections and interruptions by counsel. *See* Cravath v. Mercy Hospital, 2013 WL 6991989 (Lacka. Co. 2013) (Mazzoni, J.).

It is apparent from the deposition transcript that C.N.'s anxiety ostensibly flared in the midst of a series of interjections and objections by counsel to a single question, i.e., why she did not ask or direct the East wing nurse's aide to help the hospice CNA after she had requested assistance. A less disquieting atmosphere during the resumption of C.N.'s deposition should reduce her level of anxiety. Counsel are expected to lodge only meritorious objections that need to be preserved notwithstanding counsel's stipulation, and should interrupt the give-and-take between the questioner and the deponent only when necessary in properly representing their clients' interests in this matter. Counsel are to be guided accordingly.

DONALD J. EZRIN, Administrator of the Estate of Sidney Ezrin,	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
Plaintiff	:	CIVIL ACTION – AT LAW
vs.	:	
	:	NO. 16 CV 7103
HOSPICE PREFERRED CHOICE, INC. d/b/a AseraCare HOSPICE, 100 EDELLA ROAD OPERATIONS, LLC, d/b/a ABINGTON MANOR and GENESIS HEALTHCARE, LLC,	:	
Defendants		

ORDER

AND NOW, this 3rd day of October, 2018, upon consideration of "Defendants, 100 Edella Road Operations, LLC d/b/a Abington Manor, and Genesis Healthcare, LLC's, Emergency Motion for Protective Order," plaintiff's response thereto, and the exhibits and memoranda of law submitted by the parties, and based upon the reasoning set forth in the foregoing Memorandum, it is hereby ORDERED and DECREED that:

1. The motion for protective order filed by defendants, 100 Edella Road Operations, LLC d/b/a Abington Manor, and Genesis Healthcare, LLC, is DENIED; and

2. Prior to the expiration of the discovery deadline on October 31, 2018, defendants, 100 Edella Road Operations, LLC d/b/a Abington Manor, and Genesis

Healthcare, LLC's, shall produce [C.N.] for the continuation and conclusion of her discovery deposition on a mutually convenient date.

BY THE COURT:

J.
Terrence R. Nealon

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

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