IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DANIEL SHAW and KIMBERLY SHAW Plaintiffs, v. DAVID S. BOAZ, M.D.; SOUTH FORSYTH FAMILY MEDICINE AND PEDIATRICS, LLC; ALI MORTAZAVI, D.O., and RESURGNES, P.C., Defendants.	CIVIL ACTION FILE NO. 1:18-CV-02708-WMR

ORDER ON RULE 11 SANCTIONS

Having addressed Defendants' motion on discovery violations and sanctions under Rules 26 and 37 of the Federal Rules of Civil Procedure [Doc. 100], this Court further reviews *sua sponte* the conduct of Plaintiffs' counsel under Rule 11. Specifically, the Court reviews the following instances of conduct by Plaintiffs' counsel:

- The statement, "Dr. Levy **never** revealed the existence of his exam, or his clinic note, until all counsel learned of it during his second deposition," found in Plaintiffs' June 5, 2019, reply brief to Defendant's motion to exclude Dr. Levy, signed by Mr. Summerville.

- The statement, "We did not, however, check in with Dr. Levy after the visit…After the office visit, we did briefly try to set up a phone call with Dr. Levy, but neither of the undersigned counsel remember such a phone call or have any notices reflecting such a call," found in Plaintiffs' November 8, 2019, reply brief to Defendant's renewed motion to exclude and for sanction, signed by Mr. Wilson and Mr. Schlachter. This assertion was repeated by Mr. Wilson and Mr. Schlachter at the November 14, 2019, hearing.
- The failure of Plaintiffs' counsel to correct the Court at the hearing on June 5, 2019, when the Court said, "Plaintiffs' counsel has replied or responded to say that they found out about the meeting between the expert and the Plaintiff on the 15th of May and that it was promptly disclosed to you."

Based upon the following findings of fact and conclusions of law, the Court sanctions Mr. Wilson and Mr. Schlachter for their conduct. However, the Court finds no sanctionable conduct on the part of Mr. Summerville.

I. FINDINGS OF FACT

Plaintiffs retained Dr. Levy to be a causation expert in this case. Defendants deposed Dr. Levy for the first time on September 25, 2017. [Doc. 58-1]. On October 4, 2017, Mr. Wilson emailed Dr. Levy to ask him if he would be willing to see (medically examine) Mr. Shaw. In that email, Mr. Wilson stated that "I think this

would help answer a lot of the questions you were asked in your deposition and would certainly give your testimony more weight if the case goes to trial." [Defendant's Trial Exhibit 98]. Dr. Levy agreed, and Mr. Wilson or Mr. Schlachter gave Dr. Levy's contact information to Mr. Shaw. Shortly thereafter, Dr. Levy contacted Mr. Wilson and Mr. Schlachter and informed them that Daniel Shaw had contacted him to make an appointment. [Doc. 75-2 at 174]. Mr. Schlachter responded and said, "That's great. Please make sure that we or I am not the referral." [Doc. 75-2 at 173]. Daniel Shaw then met with Dr. Levy for a consultation on December 1, 2017. [Doc. 75-4].

After the consultation, Dr. Levy offered to have a telephone conference with Mr. Wilson and Mr. Schlachter to discuss his medical examination of Mr. Shaw. [Doc. 75-2 at 211-213]. On December 4, 2017, Mr. Schlachter emailed Dr. Levy, asking, "What phone number should I call?" [75-2 at 211]. On December 4, 2017, Dr. Levy responded with phone numbers and the message "Talk to you soon…" [Doc. 75-2 at 211 (ellipses in original)]. Although Dr. Levy recalls this conversation occurring with Mr. Schlachter [Doc. 75-1 at 72:17-20], Mr. Schlachter maintains that the December 4 phone call never took place and that he had only attempted to arrange a telephone conference with Dr. Levy.

On May 14, 2019, Mr. Wilson emailed Dr. Levy to find out whether his medical examination of Mr. Shaw had any effect of his earlier opinions. [Doc. 75-2

at 327]. Shortly thereafter, during preparations for trial, Wilson informed Defendants' counsel that Dr. Levy had changed a minor portion of his expert opinion. [Doc. 51-1]. Consequently, Defense counsel arranged to take a supplemental video deposition of Dr. Levy on May 28, 2019. [Doc. 52-1]. Mr. Summerville and Mr. Schlachter were present on behalf of Plaintiffs at the deposition. Mr. Schlachter never spoke up during the deposition when Dr. Levy revealed the existence of Mr. Shaw's December 1, 2017, consultation with Dr. Levy, and Mr. Summerville seemed not to have known of the existence of the consultation. [*See* Doc. 52-1 at 22:15-17 ("I would be glad to assist the doctor, but I don't know the answer to the question[s about the consultation]")].

Following the revelation of the undisclosed consultation, Defendants' made their first motion to exclude Dr. Levy. [Doc. 51]. In their response brief, prepared by Mr. Summerville, Plaintiffs' counsel disavowed prior knowledge of the December 1, 2017, consultation [Doc. 58 at 2]. In denying the initial motion to exclude, the Court primarily relied on Plaintiffs' counsels' representation that they lacked prior knowledge of Mr. Shaw's consultation with Dr. Levy. [Doc. 58, Doc. 74 at pp. 8:10-14, 13:20-23]. Accordingly, the Court declared a recess in the trial and continued the case to allow Defendants' counsel the opportunity to again depose Dr. Levy and/or to have their own expert conduct an independent medical examination of Mr. Shaw. [Doc. 74 at pp. 22-23].

On October 2, 2019, during the third deposition of Dr. Levy [Doc. 75-1], Defendants discovered that Plaintiffs' counsel did, in fact, have prior knowledge of Dr. Levy's medical examination of Mr. Shaw. Specifically, the evidence shows that: (i) Mr. Schlachter had arranged Mr. Shaw's appointment with Dr. Levy in 2017 and had asked Dr. Levy to "make sure that 'we or I' am not the referral" [Doc. 75-2 at pp. 173-174]; (ii) Mr. Schlachter and Mr. Wilson were both notified by Dr. Levy via email on December 2, 2017, that he had seen Mr. Shaw as requested on December 1, 2017 and, in response to the email, Plaintiff's counsel had arranged a teleconference with Dr. Levy to discuss the results of his examination [Doc. 75-2 at pp. 211-212]; and (iii) on May 14, 2019, Mr. Wilson had asked Dr. Levy via email whether his personal examination of Mr. Shaw had any impact on his medical opinions [Doc. 75-2 at p. 327]. Based on these facts, Defendants filed a motion to exlude Dr. Levy and for sanctions under Rule 26 and 37 [Doc. 75].

Prior to the hearing on November 14, 2019, the Court informed counsel for the parties that it would be also be considering, *sua sponte*, whether Plaintiffs' counsel's conduct violated Rule 11 of the Federal Rules of Civil Procedure. At this hearing, Mr. Summerville testified that the misrepresentations contained in his brief were unintentional on his part, that Mr. Wilson and Mr. Schlachter never mentioned Mr. Shaw's consultation with Dr. Levy to him, and that he did not learn the full story

of the events until he reviewed Dr. Levy's email records on September 30, 2019.[1] In sum, Plaintiffs' counsel characterized their misstatement in the response brief as an "embarrassing misstatement" and a "briefing error." [Doc. 82 at 2-3]. For his part, Mr. Wilson explained that he did not read the brief thoroughly before it was filed and that he was inattentive when the Court openly relied on their misrepresentations at the hearing on June 5, 2019. He further acknowledged that, after his review of the transcript of the June 5 hearing, he should have informed the Court at that time of the misrepresentations that had been made in their response brief. Mr. Schlachter offered similar explanations, and he further stated that he had no recollection of the telephone conference with Dr. Levy on December 4, 2017concerning the medical examination of Mr. Shaw.

II. LEGAL ANALYSIS

Rule 11(b) states, "By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney…certifies that to the best of [his or her] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances…the factual contentions have evidentiary support." Fed. R. Civ. P. 11(b)(3). The Rule 11 inquiry and sanctions may be made *sua sponte* by the Court. Fed. R. Civ. P. 11(c)(3).

[1] On a related note, Mr. Summerville confirmed that he withdrew as co-counsel for the Plaintiffs on account of this situation.

The objective standard for assessing conduct under Rule 11 is "reasonableness under the circumstances" and "what it was reasonable to believe at the time" the pleading was submitted. *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1294 (11th Cir. 2002) (quoting *Baker v. Alderman*, 158 F.3d 516, 524 (11th Cir. 1988)). Rule 11 sanctions are warranted "when a party exhibits a 'deliberate indifference to obvious facts[.]'" *Id*. While Rule 11 is most commonly raised in the context of pleadings, Rule 11 applies equally to "other papers," *see, e.g., In re Hudson*, 24 F. App'x 153, 156 (4th Cir. 2001) (per curiam) ("Plaintiff's opposition to defendants' motion for summary judgement constituted a written motion or other paper under Rule 11(b)").

In their reply brief [Doc. 58], Plaintiffs' counsel made material misrepresentations to the Court that clearly violated the attorneys' duties under Rule 11. While the Court accepts that Mr. Summerville acted in good faith when he wrote the response brief and that Mr. Wilson and Mr. Schlachter may not have a chance to review the brief that was e-filed at 4:20 a.m. on the morning of the hearing, Mr. Wilson and Mr. Schlachter appeared before the Court on June 5, 2019, and advocated the positions they had taken in their brief. By adopting the brief for the purposes of advocacy, counsel failed to adhere to their obligations under Rule 11. Indeed, the Court relied upon the representations made in the brief, as well as their silence when the issue of what they knew and when they knew it was discussed at

the hearing, when the Court reached its decision to continue the case and not to sanction the attorneys or the Plaintiffs at that time for discovery violations. [Doc. 74 at 8:10-14. 13:20-23; Doc. 100 at 2]. Because Plaintiffs' counsel made material misrepresentations upon which the Court relied, and because Mr. Wilson and Mr. Schlachter knew the truth but failed to disclose it at the June 5 hearing, this conduct is sanctionable under Rule 11.

At the hearing on June 5, 2019, Plaintiffs' counsel were under a duty to correct the Court's reliance upon the statement that Plaintiffs' counsel lacked prior knowledge about the consultation on December 1, 2017. Plaintiffs' counsel failed to inform the Court of their misrepresentation, even though they now admit that they had the duty to do so. The Court is unpersuaded that Mr. Wilson's and Mr. Schlachter's failure to speak up at the hearing was due to "inattentiveness." Failure to comply with a known duty regarding a fact that was material to the Court's decision (to continue the case and not to impose sanctions for discovery violations) amounts objectively to bad faith conduct on the part of the Plaintiffs' attorneys. For this reason, it is sanctionable conduct under Rule 11.

Finally, in the reply brief to the renewed motion to exclude and at the hearing on November 14, 2019, Mr. Schlachter disavowed any knowledge or memory of the phone call between himself and Dr. Levy on December 4, 2017. Mr. Schlachter makes this contention despite emails and deposition testimony from Dr. Levy

indicating that the phone call must have occurred. Mr. Schlachter's conduct by maintaining this contention is a "deliberate indifference to obvious facts." By making and defending this contention, Mr. Schlachter has engaged in sanctionable conduct under Rule 11.

III. CONCLUSION

As the Court finds that Mr. Wilson and Mr. Schlachter have engaged in sanctionable conduct in violation of Rule 11 by making material misrepresentations to the Court and by not informing the Court of the truth when they knew the Court was relying upon those misrepresentations in deciding whether to sanction the Plaintiffs and/or counsel due, IT IS HEREBY ORDERED that a monetary sanction is imposed against Mr. Schlacter in the amount of $1,000.00, which shall be paid into the registry of the Court. IT IS FURTHER ORDERED that a separate and distinct monetary sanction is imposed against Mr. Wilson in the amount of $1,000.00, which shall be paid into the registry of the Court. Said payments shall be made no later than thirty (**30**) days after the date of this Order.

IT IS SO ORDERED, this 25th day of November, 2019.

William M. Ray II

WILLIAM M. RAY, II
UNITED STATES DISTRICT JUDGE