COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MICHAEL TRODDEN	)	**Case No. CV 12 797046**
	)	**(Consolidated with # CV 13 807062)**
	)	
Plaintiff,	)	**JUDGE MICHAEL E. JACKSON**
	)	
v.	)	**JOURNAL ENTRY AND OPINION REGARDING PLAINTIFF'S MOTION TO LIMIT DEFENSE EXPERTS AND DEFENDANT TERRANCE SCANLON, D.O.'S MOTION TO FULLY PARTICIPATE AT TRIAL**
THE PARMA COMMUNITY GEN. HOSPITAL ASSOCIATION, et al.	)	
Defendants.	)	

These consolidated cases began with Plaintiff Michael Trodden ("Plaintiff Trodden") filing a claim of medical malpractice against Terrance Scanlon, D.O. ("Dr. Scanlon") and related negligence claims against several other individual and corporate defendants. Plaintiff Trodden also filed a second, now consolidated case against Powers Professional Corporation ("PPC"), alleging *respondeat superior* liability against PPC for Dr. Scanlon's alleged negligent acts and omissions.

Throughout this litigation, Plaintiff Trodden voluntarily dismissed several defendants.[1] At this time, the only remaining defendants are Dr. Scanlon and PPC (collectively "Defendants"). When Plaintiff Michael Trodden passed away during this litigation, Carol Trodden, the representative of his Estate and his wrongful death beneficiaries (hereinafter

[1] Plaintiff's counsel represented at the hearing described herein that his client is no longer alleging that PPC is vicariously liable for any negligent acts other than those alleged to have been committed by Dr. Scanlon. Hence, Plaintiff's counsel stated that he and his co-counsel will not argue at trial that PPC is liable for any negligent acts or omissions allegedly committed by any of the dismissed defendants who were employees in Dr. Scanlon's office. Since Plaintiff has not formerly filed anything with the Court to document this change in legal theory or strategy, Defendants have argued that Plaintiff's counsel may still argue at trial that PPC is liable for the conduct of certain dismissed Defendants and, therefore, Defendants' defenses are not necessarily aligned and they should not be forced to utilize the same experts. Likewise, Defendant PPC argued that Dr. Scanlon could argue as an affirmative defense that one or more of the dismissed defendants are liable, in whole or part, to reduce his liability. However, Plaintiff's counsel has dismissed Defendant (and PPC employee) Kim Kepchar with prejudice. Plaintiff's counsel represented at the hearing that this dismissal is evidence of his intent to focus solely on the conduct of Dr. Scanlon. On this issue, the Court considers Plaintiff's counsel's statement at the hearing as a proposed oral stipulation or waiver offered on the record. Additionally, the Court's resolution of these issues, as explained further herein, does not require both Defendants to utilize the same experts or have aligned defenses.

"Plaintiff") was substituted as the proper party. As a result and relying on the opinions of its experts, Plaintiff has amended its Complaint to additionally allege wrongful death against the remaining Defendants.

Before the Court are Plaintiff's Motion to Limit [Defense] Experts and Defendant PPC's Motion to Fully Participate at Trial. The Court has reviewed each of the motions and briefs from the parties concerning the 14 medical experts identified by Defendants, who focus in the medical areas of general practice (5), infectious disease (4), and gastroenterology (3). The Court has also considered the oral arguments of the respective attorneys on these issues at the hearing that was held on September 18, 2014. In addition, the Court has reviewed each of the expert opinions. The Court has further considered Ohio Civil Rule 16, Cuyahoga County Local Rule 21.1, as well as the cases cited by the parties concerning these issues.

Plaintiff seeks to limit the number of expert witnesses for the purposes of conducting a deposition of each of these witnesses and seeks to limit the number of experts who will actually testify at trial. Defendants oppose Plaintiff's motion, but at the same time admit that not all of these experts will testify at trial. In addition, related issues were presented concerning whether a Defendant may cross-examine another Defendant's expert, and whether the Defendants are so aligned that the number of peremptory challenges should be limited to three rather than three for each Defendant. Many of these issues are decided by this Journal Entry and Opinion. Issues not decided herein will be held in abeyance until a decision that will be announced at the conclusion of the final pretrial, unless decided before that date.

Ohio Civil Rule 16 allows this Court to consider the number of expert witnesses as part of the pretrial and trial process in order to properly manage the various aspects of a civil case in preparation for trial. In this context, the parties are entitled to sufficient latitude in order to present their case at trial. The Court agrees with Defendant PPC when it states in its brief on page 7 that "Ohio law charges trial courts with responsibility to ensure that parties are permitted to present their case, with no party having an undue or unfair advantage over the other." In this case, Defendants seek to cause Plaintiff to take the depositions of 14 experts and then Defendants

will determine which experts will be called to testify for each respective Defendant. Plaintiff has designated two medical experts.

After consideration of each party's position, the Court determines that deposing 14 medical experts is an onerous and expensive task imposed upon Plaintiff. This constitutes an unfair or undue advantage in favor of Defendants and at the expense of Plaintiff. This is particularly true based on the Court's review of each of the expert's reports. There are multiple expert reports concerning each of the three areas of medicine that will be discussed at trial in this case. Each of the experts in each of these medical areas provides a report that is remarkably similar in the opinion expressed by each physician and similar as to the basis for that opinion. While this Court is quite aware that several if not all of these expert witnesses may have formed their opinions based upon different perspectives, as each Defendant has argued, that, however, does not necessarily suggest to this Court that multiple expert witnesses should be allowed to testify concerning the same contested point, based on a review of their reports.

After consideration of all the points raised by the parties, a review of these expert reports, the applicable Civil Rules and the cases cited by the parties, the Court orders the following:

1. Each Defendant shall select one of its experts in the medical fields of general practice, infectious disease, and gastroenterology for the purpose of deposition and for possible testimony at trial.

2. This results in a total of six expert witnesses, three for each Defendant, who will be available for deposition and possible testimony at trial. The Court has not ruled on whether each of these six expert witnesses may testify at trial. That issue will be decided based on whether these two Defendants are so aligned that it would be appropriate to have fewer than the six testify. Further, even if Defendants are not considered aligned, some or all of these six defense expert witnesses may present testimony which this Court considers to be cumulative or duplicative, and in that case, the Court reserves the right to further limit the presentation of cumulative or duplicative testimony by reducing the number of experts that each Defendant may call to testify on their behalf. However, that

issue can only be determined after each of these experts' depositions are taken, and an evaluation is made thereafter.

3. If either Defendant desires that additional medical experts be designated to testify at trial, then that Defendant shall file a motion explaining the reasons that this Order should be modified in that regard. Plaintiff will have an opportunity to respond to that motion prior to a hearing. If the Court grants Defendant's motion after a hearing, part of that Order will require Defendant to pay all of Plaintiffs' legal fees and expenses in order to prepare for and attend that deposition, review and summarize that deposition after it has occurred, and all costs related to having Plaintiffs' experts review that additional deposition and render any revised opinion resulting therefrom. At this hearing, the Court will determine the appropriate hourly rate, the estimated amount of time required, and then determine the estimated amount of fees and expenses to be incurred. When that amount is determined, the Defendant will pay 75% of that amount in advance of that deposition and the balance will be paid when the actual time and expenses are determined. In any event, the total actual amount must be paid prior to the time of trial, and if that does not occur, the Court reserves the right to prohibit that expert witness from testifying.

4. All other matters raised by these motions will be the subject of a later Journal Entry that will be issued no later than the final pretrial.

IT IS SO ORDERED.

DATED: _____

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JUDGE MICHAEL E. JACKSON

THE CLERK OF COURT SHALL SERVE A COPY OF THE FOREGOING JOURNAL ENTRY AND OPINION ON ALL COUNSEL OF RECORD AT THE ADDRESS LISTED ON THE COURT DOCKET.