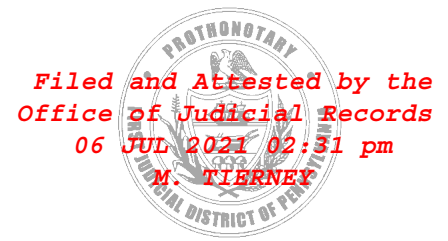


LAMB McERLANE PC

Joseph R. Podraza, Jr., Esquire (ID No. 53612)
William H. Trask, Esquire (ID No. 318229)
One South Broad Street – Suite 1500
Philadelphia, PA 19107
(215) 609-3170
(610) 430-8000



Attorneys for Plaintiffs

JOSHUA M. GREENBERG, DMD, and
SANDRA GREENBERG, as the
Administrators of the Estate of ELLEN
R. GREENBERG, deceased,

Plaintiffs,

v.

MARLON OSBOURNE, M.D., and
PHILADELPHIA COUNTY MEDICAL
EXAMINER'S OFFICE,

Defendants.

IN THE COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

CIVIL ACTION

October Term 2019
No. 01241

**REPLY IN SUPPORT OF PLAINTIFFS' MOTION
TO COMPEL PRODUCTION OF DISCIPLINARY RECORDS**

After Defendants assured the Plaintiffs no responsive documents exist, Plaintiffs filed the instant motion to compel their production. As if by magic, documents were found. Defendants now assure Plaintiffs no ***other*** responsive documents exist. Understandably wary of the Defendants' assurances—the Defendants having denied the existence of discovery materials on more than one occasion only to “find” them once faced with the possibility of court intervention—Plaintiffs asked for a declaration, prepared and signed by an individual with knowledge, to confirm there are, in fact, no other documents being withheld.

Counsel for the Defendants agreed to produce the documents and provide the requested declaration. But rather than produce the admittedly responsive documents, Defendants held them

hostage, promising to produce them only after the Plaintiffs withdrew their pending motion. Plaintiffs' counsel explained that once a satisfactory declaration was provided as promised, the motion would be appropriately resolved. (See "Exhibit 1" hereto, a Jun. 21, 2021 Email Thread between counsel.) Apparently no longer satisfied with the arrangement they had earlier agreed to, the Defendants filed a response in opposition to the Plaintiffs' motion, claiming mootness despite having never produced the documents (other than as an attachment to their filing) and having never provided the promised declaration. And disturbingly, Defendants raise for the first time a relevancy objection that suggests numerous other documents are being withheld on the ground that Defendants simply view Plaintiffs' suit as unfounded, despite a contrary ruling from this Court.

Stated plainly, the Defendants, having attached previously withheld and supposedly nonexistent documents to their response, claim the Plaintiffs' motion is moot and that, in any event, the documents sought are not relevant. The Defendants are wrong on both counts.

The Plaintiffs' Motion to Compel Is Not Moot

Although the Defendants criticize and minimize the Plaintiffs' suspicions that Defendants have withheld documents despite contrary assurances, Plaintiffs' suspicions have in each case proven justified. Case in point: after assuring the Plaintiffs there are no records of any reprimand or internal criticism of Dr. Osbourne's work performance, the Defendants attached the supposedly nonexistent documents to their response, which catalog numerous, sometimes serious, criticisms of Dr. Osbourne's performance. Given the Defendants' false assurances—including Defendants who denied the existence of these documents *under oath*—Plaintiffs reasonably requested that a person with knowledge provide a sworn statement confirming that no other documents exist and attesting to efforts undertaken in reaching that determination.

Defendants' counsel initially agreed to provide the requested declaration, but later backed out of that agreement for unknown reasons.

Because the Defendants have never provided written responses or objections to the Plaintiffs' document requests, and have never produced a privilege log or otherwise identified the universe of responsive documents in play, Plaintiffs have relied on stumbling across evidence of some withheld material, followed by the Defendants' predictable assurances that it does not exist, prompting warnings of potential court intervention and, eventually, Defendants' admission that—*lo and behold*—the materials do exist after all. This disturbing sequence, increasingly commonplace in this case, is not how discovery was designed to operate.

Given the Defendants' repeated false or mistaken assurances that discovery materials do not exist in this case, some further affirmation must be provided to satisfy the Plaintiffs and the Court that Defendants have diligently searched for responsive materials and none are being withheld, either deliberately or inadvertently. Although the Defendants initially offered to provide a sworn affirmation as set forth in Plaintiffs' motion to compel, they have since refused to do so, and the Plaintiffs' motion requesting that this Court direct the Defendants to prepare a declaration confirming that no responsive documents exist and attesting to any efforts undertaken in reaching that determination remains outstanding.

The Documents Requested Are Plainly Relevant

The Defendants now claim the documents subject to the Plaintiffs' motion are not relevant, but explain “this Court need not reach that issue,” given Defendants' attached some documents to their Response. But this Court has already reached *and decided* that issue. In overruling the Defendants' preliminary objections, discovery proceeded despite the Defendants' legal objections rehashed here. And throughout this litigation, over more than a year of

discovery, the Defendants have never claimed to be withholding documents on the basis of relevance or any other ground. On the contrary, the only excuse ever provided by Defendants for a given failure to produce materials in discovery has been that the materials do not exist. And on each such occasion, once faced with the possibility of court intervention, responsive evidence miraculously materializes. Defendants employed the same bait-and-switch here with respect to the documents subject to the current motion: hoping to foreclose further inquiry by the Plaintiffs, the Defendants initially responded to Plaintiffs' discovery request by asserting the documents did not exist only to produce them later, albeit subject to an untimely relevance objection. (See Defendants' Responses to Plaintiffs' Third Set of Document Requests at No. 2, attached as Exhibit B to Plaintiffs' Motion to Compel.)

And the documents are relevant to more than just the substantive issues in the case, including whether Dr. Osbourne failed to perceive—or perceived but failed to record—additional evidence that removes “suicide” as a viable selection on the death certificate. The mere existence of these documents casts serious doubt on the credibility of defense witnesses and, importantly for purposes of this motion, further supports the need for a declaration confirming the Defendants have no other responsive documents in their possession, custody or control.

For example, both Gulino and Osbourne, the Chief Medical Examiner and attending pathologist, respectively, were asked whether Osbourne, who completed Ellen's autopsy, had ever been subject to any written criticism, reprimand or discipline while employed by the City. And both testified without qualification, after counsel carefully confirmed each fully understood the question, that Osbourne had never received any such criticism. Osbourne was unequivocal¹

¹ Although unequivocal at his deposition, Osbourne has since equivocated. On June 30, 2021, Defendants' produced a declaration by Osbourne, wherein he explains he didn't remember receiving the criticism he testified he never received but would remember receiving if he had received it.

that he had never received any warning, reprimand or criticism of any kind related to the quality of his work, sloppy recordkeeping, incomplete autopsy records or discrepancies in his reporting. (Osbourne Dep. at 136:3 – 137:2, pertinent portions of which are attached as “Exhibit 2.”) Gulino was equally clear that, as Osbourne’s supervisor responsible for hiring him, he would know if there had ever been any kind of criticism or negative statements made about Dr. Osbourne, and he was aware of none. (Gulino Dep. at 70:21 – 73 :3, pertinent portions of which are attached as “Exhibit 3.”) Compare these statements to the documents Defendants have now produced, one of which is an email drafted by Gulino himself. Not only have the Defendants suddenly produced documents they swore did not exist, but these documents outline serious criticisms of Dr. Osbourne’s work. Defendants now claim these clearly responsive documents—and apparently any other documents sought by Plaintiffs in discovery—are not relevant because, in the Defendants’ view, Plaintiffs had no right to bring this lawsuit in the first place. This disturbing contention—previously rejected by this Court—coupled with the reluctant production of documents earlier claimed not to exist at all, raises further questions about what other materials the Defendants have been withholding solely based on the Defendants’ incorrect view that Plaintiffs’ lawsuit is unfounded.

In any event, Defendants have waived their relevancy objections and agreed to produce responsive documents. All that remains is for the Defendants to provide the promised declaration from an appropriate representative to satisfy the Plaintiffs and the Court that discovery, in this latest instance at least, has been conducted earnestly.

*

For all the foregoing reasons, and for the reasons set forth in the Plaintiffs’ principal Motion to Compel and accompanying Memorandum of Law, Plaintiffs respectfully request that

this Court grant Plaintiffs' Motion and direct Defendants to produce all records of reprimand or other internal criticism of Drs. Osbourne, Gulino and Emery and, in the event no further records exist, provide a confirmatory declaration attesting to all efforts undertaken in reaching that conclusion.

Respectfully submitted,

LAMB McERLANE PC

By: /s/ Joseph R. Podraza, Jr.

Joseph R. Podraza, Jr., Esquire

jpodraza@lambmcerlane.com

William H. Trask, Esquire

wtrask@lambmcerlane.com

One South Broad Street, Suite 1500

Philadelphia, PA 19107

(215) 609-3170

Dated: July 6, 2021

*Counsel for Plaintiffs, Joshua Greenberg
and Sandra Greenberg, Administrators of
the Estate of Ellen Greenberg*

Ex. 1

William Trask

From: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Sent: Monday, June 21, 2021 12:31 PM
To: William Trask
Subject: RE: Call if you are able

It is up to the court whether they have to be produced, based on relevance, but I am providing them despite their irrelevance.

Ellen Berkowitz
Senior Attorney
City of Philadelphia Law Department
Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

From: William Trask <wtrask@lambmcerlane.com>
Sent: Monday, June 21, 2021 12:16 PM
To: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Subject: RE: Call if you are able

External Email Notice. This email comes from outside of City government. Do not click on links or open attachments unless you recognize the sender.

Ellen,

Sorry, I missed your below message from Friday. To respond, the documents you're holding are responsive to our requests and must be produced. And, although it may not be your intention, your demand that we withdraw our motion in exchange for documents you're otherwise obligated to produce isn't appropriate. Your production of those documents does not impact the pending motion should there be additional responsive documents in your clients' possession.

I hear you saying there are no other documents, but we've asked for (and you've agreed to provide) a signed declaration from your client attesting to that fact, as it appears from previous exchanges that your clients may have withheld material even from you, their counsel, during the course of discovery. So regardless of your production of some responsive documents, absent a satisfactory declaration, the motion must still be adjudicated. This is why we asked to see the declaration in order to determine how best to address the motion.

But in the meantime, since you have documents that are responsive, please produce them.

Thanks,
Will

From: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Sent: Friday, June 18, 2021 3:50 PM
To: William Trask <wtrask@lambmcerlane.com>
Subject: RE: Call if you are able

Will,
I am willing to give you the documents now if you agree to withdraw the motion. Why do you need to see them first? This is all there is.

Ellen.

Ellen Berkowitz
Senior Attorney
City of Philadelphia Law Department
Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

From: William Trask <wtrask@lambmcerlane.com>
Sent: Friday, June 18, 2021 1:07 PM
To: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Subject: RE: Call if you are able

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Understood. You mentioned over the phone the person preparing it is out sick. In the meantime, can you forward the documents?

Thanks,
Will

From: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Sent: Friday, June 18, 2021 1:00 PM
To: William Trask <wtrask@lambmcerlane.com>
Subject: RE: Call if you are able

Ok.
I can't get you a certification before Monday. Have a good weekend.

Ellen Berkowitz
Senior Attorney
City of Philadelphia Law Department
Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

From: William Trask <wtrask@lambmcerlane.com>
Sent: Friday, June 18, 2021 12:02 PM
To: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Subject: RE: Call if you are able

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Hi Ellen,

Just following up on our call. You indicated your client has located 3 documents related to Dr. Osbourne which are responsive to our requests, and you offered to produce what you've been provided if we'll agree to withdraw our motion to compel those documents and others related to Drs. Gulino and Emery. I spoke with Joe, and we're not inclined to simply withdraw the motion. Please send us the documents you described today, and we'll revisit how to best handle the motion once we've had a chance to review your client's certification confirming no other documents exist (other than those identified in your discovery responses that we discussed).

Thanks,
Will

From: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Sent: Thursday, June 17, 2021 4:23 PM
To: William Trask <wtrask@lambmcerlane.com>
Subject: Call if you are able

215-880-9854

Ellen Berkowitz
Senior Attorney
City of Philadelphia Law Department
Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

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have received this e-mail in error, please immediately notify us by telephone at 610.430.8000 or notify us by e-mail at info@lambmcerlane.com.

Ex. 2

— — —

Plaintiffs, :
:
v. :
:
DURNE, M.D. and :
PHILADELPHIA :
THE MEDICAL :
:
Defendants. : NO. 01241

— — —

— — —

Veritext Legal Solutions
215-241-1000 ~ 610-434-8588 ~ 302-571-0510 ~ 202-803-8830 Case ID: 191001241
Control No.: 21061357

Page 134 1 evidence of injury section related to the stab 2 wound that was associated with that area. 3 So if there is any injuries 4 described, it would be in the area -- evidence 5 of injury section where the stab wounds are 6 described. 7 Q. What would -- 8 A. Otherwise, there was no injury 9 identified. 10 Q. Well, Doctor, what would be the 11 consequences of the -- one or both -- 12 A. Specifically to the basal 13 artery, there was no injury. 14 Q. My question to you is, if the 15 basal artery -- 16 A. I'm sorry, go ahead. 17 Q. Can you hear me? 18 A. Yes. 19 Q. Okay. If the basal artery had 20 been cut, what would have been the 21 consequences? 22 A. There would have been massive 23 hemorrhage in the posterior fossa, like 24 resulting in subarachnoid and subdural	Page 136 1 hemorrhage in those areas. It did not extend 2 to the basal artery. 3 Q. Doctor, have you ever received 4 any written warnings or reprimand for the 5 quality of your work when you were at the 6 Philadelphia Medical Examiner's Office? 7 A. No. 8 Q. Were you ever criticized for 9 sloppy recordkeeping? 10 A. No. 11 Q. Ever criticized for incomplete 12 autopsy records? 13 A. No. 14 Q. Were you ever criticized for any 15 discrepancies in your report, like indicating 16 no trauma when trauma was present? 17 A. No. 18 Q. Have you ever had any criticism 19 at all of your work when you were working at 20 the Philadelphia Medical Examiner's Office? 21 A. No, not to my knowledge. No. 22 Q. I would imagine that if you did 23 receive written reprimands or written warnings, 24 that's something you wouldn't forget, right?
Page 135 1 hemorrhage. 2 Q. And, therefore, whether the 3 artery was cut or not was a significant 4 determination upon autopsy with respect to the 5 consequences of that wound, correct? 6 A. Correct. 7 Q. And if the arteries were intact, 8 you would have specifically noted that, as well 9 as you would have specifically noted if it was 10 cut, correct? 11 A. I would specifically note it if 12 it was cut in the evidence of injury section. 13 Otherwise, the descriptions are as if there was 14 no other trauma, and we're looking for other 15 types of natural disease. Therefore, we're 16 specifically talking about the basal artery, 17 which is a distinct artery that is different 18 than the smaller arteries along the parts of 19 the brainstem and the cerebellum that were 20 described in the evidence of injury as being 21 injured. 22 Those were the only vessels that 23 I appreciated were injured, resulting in the 24 small amount of some focal subarachnoid	Page 137 1 A. Absolutely. So no, I did not 2 have that. 3 Q. All right. And when you were at 4 the Philadelphia Medical Examiner's Office, who 5 was your supervisor? 6 A. When I started there, Dr. Gulino 7 did not have a deputy chief, so he was directly 8 supervising all the associates. And then I 9 forget if it was in 2012 or maybe 2013, he made 10 one of the associates a deputy. So that would 11 have been Gary -- Dr. Gary Collins. 12 Q. Okay. And -- 13 A. And I think it was for a year or 14 two years before I left. 15 Q. All right. I'm sorry. From 16 when to when would Dr. Collins, to the best of 17 your knowledge, have been your supervisor? 18 A. At least a year, if not two. I 19 believe Gulino made him deputy sometime in 20 2012. So I think it would be two years or over 21 two years. 22 Q. And before that, your 23 supervisor, I'm sorry, would have been 24 Dr. Gulino?

Ex. 3

IN THE COURT OF COMMON PLEAS
PHILADELPHIA COUNTY, PENNSYLVANIA

- - -

JOSHUA M. GREENBERG and : OCTOBER TERM,
SANDRA GREENBERG, : 2019
Administrators of the :
ESTATE OF ELLEN R. GREENBERG :

v. :

MARLON OSBOURNE, M.D. and :
CITY OF PHILADELPHIA OFFICE :
OF THE MEDICAL EXAMINER : NO. 01241

- - -

April 20, 2021

- - -

Videotaped Deposition of SAM GULINO,
M.D., taken remotely via Zoom, beginning at
10:03 a.m., and reported stenographically by
Denise A. Ryan, a Professional Shorthand
Reporter and Notary Public.

- - -

VERITEXT LEGAL SOLUTIONS
MID-ATLANTIC REGION
1801 Market Street - Suite 1800
Philadelphia, Pennsylvania 19103

Page 70 1 Q. Now, in The Inquirer article, 2 Doctor, there was Dr. McDonald. Do you know 3 Dr. McDonald? 4 A. I do. He worked for me for less 5 than a year after I arrived. 6 Q. He is, at least attributed to 7 him, that Ellen's death is not the typical 8 pattern of someone who commits suicide through 9 a sharp instrument like a knife. Would you 10 agree with that statement? 11 A. I don't agree with that. 12 Q. Would you at least agree that 13 hesitation wounds can occur in suicides as well 14 as homicides? 15 A. Hesitation wounds can -- are 16 typical of suicides. I have seen occasional 17 wounds that look like hesitation wounds in 18 homicides, but when I see clusters of wounds, 19 clusters of hesitation wounds around lethal 20 wounds, that to me is indicative of a suicide. 21 Q. Dr. Osbourne, has there ever 22 been any criticism of his work that you're 23 aware of? 24 A. Dr. Osbourne did not have any	Page 72 1 A. If there were any kind of 2 written disciplinary action or reprimands, they 3 would be in his personnel file, in the office 4 of Human Resources. Like I said, he left in 5 2014. I don't know what the retention policies 6 is for those files. 7 From 2000 -- from when he was 8 hired until late 2011, November or December of 9 2011, I would have been his only supervisor 10 because I did not have a deputy chief during 11 that time. Starting in late 2011 I promoted 12 Dr. Gary Collins to the position of deputy 13 chief. At that point, from that point forward 14 he would have been Dr. Osbourne's supervisor. 15 But I would have been aware, I presume, of any 16 kind of disciplinary action against Dr. 17 Osbourne from that point on. 18 Q. All right. And not necessarily 19 disciplinary action. I mean, there could be 20 written criticisms of say the quality of some 21 work. 22 A. I'm using that term 23 collectively. So any kind of negative 24 statements about Dr. Osbourne's work would
Page 71 1 performance problems while he worked here and 2 he left the city under -- in good -- under good 3 circumstances. He wanted to take a job back in 4 Florida. So I was not aware of any problems 5 with his performance that required disciplinary 6 action. 7 Q. Well, before you became the 8 medical examiner, is there any existence of any 9 like written reprimands or things of that 10 nature involving Dr. Osbourne? 11 A. Dr. Osbourne came on after me. 12 I hired him. 13 Q. Oh, okay. 14 A. I came in 2008, he was hired in 15 I believe 2009, and then he left in I think 16 2014. 17 Q. And it's your understanding that 18 there has never been a criticism of his work in 19 any written form? 20 A. I -- that is correct. 21 Q. And this just may be that you 22 aren't aware of it. Is there a place where if 23 there were such written reprimands, they would 24 be stored, as best as you know?	Page 73 1 have -- would be either in his personnel file 2 or I would have been aware of them, and I'm not 3 aware of any. 4 Q. Okay. Now, you were contacted 5 by my prior office on June 19, 2019, on -- 6 while we were representatives of Greenburg. Do 7 you remember that? 8 A. Yes. 9 Q. All right. And we made a 10 submission to you -- 11 A. Yes. 12 Q. -- a narrative, et cetera, with 13 some enclosures; is that correct? 14 A. Yes, several things were 15 provided to me. 16 Q. Okay. Did you ever have a 17 chance to review the submission? 18 A. Yes. 19 Q. Okay. Tell me what you did and 20 what conclusions did you reach? 21 A. So I reviewed the materials that 22 were provided to me, which I will just -- which 23 included reports from Dr. Ross, Dr. Wecht, the 24 Henry Lee Forensic Science Center, Detective

CERTIFICATE OF SERVICE

I, Joseph R. Podraza, Jr., Esquire, hereby certify that I served a true and correct copy of the foregoing pleading on July 6, 2021, by sending this paper to the Court's electronic filing system (EFS) website pursuant to Pa.R.C.P. 205.4(g) and Phila. Civil Rule *205.4(f), and by virtue of automatic electronic service by the Court to all parties who have entered their appearance on the Court's electronic docket:

LAMB McERLANE PC

BY: /s/ Joseph R. Podraza
Joseph R. Podraza, Jr., Esquire
jpodraza@lambmcerlane.com

Date: July 6, 2021