

IN THE STATE COURT OF DEKALB COUNTY  
STATE OF GEORGIA

Dr. David Burr,  
Plaintiff,  
v.

Civil Action File  
No.: 18A71129

Golden Ticket City Stone Mountain Park,  
L.L.C.,  
Defendants.

**PLAINTIFF'S MOTION TO QUASH PLAINTIFF'S DEPOSITION NOTICE AND  
SUBPOENA FOR PLAINTIFF AND MOTION FOR PROTECTIVE ORDER**

COMES NOW, Plaintiff Dr. David Burr ("Plaintiff"), by and through the undersigned counsel of record and pursuant to O.C.G.A.: 9-11-26(b) and (c) and Uniform State Court Rule 5.3, and files this Motion for Protective Order and to quash Defendant's deposition notice and subpoena to Plaintiff.

**I. BRIEF STATEMENT OF MATERIAL FACTS**

This lawsuit arises out of a February 24, 2019 incident in which Dr. Burr pitched over the handlebars of his bicycle while avoiding a collision with Defendant's agent, Eric Jones, who illegally entered Dr. Burr's lane of traffic. Dr. Burr was deposed on February 21, 2019. The deposition was videotaped and lasted roughly four hours. Defendant is now requesting to depose Dr. Burr a second time. Defendant claims that Dr. Burr has brought new claims regarding a traumatic brain injury. However, Dr. Burr has maintained from the beginning of this lawsuit that, after pitching over his bicycle's handlebars, he landed on his head and suffered injuries to his head, which have gotten progressively worse over time. Dr. Burr has supplemented his medical records throughout the course of this lawsuit to reflect his ongoing treatment for neurological issues arising out of this pitch-over incident. These medical records have included medical treatment that Dr. Burr has received from a neurologist, a

neuropsychologist, and his primary care physician in which he discussed his condition in detail, including symptoms suffered, their onset, and their progression. In addition to the plethora of medical records provided to Defendant by Plaintiff, Defense counsel has also deposed Dr. Burr's neurologist and primary care doctor.

## **II. ARGUMENT AND CITATION OF AUTHORITY**

Plaintiff's deposition notice and subpoena to Dr. Burr are an attempt to cause undue burden and expense and waste Plaintiff's time. Plaintiff argues that Dr. Burr has brought a new claim for traumatic brain injury. This argument is incorrect and insubstantial. Dr. Burr has complained about injury to his head since the incident date. On the day of the incident, Dr. Burr complained of headache and head injury to first responders. Dr. Burr went on to discuss the pain and injury related to the impact to his head during his deposition. Dr. Burr's medical records – all of which have been provided to Defendant – show continuous medical care related to head injuries caused by the incident. Defendant has also been provided with all of the medical records relating to treatment for Dr. Burr's head injury and has already deposed the medical care providers from whom Dr. Burr sought treatment for his head injury. Because Defendant has already been provided with all of the medical records relating to Dr. Burr's treatment for his head injury, has already deposed Dr. Burr and the medical care providers from whom Dr. Burr sought treatment for his head injuries, they are already in possession of all of the information that they seek, and another deposition of Dr. Burr would be redundant, and only result in unnecessary burden and expense.

### **A. Standard for protective orders and quashing subpoenas.**

Uniform State Court Rule 5.3 limits a deposition to one day of seven hours, "[u]nless otherwise authorized by the court or stipulated by the parties." Depositions are a tool used to discover previously unknown relevant and/or admissible material. However, it is well

established law that, “[t]he trial court [has] wide discretion in [...] preventing the [...] taking of depositions for discovery which are oppressive, **unreasonable, unduly burdensome or expensive**, [...] or **as to matter concerning which full information is already at hand**.

Hampton Island Founders v. Liberty Capital, 658 S.E.2d 619, 283 Ga. 289 (Ga. 2008)

(emphasis added); citing Travis Meat etc. Co. v. Ashworth, 127 Ga. App. 284, 287, Young v.

Jones, 149 Ga. App. 819. “As to protective orders, a trial court will only abuse its discretion

when its ruling is unsupported by evidence of record or when that ruling misstates or

misapplies the relevant law.” Smith v. Northside Hosp., Inc., 347 Ga. App. 700, 703 (2018).

Because Dr. Burr has already been deposed, Defendant now has the burden of proving that a second deposition of Dr. Burr will not result in undue burden or expense and that the information that they seek is not already in their possession.

**1. Defendant already has the information it seeks from Dr. Burr in the form of deposition and document production, making a second deposition redundant and unnecessary.**

Here, Defendant argues that they must be afforded additional time for fair examination because Dr. Burr has brought new claims for damages that were not previously known to Defendant. This assertion is incorrect. From the start of this suit, Dr. Burr has stated that he landed on his head after successfully avoiding a collision with Mr. Jones’ van. Deposition of Dr. David Burr, hereinafter “Burr Depo.” at 89:3-4. In his first deposition, Dr. Burr testified that when he went to the emergency room following the incident, his chief complaint, among other things, was damage to his head and headache. Burr Depo. at 116:11-117:5. The symptoms that Dr. Burr has complained of since the beginning of litigation are injuries related to and indicative of head trauma. Defense currently has all available information regarding Dr. Burr’s ongoing medical problems related to head trauma and a

second deposition of Dr. Burr would only be repetitive of the information that Defense counsel already has.

*A. Dr. Burr's deposition allowed Defense counsel nearly four hours to question him about head injuries that he sustained due to the pitch-over event.*

Defense counsel had ample opportunity to question Dr. Burr about head injuries during his deposition. On at least three different occasions during Defense counsel's questioning of Dr. Burr, Dr. Burr testified that he landed on his head after avoiding the collision with Mr. Jones. When Dr. Burr is initially recounting the incident with defense counsel, Dr. Burr states that he "landed about a foot and a half from [Mr. Jones'] bumper on [his] head." Burr Depo. at 89:3-4. When Defense counsel showed Dr. Burr a photograph to determine where he had landed, Dr. Burr stated that he couldn't tell exactly where he had landed but that he "stopped right in front of [Mr. Jones'] bumper" and his "head hit the ground [...]." Burr Depo. at 99:14-16. When Defense counsel asked Dr. Burr whether or not he went over his handlebars, Dr. Burr replied that he fell "onto [his] head. Burr Depo. at 108:13-14.<sup>1</sup>

Dr. Burr's deposition lasted nearly four hours. For almost four hours, Defense counsel had the opportunity to ask Dr. Burr to elaborate on the headaches he suffered from while in the emergency room; any ongoing pain that he might be suffering as a result of landing on his head after the impact; and whether or not the head impact resulted in any symptoms that could be related to a head injury. Despite a wide window of opportunity, Defense counsel chose not to pursue this line of questioning. Defense counsel's decision not to question Dr. Burr about injury to his head despite the clear need to do so does not mean that Defense

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<sup>1</sup> In his first deposition, Dr. Burr states that he "landed about a foot and a half from [Mr. Jones'] bumper on my head." Deposition of Dr. David Burr, hereinafter "Burr Depo." at 89:3-4; "What I do know is that I stopped right in front of his bumper. My head hit the ground, and I landed one and a half feet from his bumper." Burr Depo. at 99:14-16; Q: "So you went over the handlebars?" A: "Onto my head.2." Burr Depo. at 108:13-14.

counsel should be given another bite at the apple. This Court should not allow Dr. Burr to incur more expense and burden by having to endure another lengthy deposition simply because defense counsel failed to cover their bases.

*B. The information that Defense counsel currently seeks by way of deposition will be merely duplicative of admissible information that Defense has already obtained via Dr. Burr's medical care providers' depositions and reports.*

*i. Dr. Burr's Statements to Dr. Angela Ashley-Caporale*

In addition to taking Dr. Burr's deposition, Defense counsel deposed Dr. Burr's neurologist, Dr. Angela Ashley-Caporale, M.D. During this nearly six-hour deposition, Dr. Ashley testified at length about Dr. Burr's symptoms, treatment, and prognosis. Regarding Dr. Burr's symptoms, Dr. Ashley testified that Dr. Burr's subjective complaints included headaches, mood disturbances, and memory loss. Deposition of Dr. Angela Ashley-Caporale, hereinafter "Ashely Depo." at 112:5-11. Dr. Ashely also testified that Dr. Burr complained of vertigo, anxiety, depression, irritability, severe visual disturbance, and confusion. Ashley Depo. at 44:13-19. She testified that Dr. Burr reported to her that "he did not lose consciousness at the moment that his head hit the ground, but that he did feel dazed and confused, and that feeling of being dazed and confused lasted for several minutes." Ashley Depo. at 44:2-6. As stated above, Dr. Burr testified to the same facts during his deposition. Burr Depo. at 116:11-117:5. Dr. Ashley also confirmed that Dr. Burr's first visit to her was September 18, 2019, roughly 18 months after the initial incident, and that Dr. Burr had complained that "daily headaches, pressure in his head, mood disturbance, and memory disturbance" had begun within a month of the incident. Ashley Depo. at 112:18-113:19.

Defense counsel cross-examined Dr. Ashely at length about Dr. Burr's reported symptoms. Ashely Depo. at 111:21- 212:8. Regarding whether or not Dr. Burr had lost consciousness at the scene, Defense counsel asked Dr. Ashley, "[a]re you aware that Dr. Burr

did not lose consciousness at the scene? You know that?” To which Dr. Ashely confirmed that that is indeed what Dr. Burr reported to her. Ashley Depo. at 156:8-10. Defense counsel also questioned Dr. Ashley at length about medication – specifically HCG 500 IU and Anastrozole – that Dr. Burr reported that he had been taking at the time of the incident and afterward. Defense counsel’s questioning focused specifically on the side effects of these medications. Ashley Depo. at 115:4-117:25. Dr. Ashely reported that she discussed the medications with Dr. Burr and “he assured [her] that he had been on them for quite some time and that he had not developed any adverse effects [...]” and that he believed that the symptoms for which he was seeking treatment from Dr. Ashley “started in that immediate period after his accident and he did not think that he had had any changes in symptoms when he started taking [the] supplements.” Ashley Depo. at 146:1-9. At Dr. Ashley’s behest, Dr. Burr reported that he discontinued the anti-aging medications because of their potential side effects. Ashley Depo. at 117:11-16. Defense counsel also questioned Dr. Ashley at length about Dr. Burr’s failure to report identical symptoms that he complained of to Dr. Ashley to other medical professionals from whom he sought treatment related to his injuries. Ashley Depo. 164:18-179:25. To pursue this line of questioning, Defense counsel relied upon the medical records provided to them by Plaintiff, which detail his ongoing medical treatment for the injuries that he sustained as a result of the pitch-over incident.

Defense counsel was thorough in their questioning of Dr. Ashley regarding Dr. Burr’s reported symptoms relating to a potential traumatic brain injury. Throughout their questioning, Defense counsel confirmed every symptom that Dr. Burr reported and confirmed potential contradictory statements provided to Dr. Burr’s other healthcare providers. All of the statements that Dr. Ashley made concerning Dr. Burr’s reporting of subjective symptoms and other information related to his medical care are admissible under O.C.G.A. § 24-8-803(4) as statements given for the purposes of medical diagnosis or treatment. Because these

statements are admissible as hearsay exceptions, there is no need to depose Dr. Burr for a second time simply so that he can restate the information that he already gave to Dr. Ashley. Also, because of the incredible unlikelihood that Dr. Burr has additional information to disclose to Defense Counsel about his head injury that he has not already disclosed to his medical care provider, a second deposition of Dr. Burr is very unlikely to lead to the discovery of any additional relevant information. A second deposition of Dr. Burr will only result in a regurgitation of the information listed above, which will result in an undue burden for both parties, a waste of time and a waste of financial resources.

*ii. Dr. Burr's statements to Dr. Alvin Griffin*

Defense counsel also deposed Dr. Alvin Griffin, Dr. Burr's primary care physician. Both Defense and Plaintiff's counsel questioned Dr. Griffin at length about his ongoing treatment of Dr. Burr as well as their friendship. During this deposition, Defense counsel obtained information about Dr. Burr's health prior to the pitch-over incident. Defense counsel specifically noted and questioned Dr. Griffin at length about Dr. Burr's June 15, 2017 complaint of double vision. Deposition of Dr. Alvin Griffin, M.D., hereinafter "Griffin Depo." at 33:22-25. Defense counsel relied on certified copies of Dr. Burr's medical history from Dr. Griffin's office which included statements that Dr. Burr made for the purposes of medical diagnoses or treatment. Griffin Depo. at 42:1-15.

As with the statements made by Dr. Burr to Dr. Ashley, the statements that Dr. Burr made to Dr. Griffin are admissible under O.C.G.A. § 24-8-803(4). Likewise, the statements that Dr. Burr made to Dr. Griffin for the purposes of obtaining medical care encompass all of the information that Dr. Burr has about this medical condition – this is the very basis of the hearsay exception that allows statements made to medical care providers to be hearsay exceptions. Because Dr. Burr will not provide any additional information to Defense counsel

that hasn't already been provided to them through the deposition of Dr. Griffin and their review of his medical records, an additional deposition of Dr. Burr will be redundant, and a waste of time and resources.

*iii. Dr. Burr's statements to Dr. Adam Warshowsky*

On January 21, 2020, Dr. Burr visited Dr. Adam Warshowsky for a neuropsychological evaluation. (Neuropsychological Evaluation of Dr. Burr, attached as Exhibit "A"; hereinafter "Neuropsychological Evaluation"). During his evaluation, Dr. Burr recounted much of the information that has already provided to Defense counsel, specifically that during the pitch-over incident he "flipped over the handlebars and impacted the ground with the crown of his head, the force of which caused his helmet to shatter."

Neuropsychological Evaluation at 1. Dr. Burr reported to Dr. Warshowsky that he was in a "dazed" state immediately after the incident, but could not recall if he had lost consciousness.

Neuropsychological Evaluation at 1. Dr. Burr went on to report that he began to experience visual disturbances two to three months after the pitch-over event. Neuropsychological Evaluation at 1. He also reported that that he had experienced difficulty with his memory, specifically remembering patients' names, and that had problem regulating his emotional reactivity (i.e. impaired executive functioning). Neuropsychological Evaluation at 1.

Much of this information – especially the information about Dr. Burr's state immediately following the incident – has already been preserved for Defendant through Dr. Burr's deposition. Dr. Burr has also reported identical symptoms to Dr. Ashely, and that information is available to Defendant through Dr. Ashley's deposition as well as Dr. Burr's medical records from Dr. Ashley. The medical report of Dr. Warshowsky has also been provided to Defense counsel and statements that Dr. Burr made to Dr. Warshowsky for the purpose of obtaining medical attention are admissible under O.C.G.A. § 24-8-803(4).



Defense counsel already has access to this information through various sources, and much of it is already redundant. To take another deposition of Dr. Burr just to review the information that they already have access to in at least three different sources is redundant, unnecessary, a waste of time and a waste of financial resources.

- iv. *There is no additional information that Defense counsel can get from Dr. Burr that is not already at hand.*

There is simply no stone left to turn. There is no additional information that Defense counsel can get through a second deposition of Dr. Burr that they do not already have by means of deposition or document production. There is no point in having Dr. Burr submit himself to a second deposition to repeat the information that he gave to Dr. Ashley, Dr. Griffin, and Dr. Warshowsky. The statements that Dr. Burr made to his medical care providers constitute *all of the facts and information* that Dr. Burr could possibly share about this injury. The legality of their admissibility alone, through the O.C.G.A. § 24-8-803(4), speaks to the confidence that this Court already places in the thoroughness and completeness of the statements that Dr. Burr made for the purposes of obtaining medical treatment for his head injury. Defense counsel's request for an additional deposition is not likely to lead to the discovery of additional admissible information, and would only be an additional time and financial burden on Dr. Burr.

This Court should also not allow Dr. Burr to submit himself to another deposition just so that Defense Counsel can have another opportunity to question him about the issues that he clearly presented again and again – landing on his head and suffering headaches – in his first deposition. Defense counsel had every opportunity to explore Dr. Burr's injuries at that time, and should not be afforded another bite at the apple.

- C. *Dr. Burr isn't qualified to give any statements other than those already provided to Defense counsel through the depositions and documents produced by his medical care providers.*

While Dr. Burr is a doctor, he is not a neurologist or a neuropsychologist. He is not capable of giving more information than he has already provided to his medical care providers. He is not capable of giving testimony about his diagnoses or his prognosis. He is merely capable of reciting his symptoms – which he has already done with Dr. Ashley and Dr. Warshowsky. Because Dr. Burr cannot offer any additional information than he has already provided to his medical providers or illuminate his medical provider's diagnoses, a second deposition will not provide any additional information that Defense counsel does not already have access too.

**B. If this Court does allow Dr. Burr to be deposed a second time, the deposition should be limited in scope to only review Dr. Burr's symptoms of head trauma.**

If this Court does allow Dr. Burr to be deposed, Plaintiff requests that it order that the Defense Counsel's second examination of Dr. Burr be short and narrowly tailored to only address Dr. Burr's symptoms related to head trauma. Plaintiff also asks that this Court request a motion from Defense counsel which explicitly states the specific topics of the proposed deposition.

**CONCLUSION**

Plaintiff respectfully submits this motion and its memorandum in support and asks this Court to grant Plaintiff's Motion to Quash Plaintiff's Deposition Notice and Subpoena for Plaintiff and grant Plaintiff's Motion for Protective Order.