



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: ZOLOFT LITIGATION

Civil Action No. 14-C-7000

THIS DOCUMENT APPLIES TO ALL CASES

**ORDER EXCLUDING PLAINTIFFS' EXPERT, ADAM C. URATO, MD**

The Court has reviewed *Plaintiffs' Expedited Motion to Modify The Court's Earlier Ruling Regarding Plaintiffs' Expert, Adam C. Urato, MD, and Motion for Protection and for Leave to Designate a Replacement Expert* (Transaction ID 59456773) as well as Defendants' *Response* (Transaction ID 59448366). Plaintiffs' counsel states that, Dr. Urato was going to be Plaintiffs' key liability expert in these cases. Mot. p. 2 However, "[b]ased upon extremely private information provided to Plaintiffs' counsel, Dr. Urato will not be medically able to sit for an expert deposition by August 29<sup>th</sup> or anytime in the coming months." *Id.*, p. 1

To properly consider the basis of Plaintiffs' motion, the Court held the motion in abeyance on August 31, 2016, and ordered Plaintiffs' counsel, "***no later than September 7, 2016***, to file under seal and e-serve only private on the Presiding Judges and the Mass Litigation Manager an affidavit from Adam C. Urato, M.D.'s treating physician containing, at a minimum, the following information:

1. a detailed, medical diagnosis for Adam C. Urato, M.D.'s medical condition, along with the diagnostic medical code for the diagnosis;
2. the treating physician's affirmation that, in his medical opinion, Adam C. Urato, M.D. is not medically able to sit for an expert deposition at this time, or anytime in the coming months; and
3. the date on which Adam C. Urato, M.D.'s medical condition was first communicated to Plaintiffs' counsel."

*Order Regarding Plaintiffs' Expert, Adam C. Urato* (Transaction ID 59497067), p.1 The Court ruled that “[f]ailure to provide the Court with the affidavit will result in denial of Plaintiffs’ motion.” *Id.*, p. 2

On September 7, 2016, Plaintiffs’ counsel served a letter on the Court advising that, “Despite our efforts, we have had very limited contact with Dr. Urato and he has not supplied us with the affidavit from his treating doctor.” (Transaction ID 59530040)<sup>1</sup> Because Plaintiffs’ counsel did not submit the affidavit ordered by the Court, and because Plaintiffs’ counsel has represented that Dr. Urato, “will not be medically able to sit for an expert deposition by August 29<sup>th</sup> or anytime in the coming months,”<sup>2</sup> the Court hereby DENIES Plaintiffs’ motion for protection for Plaintiffs’ Expert Adam C. Urato, M.D.

The Court finds that Plaintiffs’ counsel was aware no later than June 9, 2016, that Dr. Urato would be unable to appear for deposition for health reasons. See, Defendants’ *Response* p. 1, and Exh. F to *Defendants’ Motion to Exclude Plaintiffs’ Expert Adam C. Urato, M.D.* (Transaction ID 59216981). After hearing oral argument on Defendants’ motion to exclude Dr. Urato on August 8, 2016, the Court denied the motion without prejudice to renew and ordered the deposition of Dr. Urato to be taken no later than August 29, 2016. *Order Regarding Rulings on August 8, 2016* (Transaction ID 59400916). Plaintiffs’ counsel failed to make Dr. Urato available for deposition. On August 31, 2016, Plaintiffs’ counsel was ordered to provide an affidavit from Dr. Urato’s treating physician, stating the basis for Dr. Urato not being medically able to sit for an expert deposition at this time, or anytime in the coming months. *Order*

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<sup>1</sup> As the Court previously advised Plaintiffs’ Counsel in regards to this issue, “your letter is not an appropriate communication to the Court. If Plaintiffs desire relief in the form of a protective order that would prevent, delay or otherwise protect Mr. Urato from sitting for a deposition, Plaintiffs must file an appropriate motion and proposed order with the Court, along with supporting documentation.” See Transaction ID 59203675.

<sup>2</sup> *Plaintiffs’ Expedited Motion to Modify the Court’s Earlier Ruling Regarding Plaintiffs’ Expert, Adam C. Urato, MD, and Motion for Protection and for Leave to Designate a Replacement Expert* (Transaction ID 59456773) at p. 1

*Regarding Plaintiffs' Expert, Adam C. Urato* (Transaction ID 59497067) Plaintiffs' counsel failed to submit the required affidavit. Finding that good cause has been shown, the Court now GRANTS *Defendants' Motion to Exclude Plaintiffs' Expert Adam C. Urato, M.D.* (Transaction ID 59216981), and precludes Adam C. Urato, M.D. from testifying as an expert witness in these cases due to his inability to appear for deposition in these cases now or anytime in the foreseeable future.

The Court finds that Plaintiffs' counsel failed to ascertain Dr. Urato's medical condition, determine whether Dr. Urato was able to testify in these cases, and request a replacement expert in a timely manner. However, it would be unfair to punish the litigants for their counsel's lack of diligence. See, *Anderson v. Kunduru*, 215 W.Va. 484, 489, 600 S.E.2d 196, 201 (2004) ("Justice compels that the offending attorney should suffer for his actions, not the litigants.") Accordingly, the Court GRANTS Plaintiff's motion seeking leave to designate a replacement expert for Dr. Urato. Plaintiffs shall have until ***no later than 5:00 p.m. on September 16, 2016***, to designate a replacement expert for Dr. Urato.

Because Defendants are the parties prejudiced by Plaintiffs' counsel's delay, they shall be allowed to propose a reasonable date for a deposition of Plaintiffs' replacement expert for Dr. Urato after they learn the identity of the new expert. Additionally, fairness dictates that Plaintiffs' counsel shall bear any costs associated with the delay in deposing the newly designated expert. See, *Anderson*.

Any objections or exceptions to the Panel's order are noted and preserved for the record.

It is so ORDERED.

ENTER: September 9, 2016.

/s/ James P. Mazzone  
Lead Presiding Judge  
Zoloft Litigation