

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE**

**JEFFREY J. ZANDER, individually and)
as Trustee of the CARDINAL TRUST)
under Agreement dated February 11,)
2009, and JJZ INSURANCE AGENCY,)
a Tennessee general partnership d/b/a)
ZANDER INSURANCE GROUP,)**

No. 3:12-cv-00967

Plaintiffs,

v.

**KATZ, SAPPER & MILLER, LLP;)
KSM BUSINESS SERVICES, INC., and)
ANDREW J. MANCHIR,)**

Defendants.

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO
CONTINUE TRIAL DATE**

Defendants have moved the Court to continue the May 6, 2014, trial of this matter on the basis that their recently substituted counsel, Richard Glassman, has a state court trial in Jackson, Tennessee, beginning on the same date, and has other obligations between now and May 6, 2014, that would make it difficult for him to prepare adequately for the May 6 trial. Remarkably, in their recent motion for substitution, defendants failed to advise the Court that Mr. Glassman was already scheduled to be in trial in another case on May 6, 2014, and further failed to advise the Court that Mr. Glassman was too busy with other matters to prepare to try this case on May 6, 2014. Plainly, defendants knew of Mr. Glassman's alleged scheduling difficulties but chose not to disclose such matters to the Court. Instead, they actually cited to the impending trial date as reason to expedite resolution of the Motion to Substitute and enable Mr. Glassman to prepare quickly for trial. Having sandbagged the Court, the defendants should not now be rewarded with a continuance. This Court should also deny defendant's motion for the following reasons:

1. Contrary To Their Representations To This Court, Defendants Have Previously Sought A Continuance Of The Trial Date.

In their motion, defendants tell the Court that "This is defendants' first request for a trial continuance. Defendants have not previously made such a request." (Dkt. 134 at 4) In their memorandum, defendants likewise tell the Court that "this is defendants' first request for a trial continuance." (Dkt. 134-1 at 7) Those representations are demonstrably false.

On August 27, 2013, defendants filed a Motion to Amend the scheduling order (Dkt. 40). In that motion, defendants sought to extend the deadline to respond to dispositive motions to June 13, 2014, well beyond the May 6, 2014 trial date. (*See* Dkt. 40-1 at 2) The proposed order defendants submitted with their Motion contains the following:

TARGET TRIAL DATE:

The parties estimate that this jury trial will take five days, depending on what issues remain for trial. After consulting with Judge Sharp's courtroom deputy, this matter is set for trial on _____. Judge Sharp will conduct the final pretrial conference on _____. Judge Sharp will issue a separate order covering his requirements for the final pretrial conference and the trial.

Dkt. 40-1 at 2.

Magistrate Judge Brown summarily denied defendants' motion to amend because defendant's motion was filed in violation of Paragraph 8 of the Initial Case Management Order that required defendants to conduct a telephone conference before filing such a motion. (*See* Docket 41) On September 5, 2013, Magistrate Judge Brown conducted a telephonic conference at which he modified certain of the deadlines in the Case Management Order slightly, but denied defendant's request to amend the scheduling order in any respect that would alter the trial date. (*See* Dkt. 43)

From September 5, 2013, to the present, defendants have requested Magistrate Judge Brown to alter the Case Management Order on numerous occasions. (*See, e.g.*, Dkts. 64, 99, 117, and 125) On most such occasions, defendants sought amendments that would have required a continuance of the trial date. Although Magistrate Judge Brown altered the Case Management Order at defendant's request in certain respects, he never granted defendants the full extensions they sought because to grant such extensions would have necessitated a continuance of the trial date. In their motion, defendants even concede that "Magistrate Judge Brown advised that he opposed a continuance of the trial date." (Dkt. 134 at 7) Accordingly, defendants' representation to this Court that the present motion constitutes their first attempt to obtain a continuance of the trial date is blatantly false.

2. Mr. Glassman's State Court Trial Does Not Constitute Good Cause For A Continuance.

The defendants recognize, as they must, that Fed. R. Civ. P. 16 requires that they show "good cause" for the requested continuance. Defendants principally attempt to satisfy this requirement by pointing to the fact that Mr. Glassman is already scheduled to be in trial in state court in Jackson Tennessee on May 6, 2014, the date the trial in this matter is to commence. Quite obviously, when they moved to substitute Mr. Glassman as lead counsel in this case, both the defendants and Mr. Glassman knew that Mr. Glassman was already scheduled to be in another trial on the very date that the trial in this case was scheduled to begin. Despite such knowledge, defendants moved this Court to substitute Mr. Glassman as lead counsel while concealing from the Court his inability to attend the May 6, 2014 trial. This misconduct vitiates any claim of "good cause."

Further, in their Motion to Continue, defendants make no effort to explain why the trial of the instant action should be delayed in deference to the state court malpractice action in which

Mr. Glassman is involved. This case has been set for trial since November 27, 2012. All discovery has been completed. The deadline for filing dispositive motions has already passed. By contrast, discovery in Mr. Glassman's state court malpractice action is still ongoing. Bulso decl. ¶4. Further, plaintiff's counsel has confirmed that Mr. Glassman's opposing counsel in the state court malpractice action does not oppose a continuance of the May 6 trial of that action. *Id.* ¶5. Given that the present case has been set for trial for more than 15 months, that all discovery is complete, that all dispositive motions have been filed, and that the case is otherwise ready to be tried, there simply exists no good reason to continue the trial of this action in deference to a state court action in which discovery is ongoing and in which, were he to file one, Mr. Glassman's motion to continue would not be opposed. Such facts simply do not support defendant's' position that "good cause" exists to continue the May 6, 2014 trial of this action.

3. Mr. Glassman's Other Alleged Obligations Prior To May 6, 2014, Do Not Constitute Good Cause For A Continuance.

As a second basis for continuance, defendants claim that Mr. Glassman is too busy with other matters to prepare adequately for the May 6, 2014, trial of this action. This claim fails to demonstrate good cause in at least two respects. First, when defendants sought to substitute Mr. Glassman as lead counsel, they failed to advise this Court of their belief that Mr. Glassman's other obligations would interfere with his ability to prepare for trial in this case. To the contrary, defendants requested that this Court act expeditiously in substituting Mr. Glassman as lead counsel so that he could "immediately begin getting up to speed on this matter." (Dkt. 132-1 at 5) Defendants further asserted that they "deserve[d] to have lead counsel substituted as quickly as feasible in order for lead counsel to begin the process of getting up to speed in this litigation." (*Id.*) Defendants even pointed to the May 6, 2014, trial setting as a reason for this Court to act expeditiously in substituting Mr. Glassman as lead counsel. (*See* Dkt. 132 at 2) Nowhere in

their substitution papers did defendants advise the Court that Mr. Glassman's other obligations prevented him from being able to get up to speed in time for the May 6, 2014, trial. Having succeeded in the expeditious substitution of Mr. Glassman as lead counsel, defendants cannot now reverse course and claim that Mr. Glassman cannot adequately prepared for the May 6 trial.¹

Second, this case is not as complicated as defendants attempt to make it appear. As set out in the Complaint, the defendants misrepresented to the plaintiff, Jeffrey J. Zander, that he would realize \$2.4 million in tax savings over 5 years if a proposed sale to an ESOP were consummated. Plaintiffs only needed to take three depositions to prepare their case for trial.² Both parties have fully briefed the motions for summary judgment that frame the issues in the case. There is no reason that Mr. Glassman, an experienced trial lawyer, cannot review the record in this case with the assistance of the continuing work of his associate, Ms. Lacey Bishop, and be prepared to try any issues that remain for trial on May 6, 2014—particularly if he obtains a continuance of his state court malpractice action in Jackson Tennessee.

4. The trial of this case will not last 7 to 10 days.

On November 27, 2012, when this Court set the trial of this matter to commence on May 6, 2014, the parties estimated that trial would take five days. (*See* Dkt. 11 at 6) On August 27, 2013, when defendants first attempted to amend the Case Management Order to delay the trial, defendants estimated that the case would take five days to try. (*See* Dkt. 40-1 at 2) On October 29, 2013, defendants again represented that the case would require five trial days at most. As reflected in Judge Brown's Order (Dkt. 60) filed October 30, 2013, following one of the defendants' failed attempts to postpone the trial:

¹ As evidenced by Bulso Decl. Exs. 1 and 2, plaintiffs opposed defendants' Motion to Substitute because the defendants planned to use the substitution as grounds for a continuance. The Court, acting expeditiously as defendants had requested, granted that motion before plaintiffs could respond to it.

² The defendants point to the fact that 15 depositions were taken in this case to support their claim of complexity. In fact, the defendants took 12 of the 15 depositions in this case and most of those depositions were unnecessary.

Defendants' counsel has requested permission to take three additional depositions and to extend the discovery deadline. Plaintiffs' counsel has expressed a strong desire not to extend deadlines such that it would affect the present May 6, 2014, trial date. At the present time *the parties anticipate that this case can certainly take up to five days to try.*

Dkt. 60 (emphasis added). Now, however, with the case less than two months from trial, and despite having repeatedly advised the Court and Judge Brown that the case will require five trial days, the defendants claim that the trial will take seven to ten days. This Court should see defendants' claim for what it is: a disingenuous estimate designed to delay the resolution of this case. This is the opposite of "good cause" for a continuance.

5. Defendant's Statements Concerning Tim Edwards Are False And Misleading.

Defendants have grossly misrepresented to this Court the circumstances surrounding their apparent falling out with their former counsel, Tim Edwards. Even if that falling out would constitute good cause if it had occurred in the manner described, a look behind the defendants' misrepresentations compels a finding that no good cause exists for a continuance. The material facts concerning Mr. Edwards are as follows:

a. Mr. Edwards approached plaintiff's counsel, Leader, Bulso & Nolan, PLC, to represent him in an internal dispute at Glassman Edwards concerning the allocation of certain contingency fees Mr. Edwards had recently recovered for the firm. Bulso Decl.¶ 2. Prior to accepting such representation, Plaintiff's counsel requested that Mr. Edwards notify the defendants of such proposed representation and obtain their consent to such representation in writing.³ *Id.* No ethical rule required Plaintiff's counsel to make such a request, but they wanted

³ Although defendants and their counsel hurl claims of "outrage" and "conflict of interest" at plaintiff's counsel, the fact that plaintiff's counsel required that defendants be notified of Mr. Edwards' request for representation and that they consent to it before plaintiff's counsel would undertake it (even though such notice and consent was not required by any ethical rule or other principle of law) demonstrates the highest level of professionalism and transparency.

to be sure that defendants would not be surprised by such representation or use it to obtain some procedural or tactical advantage in this case, as they are now attempt to do unabashedly. Although defendants, in their numerous and numbingly repetitious filings in this Court, attempt to gloss over the fact, they knowingly agreed to plaintiff's counsel representing Mr. Edwards in an unrelated legal matter.

b. Defendants and Mr. Glassman now claim that defendants were misled by Mr. Edwards because Mr. Edwards failed to disclose when he sought their consent that he "was planning to leave the Glassman firm." (Dkt. 134-1 at 2) Defendants' representation that Mr. Edwards was planning to leave the Glassman firm when he obtained their written consent is a blatant, knowing misrepresentation to this Court. As set out in the very first paragraph of Mr. Leader's February 22, 2014, letter to Mr. Glassman requesting mediation of the internal fee dispute at Glassman Edwards, Mr. Edwards was not "planning to leave the Glassman firm," but rather had every intention to remain as an employee and shareholder of Glassman Edwards:

Tim Edwards has asked us to represent him to help resolve his disputes with each of you and with the firm of Glassman, Edwards, Wyatt, Tuttle & Cox, P.C. ("Glassman Edwards"). Mr. Edwards very much regrets having to take this action. ***He has practiced law with you for many years, has worked hard to help build Glassman, Edwards, and has no intention of leaving the firm that is his professional home.*** Further, as long as he is practicing at the firm, he will fulfill each and every of his professional and other obligations to you, to Glassman Edwards and, of course, to his clients.

(Dkt. 127-1, at 37; Dkt. 128-1, at 37; Dkt. 129-1, at 37; Dkt. 131-2, at 37. *See also* Dkt. 130-2 (stricken) at 37.)(emphasis added)

Notwithstanding his long-time partner's expressed desire to remain at the firm and resolve matters amicably, Mr. Glassman hastily called a special meeting of the firm's

shareholders to terminate Mr. Edwards as a shareholder of Glassman Edwards.⁴ Thus, Mr. Edwards hardly concealed from the defendants that he was planning to leave the Glassman Edwards firm when he obtained their consent to his retention of plaintiff's counsel to assist him with the fee dispute. Mr. Edwards never had any such plans. Rather, it was Mr. Glassman, defendants' new counsel, who orchestrated the unlawful and illicit termination of Mr. Edwards as an employee of Glassman Edwards.⁵ Defendants' unseemly attempts to cast aspersions on Mr. Edwards' character and integrity appear calculated simply to distract the Court from the undeniable fact that they consented to his retention of plaintiff's counsel to assist in the resolution of an intra-firm dispute regarding contingency fees.

c. Defendants also attempt to persuade the Court that they discharged Mr. Edwards as counsel in this matter because they were "outraged" that attorneys at Leader, Bulso & Nolan, PLC other than Mr. Leader are involved in seeking redress for Mr. Glassman's illicit and unlawful conduct. This also is a willful attempt to mislead the Court. Mr. Edwards retained Mr. Leader to assist in resolution of a dispute concerning contingency fees, in part, because Mr. Leader is a well-respected plaintiff's attorney in Nashville who has significant experience—both as a practicing attorney and expert witness—in addressing contingency fee issues. Neither Mr. Edwards nor any other rational person could have foreseen that Mr. Glassman would purport to terminate illegally Mr. Edwards as an employee and shareholder in response to the letter from Mr. Leader. It was only after Mr. Glassman escalated the dispute by orchestrating the putative termination of Mr. Edwards from the Glassman Edwards firm that other attorneys at Leader,

⁴ As set out in the Verified Complaint that defendants have filed of record (Dkt. 127-1), Mr. Glassman's conduct with regard to the special shareholders meeting violated Tennessee law and Mr. Edwards' employment agreement in numerous respects.

⁵ The classic illustration of chutzpah involves a man who, after killing his parents, throws himself on the mercy of the court because he is an orphan. Here, the defendants chose instead to employ a middleman and rely upon the alleged misconduct of their counsel in seeking the mercy of this Court.

Bulso & Nolan, PLC began to assist in obtaining emergency temporary injunctive relief to restrain Mr. Glassman's unlawful conduct.

But prior to the time that Mr. Bulso or Mr. Nieters made any appearance in the Glassman Edwards litigation, and prior to the time that defendants had any inkling that Mr. Bulso or Mr. Nieters were personally involved in the Glassman Edwards litigation, defendants had already decided to discharge Mr. Edwards and continue to be represented by Lacey Bishop, Ed Wallis, and the other attorneys at the Glassman Edwards firm. On March 4, 2014, at Ms. Bishop's request, Magistrate Judge Brown convened a conference call to address defendants' request that they be permitted to supplement their summary judgment papers. During that telephonic hearing on March 4, 2014, Ms. Bishop advised Judge Brown and opposing counsel, Gino Bulso, that the defendants had decided to stay with the Glassman Edwards firm and not to be represented any longer by Mr. Edwards. Bulso Decl. ¶ 7. Neither Mr. Bulso nor Mr. Nieters made any appearance in the Glassman Edwards litigation until March 6, 2014. *See, e.g.,* Dkt.127-1. Defendants even admit that they had no knowledge of Mr. Bulso or Mr. Nieters participating in the Glassman Edwards litigation until March 6, 2014—two days *after* Ms. Bishop had advised Magistrate Judge Brown that the defendants would discharge Mr. Edwards and continue with Ms. Bishop, Mr. Wallis, and the other attorneys at Glassman Edwards.

Thus, defendants' claims that they discharged Mr. Edwards because of their "outrage" that he had "falsely" claimed that that only Mr. Leader would represent him in an unrelated legal matter is an inartful attempt to perpetrate a fraud on this Court. Defendants had decided to terminate Mr. Edwards before they were even aware that Mr. Bulso or Mr. Nieters were in any way personally involved with the representation of Mr. Edwards.

d. Finally, although defendants' claims in this regard barely merit a response, defendants' statements that they are "concerned" about the confidentiality of their information and "believe that Tim Edwards' continued representation of them would be a conflict of interest," are wholly unsupported and disregard the Tennessee Rules of Professional Conduct. Defendants have absolutely no basis upon which to represent that Mr. Edwards has or will violate the duty of confidentiality he owes to defendants as former clients pursuant to Rule 1.6, yet defendants attempt to smear Mr. Edwards by placing in the record irrelevant comments that they are "concerned" about the confidentiality of their information. Likewise, defendants' statement (Dkt. 134-1 at 3) that they "believe" that Mr. Edwards' representation of them would be a conflict of interest lacks any rational legal basis. Conflicts of interest are governed by Rules 1.7 and 1.8 of the Tennessee Rules of Professional Conduct. Mr. Edwards' continued representation of defendants in this action would not have constituted a conflict of interest under any ethical rule that applies to Mr. Edwards or this case.

e. In summary, after having consented in writing to plaintiff's counsel representing Mr. Edwards in an unrelated legal matter, defendants—principally through false and misleading statements made to this Court—are attempting yet again to delay justice by obtaining a continuance of the trial date that they have consistently been denied by Magistrate Judge Brown. Respectfully, this Court should not reward defendants' unseemly efforts with the continuance they have so long sought.

Respectfully submitted,

s/ Eugene N. Bulso, Jr.
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2014, the foregoing was filed via the Court's ECF system, which is expected to deliver it via electronic means to:

Richard Glassman
Lacey Bishop
Glassman, Edwards, Wyatt, Tuttle & Cox, P.C.
26 North Second Street
Memphis, Tennessee 38103

s/ Eugene N. Bulso, Jr.
Eugene N. Bulso, Jr.