

Deposition Do-Over Ordered In Diabetes Strip Fraud Suit

By **Aaron West**

Law360 (April 14, 2023, 7:29 PM EDT) -- A New Jersey special master found that BakerHostetler attorney Lee Rosebush "indeed spoke words, but did not provide answers" when he derailed a January insurance fraud deposition with evasive and incomplete responses, ordering on Friday that Rosebush reappear for a deposition do-over.

In his analysis of the 271-page deposition, which stemmed from a 2019 insurance fraud case brought by plaintiff Roche Diagnostics Corp. against former officials, including Rosebush, of now-defunct Alliance Medical Holdings LLC, special master Dennis Cavanaugh described Rosebush as an "extraordinarily difficult and evasive" witness that caused the deposition to stretch to seven hours and three minutes in length — "three minutes over the default time limit under the federal rules."



Geoffrey Potter

Highlighting how during the deposition, in which Roche was questioning Rosebush, who was a director at Alliance, about his alleged involvement in the diabetes test strip insurance fraud scheme that purportedly bilked Roche out of \$87 million, Rosebush would frequently interject statements and asides "which had no bearing on what was asked," as well as offer incomplete and evasive answers that ran afoul of federal procedure rules. Cavanaugh in his order ultimately found that the deposition would have to be conducted again, even though he didn't find it necessary to redo it in the office of the special master as Roche had originally requested, for added scrutiny.

Still, Cavanaugh noted, Rosebush's misconduct was even more egregious than the plaintiffs had alleged in their original motion.

"In their moving papers, plaintiffs cite three or four examples of [Rosebush's] evasiveness, but in the special master's view, these examples do not fully encompass the extent of the deponent's unwillingness to respond to counsel's questions," Cavanaugh wrote in his order on Friday, going on to describe parts of Rosebush's testimony as "incomplete" and "answering a question that had not been asked."

"Defendant indeed spoke words, but did not provide answers, thereby preventing effective examination," Cavanaugh wrote.

In the January deposition, Rosebush "consistently interposed lengthy, nonresponsive and scripted answers to even the most basic of questions," according to the motion to compel for a redo Roche filed

last month, which clarified it wasn't asking for sanctions or costs, only a chance to have another crack at the deposition.

Along with Rosebush's misconduct, Roche in its motion had also pointed to the behavior of his counsel as being inappropriate and causing the deposition to go off the rails with repetitive and irrelevant objections, but Cavanaugh said that there was insufficient evidence to find that Rosebush's responses were orchestrated with the assistance of his attorneys.

Regardless, in his order, Cavanaugh said that when the parties redo the deposition, everyone needed to behave and provide "responsive and concise" answers and objections, or the parties had his permission to call him to step in.

"Counsel is directed to advise the special master, at least one week in advance, of the proposed date and time so that the special master can confirm his availability to be reached telephonically to address any issues which may arise," he wrote, adding that the deposition was "not to exceed more than four hours."

Rosebush wasn't immediately available for comment on Friday.

Roche is represented by Peter C. Harvey, Geoffrey Potter, Aron Fischer and Tara J. Norris of Patterson Belknap Webb & Tyler LLP.

Zions is represented by Liza M. Walsh, Peter J. Pizzi, Stephen V. Falanga, Marc D. Haefner, William T. Walsh Jr. and Francis W. Yook of Walsh Pizzi O'Reilly Falanga LLP.

The case is Roche Diagnostics Corp. et al. v. Smith et al., case number 2:19-cv-08761, in the U.S. District Court for the District of New Jersey.

--Editing by Jay Jackson Jr.