

IN THE MISSOURI SUPREME COURT

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No. SC88987

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STATE EX REL. CORINNE REIF

*Relator,*

vs.

THE HONORABLE MICHAEL T. JAMISON

*Respondent.*

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Appeal from the Circuit Court of St. Louis County, Mo.  
Twenty First Judicial Circuit, Division No. 10  
The Honorable Michael T. Jamison, Judge

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**RELATOR'S BRIEF**

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## **JURISDICTIONAL STATEMENT**

This Writ proceeding arises from Respondent's denial of Realtor's Motion to Compel defendant, Missouri Baptist Medical Center D/B/A West County Sports Fitness and Rehabilitation Center, to produce a substitute corporate representative(s) that was adequately prepared to answer questions regarding deposition topics one (1) and three (3) set forth on the corporate designee deposition notice.

On November 15, 2007 the Missouri Supreme Court of Appeals, Eastern District, denied Relator's Petition for Writ Mandamus without opinion. On February 19, 2008 this Court issued its Preliminary Writ of Mandamus. Under Article V, Section 4, of the Missouri Constitution, this Court has authority to determine and issue remedial writs.

## STATEMENT OF FACTS

Relator, Corrine Reif, (hereinafter, “Relator”), filed suit against defendant, on August 21, 2006 for the wrongful death of her husband, Irwin Reif (hereinafter, “decedent”). (A1-A4). Relator’s Petition alleges that on or about February 2, 2001,<sup>1</sup> decedent was walking around exercise equipment located at defendant’s facility when he tripped on an unmarked and unbarricaded electrical plug box located on the floor. (A2). Relator’s Petition alleges that as a result of the fall decedent died. (A2). Defendant denies these allegations. (A5-A8).

Relator served defendant with interrogatories seeking, in relevant part, the names and addresses of each person known by defendant to have witnessed decedent’s fall. Defendant answered the interrogatory and identified seven (7) witnesses, some employees of defendant. (A11-A12).

On March 30, 2007, Relator served defendant with a corporate designee deposition notice. (A19-A22). The deposition notice listed five topics including the two topics at issue in this proceeding. (A19-A22). The two deposition topics at issue in this proceeding are set forth below as follows:

1. Defendant’s knowledge of decedent, Irwin Reif’s fall on February 2, 2001.

\* \* \* \*

3. The reason and/or basis for the presence of an electrical plug and/or electrical plug box on an aisle floor of the premises near and around the exercise equipment at the time of plaintiff’s fall on February 2, 2001. (A19-A22).

On April 11, 2007, defendant filed objections to Relator's corporate designee deposition notice. (A23-A26).

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<sup>1</sup> The correct date of the fall is February 1, 2001.

Respondent's objection to deposition topic No. 1 reads as follows:

OBJECTION: Defendant objects to the notice as vague, ambiguous, overbroad and unduly burdensome. (A23-A26).

Respondent's objection to deposition topic No. 3 reads as follows:

OBJECTION: Defendant objects to the notice as vague, ambiguous, overbroad and unduly burdensome, not appropriately limited in time and scope and not reasonably calculated to lead to the discovery of admissible evidence. (A23-A26).

On April 12, 2007 Relator served defendant with her Motion to Compel asking Respondent to compel defendant to produce a corporate designee, pursuant to Rule 57.03(b)(4) of the Missouri Rules of Civil Procedure. (A27-A43).

On May 9, 2007 Respondent granted Relator's Motion to Compel, overruling defendant's objections to the proposed deposition and amending several of the deposition topics in light of defendant's objections and the agreement of counsel for both parties. (A44-A45). Among the objections overruled by Respondent was defendant's objection to deposition topics No. 1 and No. 3. (A44-A45).

On May 31, 2007, Relator took the deposition of defendant's designated corporate designee. (A46-A57). The deponent was produced on five topics, including topics No. 1 and No. 3. (A46-A47). In response to deposition topic No. 1 the corporate designee testified that she had no personal knowledge of how Mr. Reif fell and made no effort to determine the matters known or reasonably available to the organization on this topic. (A49-A57). In response to deposition topic No. 3 the

corporate designee testified that she had no personal knowledge of the design and placement of the electrical plug box at issue and did nothing to determine the matters known or reasonably available to the organization on this topic. (A56-A57). Defense counsel took the position at the deposition that a corporate designee only had to testify to matters within their personal knowledge. (A50-A53).

On July 23, 2007, Relator filed her motion to compel defendant to produce a substitute corporate designee prepared to testify as to matters known or reasonably available to defendant on deposition topics No. 1 and No. 3. (A58-A91). On July 25, 2007 defendant served Relator with its memorandum in opposition to Relator's motion to compel a substitute corporate designee. (A92-A158). Respondent's Memorandum in Opposition contends Respondent fully complied with Rule 57.03(b)(4), that Respondent's corporate designee testified to the best of her ability as to matters known or reasonably available to Respondent. (A92-A158). Respondent did not allege through any objection in response to the corporate designee deposition that the matters sought by Relator were protected by the attorney-client privilege or the work product doctrine.

On August 7, 2007 Respondent denied Relator's motion to compel defendant to produce a substitute corporate designee that was prepared to testify "as to matters known or reasonably available to the organization." (A159). On November 15, 2007, the Missouri Court of Appeals, Eastern District, denied Relator's petition for Writ of Mandamus. (A160). Relator filed her Petition for Writ of Mandamus in this court on December 10, 2007. This Court issued its Preliminary Writ of Mandamus

on February 19, 2008 and Respondent filed its Answer to the Writ on March 19, 2008. This brief follows pursuant o Rule 84.24(i).

## **POINTS RELIED ON**

Relator is entitled to an Order in Mandamus directing Respondent to sustain Relator's Motion to Compel, because Supreme Court Rule 57.03(b)(4) requires an organization to produce a corporate designee for deposition that is prepared to testify as to matters known or reasonably available to the organization and the corporate designee produced by defendant, Missouri Baptist Medical Center d/b/a West County Sports Fitness and Rehabilitation Center's, was woefully unprepared to testify in accordance with this obligation.

Supreme Court Rule 57.03(b)(4)

Plank v. Koehr, 831 S.W.2d 926, 929 (Mo. Banc 1992)

Annin v. Bi-State Development Agency, 657 S.W.2d 382, 386 (Mo. App. E.D. 1983).

Brazos River Authority v. GE Ionics, Inc., 469 F.3d 416, 432-33 (5<sup>th</sup> Cir. 2006).

United States v. Taylor, 166 F.R.D. 356, 360 (M.D. N.C. 1996)

## ARGUMENT

**Relator is entitled to an Order in Mandamus directing Respondent to sustain Relator's Motion to Compel, because Supreme Court Rule 57.03(b)(4) requires an organization to produce a corporate designee for deposition that is prepared to testify as to matters known or reasonably available to the organization and the corporate designee produce by defendant, Missouri Baptist Medical Center d/b/a West County Sports Fitness and Rehabilitation Center's, was woefully unprepared to testify in accordance with this obligation.**

Relator has a clear and unequivocal right to have defendant, Missouri Baptist Medical Center d/b/a West County Sports Fitness and Rehabilitation Center (hereinafter, "defendant") produce a corporate designee for deposition that is prepared to testify "as to matters known or reasonably available to the organization." Mo.R.Civ.P. 57.03(b)(4). A corporate designee cannot simply testify to matters within their personal knowledge. Respondent's ruling of August 7, 2007, denying Relator's Motion to Compel, undermines Relator's right to have a corporate designee testify as to matters known or reasonably available to the organization and constitutes an abuse of discretion.

### *A. Standard of Review.*

A writ of mandamus is the proper remedy for curing discovery rulings that exceed a court's jurisdiction or constitute an abuse of the court's discretion. State ex rel. Tennill v. Roper, 965 S.W.2d 945, 947 (Mo. App. W.D. 1998). A trial court's

refusal to permit discovery of matters which are relevant to the lawsuit and reasonably calculated to lead to admissible evidence and which are neither work product nor privileged is an abuse of discretion. St. Louis Little Rock Hospital, Inc. v. Gaertner, 682 S.W.2d 146, 148 (Mo. App. E.D. 1984).

***B. Argument***

Rule 56.01(b)(1) of the Missouri Rules of Civil Procedure provides as follows:

(b) Scope of Discovery. Unless otherwise limited by order of the Court in accordance with these rules, the scope of discovery is as follow:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be

inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Mo.R.Civ.P. 56.01(b)(1)

The purposes of discovery are to eliminate concealment and surprise, to aid the litigants in determining the facts prior to trial and to provide the litigants with access to proper information with which to develop their respective contentions and to present their respective sides of the issues framed by the pleadings. State ex rel. Martel v. Gallagher, 797 S.W.2d 730, 732 (Mo.App. E.D. 1990); Anheuser v. Nolan, 692 S.W.2d 325, 328 (Mo.App. E.D. 1985).

Mandamus is appropriate where relators have a clear and unequivocal right that presently exists. Roper, 965 S.W.2d at 947. To determine whether the right to mandamus is clearly established and presently existing, a reviewing court examines the statute under which the Relator claims the right. Roper, 965 S.W.2d at 947. The rules of construction used to interpret statutes are also used to interpret Missouri Supreme Court Rules. Dynamic Computer Solutions v. Midwest Marketing, 91 S.W.3d 708, 713 (Mo. App. W.D. 2002)(“Missouri Supreme Court Rules are interpreted in the same fashion as statutes.”) In interpreting the rules of civil procedure, courts seek to ascertain the intent of the Missouri Supreme Court, giving the language used its plain and ordinary meaning. Midwest Marketing, 91 S.W.3d at 713. Each of the words utilized are presumed to have a separate and individual meaning. Engine Masters, Inc. v. Kirns, Inc., 872 S.W.2d 644, 646 (Mo. App. E.D.

1994). The use of the word “shall” in a statute is indicative of a mandate to act. Hanks v. Rees, 943 S.W.2d 1, 4 (Mo. App. 1997). The general rule is that use of the word “shall” is considered mandatory and not permissive. Rees, 943 S.W.2d at 4.

Rule 57.03(b)(4) provides as follows:

(4) A party may in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. **The persons so designated shall testify as to matters known or reasonably available to the organization.** This Rule 57.03(b)(4) does not preclude taking a deposition by any other procedure authorized in these rules.

Mo. R. Civ. Pro. 57.03(b)(4)(emphasis added).

This Court has previously indicated that one of the reasons for Rule 57.03

(b)(4) is to permit a party to take the deposition of an opposing corporation's representative at a time when the party taking the deposition knows that the statements made by the witness on the identified topics will be admissible against and binding on the corporation. Plank v. Koehr, 831 S.W.2d 926, 929 (Mo. Banc 1992). The intent behind the rule is to place natural persons and corporations on a level playing field when taking the deposition of a party. Koehr, 831 S.W.2d at 929; Annin v. Bi-State Development Agency, 657 S.W.2d 382, 386 (Mo.App. E.D. 1983)(Testimony of person designated to answer deposition questions under Rule 57.03(b)(4) is not the deposition of an individual "but under 57.03(b)(4) is the deposition of the corporate defendant.").

Rule 57.03(b)(4) is Missouri's counterpart to Rule 30(b)(6) of the Federal Rules of Civil Procedure. Koehr, 831 S.W.2d at 927. Where the Missouri and federal rules are essentially the same, federal precedent constitutes persuasive, although not binding, authority. Hemme v. Bharti, 183 S.W.3d 593, 597 (Mo. banc 2006).

The federal courts are in agreement concerning a party's duty to designate and prepare a corporate designee. United States v. Taylor, 166 F.R.D. 356, 360 (M.D.N. Carolina 1996)(8A. Charles A. Wright, Arthur R. Miller, Richard L. Marcus, Federal Practice and Procedure §2103 (2d Ed. 1994)). The testimony elicited at a corporate designee's deposition represents the knowledge of the corporation, not the individual deponent. Taylor, 166 F.R.D. at 361. If the persons designated by the corporation do not possess personal knowledge of the matters set

out in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation. Taylor, 166 F.R.D. at 361. Thus, the duty to present and prepare a corporate designee goes beyond matters personally known to that designee or to matters in which that designee was personally involved. Taylor, 166 F.R.D. at 361; S.E.C.v. Morelli, 143 F.R.D. 42, 45 (S.D.N.Y 1992).

Rule 30(b)(6), and its Missouri Counterpart Rule 57.03(b)(4), is designed to avoid the possibility that several organizational employees might be deposed in turn, with each disclaiming personal knowledge of facts that are clearly known to persons within the organization and thus to the organization itself. Brazos River Authority v. GE Ionics, Inc., 469 F.3d 416, 432-33 (5<sup>th</sup> Cir. 2006). The organizational deponent must be prepared to testify to the extent matters are reasonably available, whether from documents, current or past employees, or other sources. Brozos River Authority, 469 F.3d at 433. This duty extends not only to facts, but also to subjective beliefs and opinions. Id. at 433 If it becomes obvious that the corporate designee is deficient, the organization is obligated to provide a substitute. Id. at 433. If the designated witness is not knowledgeable about relevant facts, and the organization has failed to designate an alternative, knowledgeable deponent, the corporate designee's appearance is, for all practical purposes, no appearance at all. Id. at 433-434; Resolution Trust Corp. v. S. Union, 985 F.2d 196, 197 (5<sup>th</sup> Cir. 1993).

On May 9, 2007 Respondent granted Relator's Motion to Compel, overruling

defendant's objections to deposition topics No. 1 and No. 3. Deposition Topic No. 1, and defendant's overruled objection to it, provide as follows:

(1) Defendant's knowledge of decedent, Irwin Reif's fall on February 2, 2001;

OBJECTIONS: Defendant objects to the notice as vague, ambiguous, overbroad and unduly burdensome.

On May 9, Respondent overruled this objection. (A44-A45).

On May 31, 2007, Relator took the deposition of defendant's designated corporate designee. (A112-A128). The corporate designee was produced on five topics including topics No. 1 and No. 3. (A112-A128). In response to deposition topic No. 1, the corporate designee testified that she did not have any personal knowledge of how Mr. Reif fell and made no effort whatsoever to determine the matters known or reasonably available to the organization on this topic. (A114-A117).

An example of defendant's corporate designees complete failure to prepare to testify as to matters known or reasonably available to defendant concerning the facts surrounding Mr. Reif's fall is set forth below as follows:

Q. Okay. Let me ask you a different question. Based upon your recollection - - do you know how Mr. Reif fell?

A. I do not know how he fell.

Q. Do you know if anybody that works for Missouri Baptist knows how he fell?

A. No.

\* \* \* \*

Q. And you didn't try to find out, correct? In preparation for your deposition today, you did not try to find out if anybody -

A. Correct

Q. - at Missouri Baptist knew how he fell, is that correct? I just want to be clear.

A. That's correct.

Q. Do you know if Mr. Reif tripped over an electrical outlet plug?

A. I do not know that.

Q. Do you know whether or not anybody at Missouri Baptist knows that?

A. No.

Q. Because you did not try to find out, correct?

A. Correct.

(A116-A117).

Evidence of the corporate designee's complete failure to even attempt to adequately prepare to testify as to matters known or reasonably available to the organization continued as follows:

Q. Before I ask you about these work orders I want to ask you, did you do anything else in preparation for your deposition as far as talking to any other people that work for Missouri Baptist?

A. No.

\* \* \* \*

Q. What I'm referring to, though, is to gather any type of factual information about the incident. Did you speak to anybody else besides your attorneys?

A. No.

(A115).

\* \* \* \*

Q. Ms. Stroh, are you indicating to us that you did not do that? You did not try to gather all the information available to Missouri Baptist through its own employees about how this incident took place?

A. Since the day of the incident I would say I have not spoken to anyone recently, if that's what you are asking.

Q. What I'm asking is because you've been identified and produced as the corporate designee, did you try to

determine what knowledge Missouri Baptist had about how this incident took place?

\* \* \* \*

A. Not recently. I mean no. No.

Q. So since you realized that you were to be designated as the corporate designee, you did not try to gather that information, is that correct?

A. No. That's correct.

Q. What would your information be based upon about this incident that took place?

A. My own recollection, and what I recall as talking place that day when the incident happened.

(A116).

The corporate designee was also not prepared to testify as to matters known or reasonably available to defendant regarding deposition topic No. 3. Topic No. 3 provides as follows:

(3) The reason and/or basis for the presence of an electrical plug and/or electrical plug box on an aisle floor of the premises near and around exercise equipment at the time of plaintiff's fall on February 2, 2001.

(A19-A22).

This topic was amended by the Respondent's Order of May 9, 2007 as follows:

(3) Refers to the design and placement of the electrical plug box at issue.

(A44-A45).

During the corporate designee's deposition the deponent was specifically asked about the design and placement of the electrical plug boxes. Once again, the corporate designee demonstrated a complete failure to prepare to testify as to matters known or reasonably available to defendant. The corporate designee's deposition proceeded, in pertinent part, as follows:

Q. Would you be able to tell us who decided where these electrical outlet plugs should be placed?

A. I could not tell you that.

Q. I take it you couldn't tell us who decided what the height of the electrical outlet plugs should be?

A. I could not.

\* \* \* \*

Q. Did you try to find anybody that might know that information prior to your deposition today?

\* \* \* \*

A. I did not try to find out why the plugs were located where they were.

(A125).

Defendant's counsel indicated during the deposition that a corporate designee does not have to testify as to matters known or reasonably available to the organization but only to the individual deponent's personal knowledge. This is evidenced by the following exchange between counsel that took place at the deposition:

Q. So you are telling us that Missouri Baptist has no knowledge about what caused Mr. Reif to fall, based upon any witnesses?

MR. WASSERMAN [defense counsel]:

Well, let me object to the question. I think that mischaracterizes her testimony. I think she said that she doesn't know. I understand that she's here as a corporate representative, but in a case where we've identified several fact witnesses of the incident, don't know that a single person can give you the Missouri Baptist position of how Mr. Reif fell. So I think she's capable of telling you what her memory was at the time, and I think that may be all she can do.

\* \* \* \*

MR. WASSERMAN. All I can tell you Chris, is that she can tell you what she knows. I can tell you she

hasn't, in preparation for this deposition, gone back and interviewed all the folks that we identified as witnesses. So if you feel that our producing her as a corporate representative on topic number one was insufficient somehow, then we can take that up with the judge and figure it out. And if we have to reconvene with her or someone else, we will just do what the Court tells us to do.

(A115-A116).

In the present case, defendant did absolutely nothing to prepare its corporate designee to testify as to matters known or reasonably available to the corporation. This is a violation of the plain language of Rule 57.03(b)(4) which provides that the corporate designee “shall testify as to matters known or reasonably available to the organization.” Rees, 943 S.W.2d at 4 (the general rule is that use of the word “shall” is mandatory and not permissive). Moreover, the testimony of a person designated to answer questions under Rule 57.03(b)(4) is not the deposition of an individual “but under 57.03(b)(4) is the deposition of the corporate defendant.” Annin v. Bi-State Development Agency, 657 S.W. 2d 382, 386 (Mo. App. E.D. 1983). If the persons designated by the corporation do not have personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designee so that they may give knowledgeable and binding answers for the corporation. Taylor, 166 F.R.D. at 361. A party does not fulfill its obligation at a

corporate designee deposition by stating it has no knowledge or position with respect to a set of facts or area of inquiry within its knowledge or reasonably available to the organization. Starlight Int'l Inc., v. Herlihy, 186 F.R.D. 626, 638 (D. Kan. 1999).

***C. Defendant's New Privilege Arguments To Support Respondent's Ruling Are Improper And Without Support In The Record***

Defendant argues that Respondent's ruling denying Relators Motion to Compel is proper because the deposition topics, and Relator's counsel's questions during the corporate designee deposition, sought to obtain work-product and attorney-client information through the "back door." Defendant did not raise this objection before or during the deposition of its corporate designee. Moreover, defendant did not make this argument to Respondent as a basis for its failure to prepare its corporate designee to testify as to matters known or reasonably available to the organization. In a writ proceeding, the reviewing court is limited to the record made in the court below. State ex rel. Dixon v. Darnold, 939 S.W.2d 66, 69 (Mo. App. S.D. 1997). In the present case, defendant did not make a privilege claim to the trial court and there is no basis for such a claim to support the trial court's ruling.

When a party asserts a privilege as a basis to avoid discovery, the burden of proof shifts from the proponent of discovery to the opponent of discovery. Darnold, 939 S.W.2d at 70. A party that asserts the work-product doctrine as a shield to discovery has the burden of establishing that the privilege applies. State ex rel. Ford

Motor Co. v. Westbrooke, 151 S.W.3d 364, 367 (Mo. Banc 2004). Blanket assertions of work product are insufficient to invoke its protection. Westbrooke, 151 S.W. 3d at 367. In order to invoke work product protection, the party opposing discovery must establish, via competent evidence, that the materials sought to be protected are, among other things, prepared in anticipation of litigation or trial, and were prepared by or for a party or a representative of the party. Id. A party challenging the privilege must be given sufficient information to assess whether the privilege claimed is applicable. Id. “Limited discovery by deposition or otherwise regarding work product may be necessary.” Through this process, the parties are able to develop a factual record that is sufficient for a court to reach an informed decision. Id.

Similarly, when a party asserts the attorney-client privilege as a shield to discovery, the party claiming the privilege must supply the court with sufficient information to enable the court to determine that each element of the privilege is satisfied. Darnold, 939 S.W.2d at 70. A failure of proof as to any element of the privilege causes the claim to fail. Id.

An unsupported claim of privilege raised for the first time before an appellate court does not support Respondent’s ruling denying Relator’s Motion to Compel.

### **CONCLUSION**

Rule 57.03(b)(4) requires an organization to produce a corporate designee for deposition that is prepared to testify as to matters known or reasonably available

to the organization. This rule plays a fundamental role in the Missouri system of justice by helping place organizations and individuals on an equal playing field in the discovery process. Respondent's ruling of August 7, 2007, denying Relator's Motion to Compel, undermines this essential principal of Missouri Law.

Relator, therefore, respectfully requests that this Court make its Writ of Mandamus absolute and order Respondent to grant Relator's Motion to Compel.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.03(b) and contains 4,539 words, excluding the cover, this certification and the appendix as determined by Microsoft Word software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That two true and correct copies of the attached brief, and a disk containing a copy of this brief, were sent via U.S. Mail, postage prepaid, this 24<sup>th</sup> day of April, 2008, to:

**Steven S. Wasserman**, *WILLIAMS VENKER & SANDERS LLC*, 10 South Broadway, Suite 1600, St. Louis, MO 63102

**Judge Jamison**, St. Louis County Circuit Court, Division 10, 7900 Carondelet Avenue, Clayton, MO 63105

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