

IN THE SUPREME COURT OF MISSOURI

CASE NO. SC 88777

STATE *ex rel.* FIDELITY NATIONAL TITLE INSURANCE COMPANY,

Relator,

vs.

**THE HONORABLE NANCY L. SCHNEIDER, JUDGE
CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI**

Respondent.

On Grant of Preliminary Writ of Prohibition

RELATOR'S REPLY BRIEF

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ARGUMENT

THE BRIEF FILED ON BEHALF OF RESPONDENT FAILS TO SHOW WHY RESPONDENT’S ORDER COMPELLING THE DEPOSITION OF FIDELITY’S TOP-LEVEL EXECUTIVE SHOULD NOT BE VACATED.

In its Preliminary Writ of Prohibition, the Court ordered Respondent to “show cause” why her Order compelling the deposition of Fidelity’s top-level employee should not be vacated. Preliminary Writ of Prohibition (September Session 2007, En Banc). To do so, Respondent needed to show that she followed the law as laid down by this Court in State ex rel. Ford Motor Company v. Messina, 71 S.W.3d 602, 607 (Mo. banc 2002). Rather than make the necessary showing, the Brief that has been filed on Respondent’s behalf mostly ignores the holding in Messina and, instead, invests itself in the telling of an acid-laced tale about a series of other discovery disputes, complete with two additional volumes of irrelevant appendices. Respondent’s Brief throws off more heat than light and, as a result, utterly fails to demonstrate why the Preliminary Writ in Prohibition should not be made absolute.

Significantly, Respondent’s Brief includes no attempt to distinguish the facts of this case from those that were determinative in Messina. We submit that no distinction has been made because no distinction can be made. Just as the high-level executives of Ford had no involvement in or knowledge of the events and transactions giving rise to the claims in Messina, Fidelity’s top-level executive, Raymond R. Quirk, likewise had no involvement in and has no knowledge of the

events and transactions giving rise to the claims and crossclaims in this case. *See* Quirk Affidavit, ¶s 3, 4, 5, Appendix, p. A-17, Tab E. Nothing in Respondent’s submission shows otherwise. Indeed, as president of Fidelity and C.E.O. of Fidelity’s corporate parent, Mr. Quirk is at least as far removed from the underlying events and transactions at issue in this case as were the executives in Messina.

Unable to distinguish this case from Messina on the basis of any relevant factor, the Brief submitted on behalf of Respondent relies instead upon a self-serving account of past discovery disputes in which Fidelity and its lawyers are said to have engaged in “trench warfare”. The implication of this rhetorical flourish and the argument that follows it is that Respondent based her decision to compel Mr. Quirk’s deposition at least in part on what she perceived to be discovery misconduct on the part of Fidelity. That is not the case, and nothing in the record suggests otherwise.

While it is true that Guarantee filed motions for sanctions in the trial court, it is also true that none of them had merit and Respondent denied each of them. In fact, on at least two occasions counsel for Guarantee has had to apologize for and withdraw the accusations asserted against Fidelity and its lawyers. Respondent also denied, at least “in part”, all but one of Guarantee’s Motions to Compel. *See e.g.* Appendix to Resp. Br., pp. A-370, A-388, A-431, and A-432; Appdx. to Relator’s Br. p. A-1. Moreover, Respondent ruled in favor of Fidelity on Fidelity’s own motion to compel (Appdx. to Resp. Br., p. A-629). Thus, the

history of past discovery disputes presented in Respondent's Brief is neither accurate nor complete.

More important, that history is irrelevant. We have found no decision by a Missouri court holding that claims of misconduct or improprieties of a party or its counsel during discovery are grounds for forcing the deposition of a high-level employee who knows nothing about the transactions at issue. In cases where such misconduct or improprieties may occur, the Missouri Supreme Court Rules prescribe the available remedies. *See e.g.* Rules 57, 58, 61. None of those remedies include forcing a party's high-level executive to submit himself or herself to a deposition, regardless of his or her lack of knowledge of the pertinent facts.

Accordingly, assuming (contrary to fact) that Fidelity had improperly obstructed or thwarted Guarantee's efforts to obtain information through means less intrusive than a deposition of Mr. Quirk, the remedy would not be to compel Mr. Quirk's deposition, particularly where, as here, there has been no showing that Mr. Quirk has personal knowledge of the information Guarantee is seeking. Rather, the remedy would be to compel the discovery through the less intrusive means, *e.g.* by compelling answers to interrogatories, production of documents, or lower level deposition. *See* Rules 57, 58, 61. To the extent it has been implied that Respondent may have done otherwise, she would not have been following Messina.

Under Messina, the relevant factors that Respondent should have considered are as follows: 1) the availability of less intrusive means of discovery; 2) the necessity for the deposition; and 3) the burden, expense, oppression and annoyance to the proposed deponent and his or her organization. Id. at 608.

In addressing these relevant factors, Respondent's Brief falls woefully short. As to the first factor, Respondent's Brief ignores the fact that much of the information that Guarantee allegedly will seek from Mr. Quirk already has been provided to Guarantee by way of interrogatory answers, thousands of pages of documents and hundreds upon hundreds of pages of deposition transcript. Out of all of this discovery, Respondent's Brief cites to not a single Fidelity response that failed to provide relevant information that can be obtained from no one other than Mr. Quirk.

Even if there were such a gap in Fidelity's responses, Guarantee would still have to overcome the fact that it has not yet deposed a Fidelity corporate representative, pursuant to Rule 57.03(b)(4). Significantly, it was not until after the Court issued its Preliminary Writ of Prohibition in this case that Guarantee first served a Notice for the deposition of a corporate designee on the topics about which Guarantee has claimed it intends to examine Mr. Quirk. *See* Notice, Appdx. to Resp. Br. p. A-642. Under Messina, Guarantee should at the very least be required to depose a Fidelity corporate representative on these topics before subjecting Mr. Quirk to a burdensome deposition in a case about which he has no

personal knowledge. *See Id.* at 607 (“Plaintiffs noticed Ford for a Rule 57.03(b)(4) deposition, but have not yet taken that deposition.”).

Given the availability of less intrusive means of discovery and the fact that Mr. Quirk has no knowledge of the underlying events and transactions of this case, Guarantee has no need for his deposition. It is this obvious lack of necessity for a deposition of Mr. Quirk that leads us to suspect that Guarantee’s sole purpose here is that of harassment. Nothing else explains Guarantee’s decision to target Fidelity’s top-level executive for a deposition. That the goal is harassment is further evidenced by the fact that, as Guarantee certainly knows, few if any other depositions could be more disruptive and burdensome for Fidelity than a deposition of Mr. Quirk.

The Brief filed on behalf of Respondent attempts to downplay the burden and oppression Mr. Quirk and Fidelity will suffer if Mr. Quirk is compelled to testify at a deposition. The argument on this point rings hollow. Mr. Quirk lives in Jacksonville, Florida and presides as C.E.O. over a nationwide title insurance operation that includes five separate title insurance companies. Quirk Bio, Appendix, p. A-33, Tab G. He has no knowledge of any dealings between Fidelity and Phoenix Title or between Fidelity and Guarantee, and Guarantee has offered no evidence to suggest otherwise. Quirk Affidavit, ¶s 3, 4, 5, Appendix, p. A-17, Tab E. In view of these facts, forcing Fidelity’s top-level executive into a deposition in a case about which he can say little if anything is, *ipso facto*, unduly burdensome and oppressive. This is the core of the holding in Messina.

Moreover, Guarantee continues to maintain that it wants to depose Mr. Quirk in six separate lawsuits, including one to which Fidelity is not even a party. This means that, in a matter in which he played no role, Mr. Quirk could be forced to answer questions from up to fifteen lawyers. The mere prospect of such a deposition is oppressive enough, not to mention the deposition itself.

Finally, Respondent's Brief argues that because Guarantee produced its top-level executives (Tom Conroy and Hi Blomquist) for deposition, Fidelity should have to do likewise. (Resp. Br. pp. 15-16). This argument is simply disingenuous. Unlike Fidelity, with operations across the country, Guarantee had only two full-time employees, Mr. Conroy and an administrative employee named JoAnna Reed. Unlike Mr. Quirk, Messrs. Conroy and Blomquist were directly involved in Guarantee's decision to underwrite title insurance for Phoenix Title, in Guarantee's belated decision to audit Phoenix Title and, ultimately, in Guarantee's decision to terminate Phoenix Title as an agent for Guarantee. Mr. Conroy negotiated and signed Guarantee's agency contract with Phoenix Title and testified that "I lost my job over this whole matter" with Phoenix Title. Conroy Depo. p. 26. Mr. Blomquist is the one who fired Mr. Conroy.

Given their direct involvement with Phoenix Title and in the underlying events of this case, Guarantee had no choice but to produce Mr. Conroy and Mr. Blomquist for deposition. By contrast, given his lack of involvement, Fidelity should not have to produce Mr. Quirk for deposition. In contravention of the

Court's decision in Messina, Respondent clearly abused her discretion when she ruled otherwise.

Conclusion

In accordance with this Court's decision in Messina, the Court should make absolute its Preliminary Writ of Prohibition.

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that a copy of the foregoing Relator's Reply Brief was served the 22nd day of January 2008 by hand-delivery, expenses prepaid, along with one (1) diskette containing a copy of the same, to:

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Furthermore, the undersigned certifies that: (1) Relator's Reply Brief complies with the limitations contained in Rule 84.06 (excluding the cover, certificate of service and compliance, signature block and appendix, there are 1525

words in Relator's Reply Brief; (2) the name and version of the word processing software used to prepare Relator's Reply Brief is Microsoft Word; and (3) the diskette provided to this Court has been scanned for viruses and is virus-free.
