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JURISDICTIONAL STATEMENT

This is an original proceeding in mandamus seeking to compel Respondent, the Honorable Michael T. Jamison, to compel defendant Missouri Baptist Medical Center d/b/a West County Sports Fitness and Rehabilitation Center to designate and produce one or more substitute officers, directors or managing agents, or other persons who consent to testify on its behalf as to certain matters.

Pursuant to Article V, Section 4, of the Missouri Constitution, the Missouri Supreme Court is authorized to issue extraordinary original remedial writs.

STATEMENT OF FACTS

Plaintiff/Relator Corinne Reif is the widow of Irwin J. Reif. (Exh. 1, p. 1)¹ Mrs. Reif brings suit against Missouri Baptist Medical Center d/b/a West County Sports Fitness and Rehabilitation Center (hereinafter also referred to as “Missouri Baptist”), claiming Missouri Baptist negligently caused her husband to fall, and that the fall caused her husband’s death. (Exh. 1, p. 2-3). Specifically, Plaintiff alleges Mr. Reif was walking around the exercise equipment provided for the invitees of Defendant when he tripped on an unmarked and unbarricaded electrical plug and/or electrical plug box located on the floor. (Exh. 1, p. 2). Defendant denied all such allegations. (Exh. 2, p. 5-7).

Plaintiff originally filed this action in 2003. (*See* Exh. 1). Plaintiff dismissed that 2003 action without prejudice, however, and later refiled an identical action in August 2006. (*See* 2006 Petition, attached hereto as Exhibit A to Respondent’s Appendix). Defendant again denied all

¹ All exhibit references, unless otherwise indicated, are to the exhibits submitted by Plaintiff with her Petition for Writ of Mandamus and refer to the exhibit number followed by the page number of the consecutively numbered exhibit package or to the deposition transcript page, where applicable.

allegations. (*See* 2006 Answer, attached hereto as Exhibit B to Respondent's Appendix).

On March 31, 2004, in the course of discovery in the original action, Defendant answered interrogatories served upon it by Plaintiff. (Exh. 3, p. 9-18). In those 2004 discovery responses, Defendant identified a total of seven individuals known by Defendant to have witnessed the occurrence or who were present at the scene within 60 minutes of the occurrence. (Exh. 3, p. 11-12).

Later, as part of the 2006 action, Defendant filed supplemental answers to that discovery and identified the same seven individuals plus Plaintiff Corinne Reif as either witnesses or individuals who were in the area. (Defendant's Supplemental Answers to Plaintiff's Interrogatories, Nos. 6 and 17, attached hereto as Exhibit C to Respondent's Appendix, pages 014-015, 020-021). Two individuals were identified as having witnessed the alleged occurrence; a patient named Elaine Glantz and one of Defendant's employees named Pam Diguisseppe. (Exh. C to attached appendix, Nos. 6 and 17, pages 014-015, 020-021). In discovery filed in both the 2003 and 2006 actions, Defendant identified the same eight individuals as being witnesses to the condition of the premises in the area of the occurrence within 60 minutes before or after the incident. (Exh. 3, p. 15;

Exh. C attached hereto, Nos. 6 and 17). The discovery responses in both the 2003 and 2006 actions also disclosed that Defendant is not the owner of the premises in question, but rather leases the property from another company. (Exh. 3, p. 13-14; Exh. C attached hereto, Nos. 13, 18 and 20, pages 018, 021-022).

On March 30, 2007, Plaintiff served a Notice of Taking Deposition pursuant to Rule 57.03(b)(4). (Exh. 4, p. 19). In that notice, Plaintiff requested a corporate designee deposition on five specific topics. (Exh. 4, p. 19-20). Relevant to this current proceeding, deposition topic numbers 1 and 3 asked for a corporate designee to testify regarding the following:

- 1) Defendant's knowledge of decedent, Irwin Reif's fall on February 2 (sic), 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 the plaintiff's fall on February 2 (sic), 2001.

(Exh. 4, p. 19-20). After Defendant filed objections to the deposition topic requests (Exh. 5, p. 23-26) and Plaintiff filed a motion to compel (Exh. 6, p. 27-33), Respondent modified request number 3 to refer "to the design and

placement of the electrical plug box at issue” and overruled Defendant’s objection to request number 1. (Exh. 7, p. 44).

On May 1, 2007, Defendant produced Barbara Stroh for deposition pursuant to the Rule 57.03(b)(4) notice. At the time of the incident, Ms. Stroh was the operations manager of the rehabilitation facility, which included being Manager of the cardiopulmonary area. (Exh. 10, 000119, p. 27:22-28:6). Ms. Stroh testified she was appearing for deposition as a corporate designee for Defendant and was being produced to testify as to all five topics listed in the corporate designee notice. (Exh. 10, 000113, pp. 5:9-14, 20-24; 000114, 6:7-10). She testified that in preparation for her deposition, she spoke to Defendant’s attorneys. (Exh. 10, 000115, p. 10:18-21). She further testified that in preparation for her deposition, she reviewed some work orders pertaining to the facility and Defendant’s interrogatory responses. (Exh. 10, 000114, pp. 6:15-7:13).

Purportedly pursuant to deposition topic number 1, Plaintiff’s counsel asked, “Since you are being produced as the corporate designee, I want to ask you, what is your understanding of *how* Mr. Reif’s fall occurred?” (Exh. 10, 000115, p. 12:10-12)(emphasis added). In response, Ms. Stroh testified as to Defendant’s position on how the incident *did not* occur, in that she testified the electrical plugs—which Plaintiff alleges were the cause of the

incident—are not a safety hazard. (Exh. 10, 000120-123, pp. 31-43). She also testified there were staff members in the area and that an incident report had been prepared. (Exh. 10, 000114, p. 7:16-19; 000115, p. 13:1-7).

With respect to deposition topic number 3, which asked for the reason and/or basis for the presence of an electrical plug, or an electrical plug box on an aisle floor of the premises near or around exercise equipment, Ms. Stroh testified the reason and/or basis was that there was electrical equipment in various areas of the facility that needed access to electrical plugs. (Exh. 10, 000125, p. 50:9-17).

On the record at the deposition, Plaintiff's counsel expressed concern that it did not appear Ms. Stroh had interviewed all the fact witnesses identified by Defendant. (Exh. 10, 000116, p. 14:8-23). Defendant's counsel reminded Plaintiff's counsel that Defendant, in interrogatory answers filed in the original 2003 action and long before Ms. Stroh's deposition, had identified several fact witnesses and further indicated that Mrs. Stroh personally had not gone out and interviewed each one in preparation for the corporate representative deposition. (Exh. 10, 000116, p. 14:1-2 and 16:1-4). Mrs. Stroh testified her source for the information about the incident was her recollection of the facts as her staff presented them to her on the day of the incident. (Exh. 10, 000116, p. 17:7-18).

Plaintiff has chosen not to depose five of the other six individuals—some of whom are no longer employed by Defendant—identified in Defendant’s interrogatory responses as having knowledge of the incident or as having been in the vicinity of the location of the incident within 60 minutes of its alleged occurrence. Plaintiff has deposed Elaine Glantz, a patient of Defendant and one of the two persons identified as being eyewitnesses to the incident.

On July 23, 2007, nearly three months after the corporate representative deposition, Plaintiff filed a Motion to Compel and for Sanctions, arguing that Barbara Stroh, as the corporate designee and in response to deposition topic number 1, did not know *how* Mr. Reif fell. (Exh. 9, p. 59). Further, Plaintiff argued that in response to request number 3, Ms. Stroh “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 corporation’s knowledge of this issue.” (Exh. 9, p. 59-60).

On July 25, 2007, Defendant filed its Memorandum in Opposition to Plaintiff’s Motion to Compel and for Sanctions. (Exh. 10). Among other things, Defendant argued it had fully complied with Rule 57.03(b)(4) and, if Plaintiff believed there were topics to which the corporate designee could not testify, it was because Plaintiff failed to describe with reasonable

particularity the matters on which examination was requested. (Exh. 10, p. 94). As to the topics actually requested, Defendant argued Ms. Stroh testified to the best of her ability as to matters known or reasonably available to Defendant regarding Defendant's knowledge on the requested topics. (Exh. 10, p. 95).

On August 7, 2007, after hearing arguments of counsel, Respondent denied Plaintiff's Motion to Compel and for Sanctions. (Exh. 11, p. 159). Because Plaintiff's counsel indicated at the hearing an intent to seek interlocutory review of the discovery ruling, Respondent continued the trial of the case (previously set for September 24, 2007) to February 11, 2008. (Exh. 11, p. 159). Approximately three months thereafter, on November 13, 2007, Plaintiff sought a writ of mandamus from the Missouri Court of Appeals, Eastern District, which the court denied on November 15, 2007. (Exh. 12, p. 160).

On December 10, 2007, Plaintiff sought a writ of mandamus from this Court, with Respondent filing Suggestions in Opposition of same on January 22, 2008. On February 19, 2008, this Court issued an Alternative Writ of Mandamus, to which Respondent filed an Answer/Return on March 19, 2008. This briefing follows.

ARGUMENT IN RESPONSE TO RELATOR’S SOLE POINT

RELIED ON

Relator is not entitled to an Order of Mandamus directing Respondent to sustain Relator’s Motion to Compel in that Respondent properly denied Plaintiff’s Motion to Compel because Defendant fully complied with the Rule 57.03(b)(4) deposition notice Plaintiff served upon it, including producing for deposition a well-prepared corporate representative best able to testify as to the matters known or reasonably available to the organization on the topics listed in the deposition notice.

A. Standard of Review

“The trial court is vested with broad discretion in administering the rules of discovery and a reviewing court should not disturb a ruling absent an abuse of discretion.” *State ex rel. Upjohn Co. v. Dalton*, 829 S.W.2d 83, 84-85 (Mo.App. E.D. 1992). A trial court rules on discovery requests in the first instance, and the appellate courts will prohibit a trial court from acting only in rare circumstances where the trial court abuses its discretion. *See State ex rel. City of Springfield v. Brown*, 181 S.W.3d 219, 221 (Mo.App. S.D. 2005); *State ex rel. Williams v. Lohmar*, 162 S.W.3d 131, 133 (Mo.App. E.D. 2005).

B. This Court should quash the Alternative Writ and deny Relator's Petition for Writ of Mandamus challenging Respondent's August 7, 2007 order because Defendant fully complied with the corporate representative deposition notice and Respondent properly exercised his discretion in denying Plaintiff's Motion to Compel and for Sanctions.

Defendant Missouri Baptist fully complied with Plaintiff's Rule 57.03(b)(4) deposition notice in producing the witness best able to testify as to matters known or reasonably available to the organization on the topics listed in the deposition notice. As such, Respondent did not abuse his discretion in his discovery rulings in this matter.

Rule 57.03(b)(4) states:

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.

Rule 57.03(b)(4) (emphasis added).

Here, in compliance with Rule 57.03(b)(4), defendant produced Ms. Stroh as its corporate designee to testify to the best of her ability as to matters known or reasonably available to Defendant regarding the deposition topics identified by Plaintiff and as amended by the trial court. Ms. Stroh, who is no longer employed by Defendant, was the Manager in charge of operations at Defendant's facility at the time of decedent's fall in February 2001. (Exh. 10, 000113, p. 4; 000119, pp. 27-28).

1. Deposition Topic No. 1

Deposition topic No. 1 requested, in extremely broad language, "Defendant's knowledge of decedent, Irwin Reif's fall on February 2, 2001."² (Exh. 4, pp. 19-20). Plaintiff erroneously claims Ms. Stroh's

² The date of the incident as alleged in both the Petition filed in 2003 and that filed in 2006 is February 2, 2001, but Defendant is only aware of an

testimony was somehow inadequate on this topic because she did not know the *cause* of decedent's fall beyond what had been reported on the day of the incident. Deposition topic No. 1 did not, however, specifically include the *cause* of the fall, but rather only inquired as to Defendant's knowledge that decedent fell. (Exh. 4, pp. 19-20).

At the deposition, Ms. Stroh testified to the best of her ability as to matters known or reasonably available to Defendant regarding Defendant's knowledge as to decedent's alleged fall at Defendant's facility. (*See generally* Exh. 10, 000115-125, pp. 12-53). Ms. Stroh provided what is reasonably known about the "who, what, where and when" of the alleged fall. She testified she, as the operations manager, was aware that decedent fell in February 2001, that he fell before lunchtime near some exercise equipment on the lower level of the cardiopulmonary area to the right of the stairs, that some of Defendant's staff members were in the area near where he fell, and that it was not noted by anyone specifically how he fell. (Exh. 10, 000115, pp. 12-13; 000117, pp. 19-21). Further, she drew a diagram of the exercise equipment and the lower level of the cardiopulmonary area (Exh. 10, 000118-119, pp. 23-26), and she identified and described some

incident involving Mr. Reif reported as having happened on February 1, 2001.

photographs taken in the cardiopulmonary area in or around February 2001. (Exh. 10, 000120, pp. 31-33). Ms. Stroh further testified her knowledge regarding the fall is based upon her own recollection and the facts presented to her by Defendant's staff members who were working on the day decedent fell. (Exh. 10, 000116, p 17).

Further still, although Plaintiff alleges she could not specifically testify as to the "how" of the incident, she did testify as to Defendant's position on how the incident *did not* occur in that she testified the electrical plugs—which Plaintiff alleges were the cause of the incident—are not a safety hazard. Specifically, Plaintiff's counsel questioned her extensively regarding the electrical outlets and plugs, whether they posed a tripping hazard, and what interventional efforts Defendant made to alleviate any tripping hazard. (Exh. 10, 000120-123, pp. 31-43). In response to that line of questioning, Ms. Stroh, as the corporate designee, explained why it was unlikely a patient could have tripped over an electrical outlet plug, even if the potential to do so theoretically exists. (Exh. 10, 000123, pp. 42:9-21 and 43:1-17).

In light of the position being taken by Plaintiff now and in her Motion to Compel, it is obvious that the only failure regarding the corporate designee deposition was Plaintiff's failure to describe the topics with

reasonable particularity, as required by Rule 57.03(b)(4). Based on the questioning at the deposition, Plaintiff apparently was most interested in discovering *how* the corporation believes the incident occurred. (Exh. 10, pp. 12:10-18:24). Although that topic was not listed in the Rule 57.03(b)(4) notice, Ms. Stroh, on behalf of the corporation, nevertheless provided all of the information that was available to her and the corporation either from her own recollection or from information she obtained from Defendant's staff members at the time of the incident regarding decedent's fall. That her response to the specific question of *how* the incident occurred was answered on behalf of the corporation with an "I don't know" type of response may not have been the answer Plaintiff was hoping for, but it was nonetheless a truthful response and the position of the corporate Defendant.

Further, Defendant identified in its original interrogatory answers from the action filed in 2003 (Exh. 3, pp. 9-18) and its Supplemental Answers to Plaintiff's Interrogatories filed in the 2006 action a total of eight witnesses, including Plaintiff herself, who were present within sixty minutes of decedent's fall, two of whom claim to have actually witnessed the fall. (*See* Defendant's Supplemental Answers to Plaintiff's Interrogatories, Nos. 6 and 17, attached hereto as Exhibit C). Of the two eyewitnesses, one (Elaine Glantz) was a patient of the facility and Plaintiff's counsel has

already deposed her in this case. The other person identified as an eyewitness, Pam Diguissepe (now Quarenghi), is currently employed by Defendant. (Exhibit C, No. 17). Although Defendant has made Ms. Quarenghi available for deposition, Plaintiff has not chosen to take her deposition.

It seems clear Plaintiff is trying to use a single corporate representative deposition as a substitute for conducting all other fact witness discovery. While Plaintiff may believe this is an efficient way to conduct discovery, it is not an appropriate way to do so. None of the cases cited by Plaintiff in any of her briefing in this writ proceeding supports this as a proper use of Rule 57.03(b)(4).

2. Deposition Topic No. 3

Deposition topic No. 3 requests, again in broad language, “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 the plaintiff’s fall on February 2, 2001.” (Exh. 4, pp. 19-20). This topic was amended by the trial court to refer to the reason and/or basis for “the design and placement of the electrical plug box at issue.” (Exh. 7, pp. 44-45). Plaintiff erroneously implies Ms. Stroh’s testimony was inadequate on this topic because she did not know the name of the individual

or entity that determined the placement of the electrical outlet at issue. Ms. Stroh testified to the best of her ability as to matters known or reasonably available to defendant regarding the design and placement of the electrical plug box at issue, in light of the fact that Defendant does not own the property at issue.

Ms. Stroh testified that she was personally familiar with the electrical outlets present at the Defendant's facility in February 2001. (Exh. 10, 000120, p. 31:21-24). She testified the outlets were in that location so that they could provide electricity for the electrical exercise equipment at various locations in the facility. (Exh. 10, 000125, p. 50:9-21). She testified that the electrical outlets were a part of the facility, and she was not aware of any other entity that had the authority to decide what types of electrical outlets would be used at the facility. (Exh. 10, 000124, pp. 48:7-49:16). In addition, Ms. Stroh testified (and Defendant so stated in its Supplemental Answers to Plaintiff's Interrogatories) that Defendant leased the property. (Exh. 10, 000125, pp. 51:18-21; Exh. A Nos. 13, 18, 20). As the corporate designee, Ms. Stroh was not aware of any employee of Defendant who would know the name of the individual or entity that determined the placement of the electrical outlet at issue. (Exh. 10, 000125, p. 52:8-14).

Ms. Stroh, therefore, provided all of the information that was either her own recollection or facts that were relayed to her by Defendant's staff members regarding Defendant's knowledge of the design and placement of the electrical plug box at issue. As was disclosed to Plaintiff, Defendant does not own the property at issue and was not involved in its construction. (*See* Exh. C, Nos. 13, 18 and 20). Defendant should not be expected to provide any additional information regarding the design and construction of the building when it was not involved in that design or construction and does not have access to that information.

There is no evidence or indication—from Stroh's deposition or otherwise—that Defendant acted in bad faith or was trying to be obstructive to the discovery process in any way. In fact, during the Stroh deposition, Defendant's counsel allowed her to testify beyond the scope of the deposition notice (*See e.g.*, Exh. 10, 000123-124, pp. 45-46), and he assisted Plaintiff's counsel in the fact-gathering process. (Exh. 10, 000126, pp. 54:4-57:8).

Plaintiff primarily relies upon several federal court cases that are factually dissimilar to this one as support of the erroneous proposition that Defendant failed to comply with Rule 57.03(b)(4). One overriding message that can be taken from the cases, however, is that a trial court has broad

discretion in this regard and the sufficiency of each corporate representative designation must be judged on its own facts. *See also State ex rel. City of Springfield v. Brown*, 181 S.W.3d 219, 221 (Mo.App. S.D. 2005)(a trial court rules on discovery requests in the first instance, and the appellate courts will prohibit a trial court from acting only in rare circumstances where the trial court abuses its discretion); *State ex rel. Williams v. Lohmar*, 162 S.W.3d 131, 133 (Mo.App. E.D. 2005)(same).

Illustrative are two cases cited by Plaintiff in his Motion to Compel and for Sanctions. In *Berwind Property Group Inc. v. Environmental Management Group, Inc.*, 233 F.R.D. 62 (D.Mass. 2005), the court found that despite the plaintiff's complaints that the corporate designee was unable to answer some questions related to some topics outlined in the deposition notice, there was "no bad faith on [the corporation's] part nor a willful obstruction of the discovery process." *Id.* at 65. In that case, the designee had not worked on the project at issue but had reviewed corporate files related to the transaction, consulted with inside and outside counsel and answered most questions based on the best corporate information available to him. *Id.* Therefore, the court decided not to order the corporation to produce another corporate designee deposition witness. *Id.*

Similarly, in *Barron v. Caterpillar Inc.*, 168 F.R.D. 175 (E.D. Pa. 1996), the court declined to order defendant Caterpillar to produce another corporate designee because the witness they produced previously was the best person to speak to the topics identified in the deposition notice. *Id.* at 177. The witness' inability to answer all the questions posed to him was caused by the age of the product at issue and the fact that certain information was unavailable to Caterpillar. *Id.* The court found no evidence that Caterpillar acted willfully or in bad faith to obstruct discovery. *Id.* at 178.

Here, Defendant prepared its corporate designee to respond to questions regarding deposition topic Nos. 1 and 3 to the extent the information was reasonably available. Defendant produced Ms. Stroh, a former employee, because she was the Manager of operations at Defendant's facility at the time of the fall, and was the best person to respond to the deposition topics on behalf of Defendant. Ms. Stroh's responses were neither incomplete nor evasive. Like the corporate defendants in *Berwind* and *Barron*, Ms. Stroh was unable to provide answers to some of the questions based on circumstances beyond her control and the control of Defendant. This does not constitute a failure to appear, an obstruction of the discovery process, or an attempt at "sandbagging" by Defendant. Respondent, therefore, properly exercised his discretion in denying

Plaintiff's Motion to Compel, and Plaintiff is not entitled to sanctions or any of the other relief requested.

C. Respondent also properly denied Plaintiff's Motion to Compel because granting the motion would have, in effect, allowed use of the Rule 57.03(b)(4) deposition as a "back door" to discover information from Defendant shielded by the work product doctrine and the attorney-client privilege.

Based on the questioning at Ms. Stroh's deposition and the position being taken by Plaintiff herein, it is obvious that Plaintiff's counsel seems most interested in discovering what the corporation believes was the root cause of the incident, despite the fact that the deposition notice did not list this as a topic to be covered. (Exh. 10, 000115, pp. 12:10-18:24). As such, granting Plaintiff's motion to compel would ultimately allow Plaintiff to misuse the Rule 57.03(b)(4) deposition to delve into the results of pre-suit and post-suit investigation conducted by Defendant's counsel and risk management personnel regarding the cause of the fall, which is an improper use under Missouri law.

In her Brief, Plaintiff claims this argument as to the privileged nature of the information sought is improper and without support in the record to the extent Defendant did not raise a work-product/attorney client privilege

objection during the deposition of the corporate designee. (Relator's Brief, p. 23). Plaintiff's contention, however, misses the point. Defendant did not claim at the time of the deposition, nor is it now claiming, that the deposition topics listed in the notice or the questions actually asked of and answered by the corporate designee at deposition were protected from disclosure by any privilege. Rather, it is the information that Plaintiff now seeks through the Motion to Compel and through this writ proceeding which, if Defendant is ultimately compelled to comply, will be a back door avenue to obtain discovery of otherwise privileged information.

If Plaintiff is merely using the Rule 57.03(b)(4) deposition to seek factual information regarding the circumstances surrounding decedent's fall, then Ms. Stroh provided Plaintiff's counsel all of the information that was reasonably available to her and the corporation either from her own recollection or from information she obtained from Defendant's staff members at the time of the incident regarding decedent's fall. Furthermore, if it is additional fact discovery which Plaintiff seeks, then Defendant identified in its original interrogatory answers from the action filed in 2003 (Exh. 3, pp. 9-18) and its Supplemental Answers to Plaintiff's Interrogatories filed in the 2006 action a total of eight witnesses, including Plaintiff herself, who were present within sixty minutes of decedent's fall,

two of whom claim to have actually witnessed the fall. (*See* Defendant's Supplemental Answers to Plaintiff's Interrogatories, Nos. 6 and 17, attached hereto as Exhibit C). Of the two eyewitnesses, one (Elaine Glantz) was a patient of the facility, and Plaintiff's counsel has already deposed her in this case. The other person identified as an eyewitness, Pam Diguiseppe (now Quarenghi), is currently employed by Defendant. (Exhibit C, No. 17). Plaintiff has not chosen to depose any of the other fact witnesses identified by Defendant.

It is clear by Plaintiff's counsel's questioning in Ms. Stroh's deposition and by this writ proceeding, however, that Plaintiff is trying to use a single corporate representative deposition as a substitute for conducting all other fact witness discovery, which ultimately will lead to discovery of Defense counsel's mental impressions and trial strategy. This is not an appropriate way to conduct discovery because it would reveal information protected by the work product doctrine and attorney-client privilege, and other less intrusive means of fact discovery are available to Plaintiff.

- 1. Plaintiff should not be allowed to discover, via a Rule 57.03(b)(4) deposition, information contained in an incident report created by Defendant's personnel that is protected from disclosure under Missouri law.**

Under Missouri law, incident reports prepared with the intention of seeking legal advice and in anticipation of litigation are protected from discovery by the attorney-client privilege and/or work product doctrine, respectively. *See Enke v. Anderson*, 733 S.W.2d 462, 466-67 (Mo.App. S.D. 1987); Rule 56.01(b)(1) and (3). While privileged matters are absolutely not discoverable, discovery of work product may be possible only in the event the requesting party can: (1) demonstrate a substantial need for the information requested; and (2) demonstrate that the requesting party cannot without undue hardship obtain the substantial equivalent by other means. *Id.* at 466.

With the Motion to Compel and this writ proceeding, it is clear Plaintiff wants to use the Rule 57.03(b)(4) deposition to delve into the results of Defendant's investigation regarding the cause of decedent's fall conducted by counsel and risk management personnel. The incident report is protected from disclosure by both the attorney-client privilege and the work product doctrine because Defendant's employees prepared it during the

course of its investigation with the intention of seeking legal advice and in anticipation of potential litigation. (*Id.* at 000114, p. 8:10-22); *Enke*, 733 S.W.2d at 466-67; Rule 56.01(b)(1) and (3). Plaintiff cannot be permitted to use the Rule 57.03(b)(4) deposition to do an “end-run” around these protections, and thereby discover the content of the incident report that is otherwise privileged and protected from disclosure. That is precisely what Plaintiff is now attempting to do here, and what Plaintiff’s counsel will attempt to do in the event this Court requires Respondent to sustain the Motion to Compel.

- 2. Plaintiff also should not be allowed to discover, via a Rule 57.03(b)(4) deposition, the results of Defendant’s investigation regarding the cause of decedent’s fall, including interviews and witness statements, which are protected from disclosure under Missouri law.**

The work product doctrine precludes an opposing party from discovering materials created or commissioned by counsel in preparation for possible litigation. *See State ex rel. Friedman v. Provaznik*, 668 S.W.2d 76, 80 (Mo. banc 1984)(citing *Hickman v. Taylor*, 67 S.Ct. 385, 329 U.S. 495, 505 (1947)). In addition, the work product doctrine “protects the ‘thoughts’ and ‘mental processes’ of the attorney preparing a case.” *State ex rel.*

Polytech, Inc. v. Voorhees, 895 S.W.2d 13, 14 (Mo. banc 1995). The doctrine generally protects both tangible work product (consisting of trial preparation documents such as written statements, briefs, and attorney memoranda) and intangible work product (consisting of the mental impressions, conclusions, opinions, and legal theories of an attorney or other agent of a party – sometimes called “opinion” work product) from disclosure. *State ex rel. Atchison, Topeka and Santa Fe Ry. Co. v. O'Malley*, 898 S.W.2d 550, 552 (Mo. banc 1995). Intangible work product is afforded absolute work product protection, meaning the substantial need requirement that can authorize production of certain tangible work product does not apply to intangible work product. *Id.* at 553.

Although a party may discover the identities of witnesses with certain knowledge relevant to a case, a party may not discover from which of the witnesses the opposing party has obtained statements. *Id.* In *O'Malley*, this Court held that interrogatories seeking information regarding oral interviews of witnesses were improper because they sought information that was “clearly protected as intangible work product.” *Id.* This Court reasoned that the interrogatories sought a schematic of opposing counsel’s investigative process because they sought information that would reveal the investigative process and relative weight attributed to certain witnesses’ statements by the

opposing side. *Id.* For that reason, this Court held that the work product doctrine applied to protect the requested information. *Id.*

A similar result should be reached here. In this case, Plaintiff is attempting, via a Rule 57.03(b)(4) deposition, to obtain the results of Defendant's investigation conducted by counsel and risk management into the cause of decedent's fall. Plaintiff's counsel stated during Ms. Stroh's deposition that he expected her, as corporate designee, to interview all of Defendant's employees who witnessed decedent's fall and testify about the results of the interviews during the deposition. (Exh. 10, 000116, p. 15:19-24; 16:10-19; 17:2-6). Defendant's investigation was conducted by counsel and risk management and not by Ms. Stroh personally, and Ms. Stroh properly declined to testify about the results of the investigation.

Discovery, via a Rule 57.03(b)(4) deposition, of the results of Defendant's investigation into the case of decedent's fall would result in the disclosure of both tangible and intangible work product because Plaintiff would learn Defendant's investigative process and relative weight attributed to certain witnesses' statements. Plaintiff is not entitled to learn what Defendant, through counsel and risk management, did during the course of its investigation, which witnesses Defendant spoke to, and what those witnesses had to say. *See O'Malley*, 898 S.W.2d at 553. This is clearly

improper under Missouri law, whether attempted via written interrogatory or deposition. *Id.* Plaintiff must not be allowed to use the Rule 57.03(b)(4) deposition as a sword to pierce the shield that the work product doctrine affords information discovered by Defendant during the course of its investigation and in preparation for trial.

Courts from other jurisdictions have dealt with similar situations and held a corporate designee deposition may not be used to discover work product generated during the course of an investigation by opposing counsel. *Securities and Exchange Commission v. Buntrock*, 217 F.R.D. 441, 446 (N.D. Ill. 2003); *Federal Trade Commission v. U.S. Grant Resources, LLC*, 2004 WL 1444951, *4 (E.D. La. 2004); *Kemp v. City of Seattle*, 1999 WL 507858, *10 (Wash.App. 1999).

In *Buntrock*, the Securities and Exchange Commission (“SEC”) brought a civil fraud enforcement action against corporate officers. *Buntrock*, 217 F.R.D. at 443. One of the officers, Buntrock, sought to depose SEC personnel to testify concerning the results of an investigation that led to the filing of the enforcement action. *Id.* The court found that Buntrock, rather than using written discovery and then conducting the necessary oral discovery from witnesses with knowledge of the facts alleged in the complaint, sought instead to use a corporate designee deposition to

ascertain the results of the SEC's investigative efforts by its attorneys, which constituted work product. *Id.* at 445. The court was not persuaded by Buntrock's contention that he was merely seeking "facts" and the SEC's "position" on the facts, because it was clear Buntrock actually sought the SEC's legal position on the case and how it arrived at that position. *Id.* at 446. Significantly, the court noted the "facts" were available to Buntrock elsewhere and through other means. *Id.*

In *U.S. Grant Resources*, the Federal Trade Commission ("FTC") sought equitable relief for the allegedly deceptive advertising practices of the defendants. *U.S. Grant Resources*, 2004 WL 1444951 at *1. The defendants sought to depose a corporate designee of the FTC on matters concerning its investigation process and the results of the investigation that led to the filing of the equitable action. *Id.* at *3, 9. The court found the defendants were inappropriately attempting to use the corporate designee deposition to conduct a *de facto* deposition of opposing counsel and delve into the theories, opinions and mental impressions of the FTC attorneys. *Id.* at *9. Because FTC attorneys and FTC employees working under the direction of attorneys conducted the investigation at issue, the deposition would either require the testimony of one or more attorneys, or require FTC attorneys to prepare other witnesses to testify. *Id.* This was improper

because the deposition would result in the disclosure of “how the FTC intends to marshal its facts, documents and other evidence and to discern the deliberations, mental impressions and/or thought processes” upon which the equitable action was predicated. *Id.* Thus, the court quashed the deposition notice, which sought “either the deposition of opposing counsel or the practical equivalent thereof.” *Id.*

In *Kemp*, a discharged employee filed suit against her former employer, alleging disability discrimination and race discrimination. *Kemp*, 1999 WL 507858 at *1. The employee sought to depose a corporate designee of the City who could explain, among other things, the factual and legal bases for the City’s position in the lawsuit. *Id.* at *9. The court found the employee improperly attempted to use the corporate designee deposition to discover the defense counsel’s thoughts and impressions and strategies in preparation for trial, which was protected by the work product doctrine. *Id.* at 9-10. More specifically, the court found work product encompasses “interviews, statements, memoranda, correspondence, briefs, mental impressions, personal briefs, and countless other tangible and intangible” things. *Id.* at 10.

The cases above are instructive here because Plaintiff is attempting to do exactly what the requesting parties attempted to do in those cases – use a

corporate designee deposition as a “back door” to discover the results of Defendant’s investigation into the root cause of decedent’s fall conducted by counsel and risk management in anticipation of litigation. Just as the court in *Buntrock* discovered, Plaintiff is not merely attempting to discover facts or the Defendant’s position on the facts (Ms. Stroh’s deposition already provided her with this information), but is actually attempting to discover Defendant’s legal position on the case and how it arrived at that position. See *Buntrock*, 217 F.R.D. at 446. In order to answer all of the questions that plaintiff’s counsel asserts in the Motion to Compel and herein, Defendant would either have to appoint one of its attorneys to testify or have its attorneys prepare other witnesses to testify regarding the results of Defendant’s investigation done in anticipation of litigation. See *U.S. Grant Resources*, 2004 WL at *9.

This information is absolutely protected from disclosure as intangible work product, and Plaintiff should not be allowed to abuse Rule 57.03(b)(4) for purposes of circumventing the work product doctrine. Similarly, Plaintiff should not be permitted to discover how Defendant intends to marshal its facts, documents and other evidence or to discover the deliberations, mental impressions and/or thought processes upon which

Defendant's legal position is based. *See U.S. Grant Resources*, 2004 WL at *9; *Buntrock*, 217 F.R.D. at 446; *Kemp*, 1999 WL at *9-10.

3. Plaintiff will not be prejudiced by quashing the alternative writ because factual information regarding the circumstances surrounding decedent's fall is available to Plaintiff elsewhere and through other means.

Part of the court's rationale in *Buntrock* was that the "facts" allegedly sought by Buntrock via a corporate designee deposition were available to him elsewhere and through means other than a corporate designee deposition. *Buntrock*, 217 F.R.D. at 446. For example, the court stated that Buntrock could have obtained the necessary factual information via written discovery and then by conducting the necessary oral discovery from witnesses with knowledge of the facts alleged in the complaint. *Id.* at 445.

Here, Plaintiff may obtain all of the necessary facts in this case by the same, less intrusive, methods, and Plaintiff has already availed herself of some of these methods, i.e., by deposing fact witnesses. Thus, Plaintiff will not be prejudiced if this Court quashes the Alternative Writ of Mandamus.

CONCLUSION

Defendant prepared its corporate designee to respond to questions regarding the deposition topics to the extent the information was reasonably

available to the corporation. Ms. Stroh's responses were neither incomplete nor evasive. Plaintiff's Motion to Compel sought Defendant to produce another corporate designee, but in doing so, Defendant believes it will ultimately be compelled to reveal the results of Defendant's investigation conducted by counsel and risk management into the cause of decedent's fall. This information is absolutely protected from disclosure by the work product doctrine and/or the attorney-client privilege. Respondent, therefore, properly exercised his discretion in denying Plaintiff's Motion to Compel, and Plaintiff is not entitled to sanctions or any of the other relief requested in the Petition for Writ of Mandamus. This Court should quash its Alternative Writ and deny Plaintiff's Petition for Writ of Mandamus.

WILLIAMS VENKER & SANDERS LLC

By: _____

Steven S. Wasserman, #41078
Lisa A. Larkin, #46796
Bank of America Tower
100 North Broadway, 21st Floor
St. Louis, MO 63102
(314) 345-5000
(314) 345-5055 FAX
swasserman@wvslaw.com
llarkin@wvslaw.com

ATTORNEYS FOR DEFENDANT
MISSOURI BAPTIST MEDICAL
CENTER d/b/a WEST COUNTY
SPORTS FITNESS AND
REHABILITATION CENTER

RULE 84.06(c) CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, pursuant to Supreme Court Rule 84.06(c), that the foregoing Respondent's Brief contains 7,345 words (exclusive of the appendix) and that counsel relied on the word count of the word-processing system used to prepare the brief (Microsoft Word for Windows). Counsel further certifies that the disks containing electronic copies of the Respondent's Brief have been scanned for viruses and are virus free.

Steven S. Wasserman, #41078
Lisa A. Larkin, #46796
100 North Broadway, Suite 2100
St. Louis, Missouri 63102
314-345-5000
314-345-5055 (fax)
Counsel for Defendant

PROOF OF SERVICE

One copy of the foregoing Respondent's Brief and Appendix, along with one 3 ½ inch diskette containing a true and accurate electronic copy of the Brief, were hand-delivered on the 22nd day of May 2008, to:

Christopher W. Dysart
The Dysart Law Firm
100 Chesterfield Business Parkway
2nd Floor
Chesterfield, MO 63005
636-812-0191
Attorney for Plaintiff/Relator

The Honorable Michael Jamison
St. Louis County Circuit Court
Division 10
7900 Carondelet Ave.
Clayton, MO 63105
314-615-1510
Respondent

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