IN THE MISSOURI SUPREME COURT

No. SC88987

STATE EX REL. CORINNE REIF

Relator,

vs.

THE HONORABLE MICHAEL T. JAMISON

Respondent.

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

RELATOR'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

I. ARGUMENT SUMMARY (Replies to Argument B. of Respondent's Brief)

The Honorable Michael T. Jaminson, (hereinafter "Respondent") contends an Order in Mandamus is not warranted in this case because (A) Deposition Topic No. 1 did not specifically identify the cause of decedent, Irwin Reif's fall as a deposition topic; (B) defendant, Missouri Baptist Medical Center d/b/a West County Sports Fitness and Rehabilitation Center's (hereinafter, "defendant") corporate designee, Barbara Stroh (hereinafter "Ms. Stroh") was "well-prepared" to respond to the deposition topics specified in Relator, Corinne Reif's, corporate designee notice; (C) defendant identified eight separate fact witnesses and this relieves defendant of the duty to produce a corporate designee prepared to testify "as to matters known or reasonably available to the organization."; (D) defendant's corporate designee was properly prepared to respond to Deposition Topic No. 3; and (E) the cases cited by Relator to support Mandamus are distinguishable. Each of these contentions is without merit.

A. Respondent overruled defendant's objection that Deposition Topic No. 1 is not stated with reasonable particularity

Defendant objected to Deposition Topic No. 1 prior to its corporate designee deposition as "vague, ambiguous, overbroad and unduly burdensome." (A23-A26). Respondent overruled this objection. (A44-A45). Respondent's argument that Deposition Topic No. 1 is not described with reasonable particularity ignores this prior ruling.

Respondents argument that Deposition Topic No. 1 is not stated with reasonable particularity also overlooks the plain meaning of the word "knowledge."

The word knowledge is defined by the Oxford American Dictionary as follows:

> n. 1. knowing. 2. all that a person knows. 3. all that is known, an organized body of information.

Oxford American Dictionary 492 (Heald College Ed. 1980).

The word knowledge is defined by Webster's New World Dictionary as follows:

> n. 1. the fact or state of knowing. 2. range of information or understanding. 3. what is known; learning. 4. the body of facts, etc., accumulated by humanity. – to (the best) of one's knowledge as far as one knows.
>
> Webster's New World Dictionary 360 (4th Ed. 2003).

Deposition Topic No. 1, therefore requests "all that defendant knows", or "what is known" of decedent, Irwin Reif's fall. Respondents contention that this topic does not include "how" or the "cause" of Mr. Reif's fall is misplaced.

Respondent attempts to avoid the plain meaning of the words used by claiming Deposition Topic No. 1 only inquired as to defendant's knowledge **that** decedent fell. Respondent's Brief at 16. But this is not the language used in Deposition Topic No. 1. Deposition Topic No. 1 does not state defendants knowledge **that** decedent, Irwin Reif, fell. Relator's Deposition Topic No. 1 states

"defendant's knowledge of decedent, Irwin Reif's, fall…." Moreover, during the corporate designees deposition no objection was made that questions regarding how decedent fell, or the cause of decedent's fall, were outside the scope of the deposition notice.

This Court recognized in Plank v. Koehr, 831 S.W 2d 926, 929 (Mo. Banc 1992) that the topics identified in a Rule 57.03(b)(4) deposition will be stated more broadly than an interrogatory, a request for admission or any other specific form of discovery. In determining if a topic is stated with reasonable particularity, the only question is whether the topic is relevant and the matters to be covered are stated with sufficient clarity so the deponent is able to discern the times, places, persons, objects or events to be covered in the deposition. Plank, 831 S.W. 2d at 929. Deposition Topic No. 1 meets this standard and Respondent's argument that it does not should be rejected.

B. Defendant's corporate designee was not "well prepared" to testify as to matters known or reasonably available to the organization

Respondent contends Ms. Stroh testified to what is reasonably known about the "who, what, where and when" of decedent's fall. Respondent Brief at 16. Ms. Stroh testified at her deposition that she did not know how Mr. Reif fell. (A116, Tr. at 17). Ms. Stroh testified at her deposition that her testimony was based on "[m]y own recollection, and what I recall as taking place that day when the incident happened." (A116, Tr. at 17). Ms. Stroh testified that after she was identified as

defendant's corporate designee she did nothing to determine what knowledge her organization had about how the incident took place. (A116, Tr. at 16-17).

Defendant's counsel clarified defendant's position regarding its duty to prepare a corporate designee to testify by stating " I don't think its incumbent upon a corporate representative to hypothetically interview every single witness to an event, gather all the information, and then come to the deposition and tell you what the hospital's position is on any particular issue, and in this case, how this man fell…. All I can tell you, Chris, is that she can tell you what she knows." A116, Tr. at 15-16. Defendant's position on its duty to prepare its corporate designee for her deposition is similarly illuminated by the following exchange between counsel:

> Q. So are you telling us that Missouri Baptist has no knowledge about what caused Mr. Reif to fall, based upon any witnesses?
>
> MR. WASSERMAN: 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, I don't know that a single person can give you the Missouri Baptist position on 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

that she can do.

(A115-A116, Tr. at 13-14).

It is clear, therefore, that Respondent believes a corporate designee's duty to prepare for a corporate designees deposition is limited to an individual deponent's memory of the incident and nothing more.

The organizational deponent, however, must be prepared to testify to the extent matters are reasonably available, whether from documents, current or past employees, or other sources. Brazos River Authority v. GE Ionics, Inc., 469 F.3d 416, 432-33 (5th Cir. 2006). The intent of the rule is to place natural persons and corporations on a level playing field when taking the deposition of a party. Plank v. Koehr, 831 S.W.2d 926, 929 (Mo. Banc 1992). If the individuals 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 designee so they may give knowledgeable and binding answers for the corporation. United States v. Taylor, 166 F.R.D. 356, 361 (M.D.N.C. 1996). The duty to present and prepare a Rule 57.03(b)(4) designee goes beyond matters personally known to that designee or to matters in which the designee was personally involved. United States v. Taylor, 166 F.R.D. 356, 361 (M.D.N. Carolina 1996). Presenting the organization's position includes testifying about the organizations subjective beliefs and opinions, including its interpretation of events. Taylor, 166 F.R.D. at 361. A corporate designee does not properly limit their testimony to their personal memory of an

event, rather it extends to the organization's memory "which has a life beyond that of mortals" and includes matters reasonably available form documents and events or past employees. Taylor, 166 F.R.D. at 361.

Ms. Stroh testified she did nothing to determine her organization's knowledge of decedent, Irwin Reif's fall. (A115-A117). Ms. Stroh's testimony was limited to her personal memory of the event. Ms. Stroh's lack of any effort whatsoever to "testify as to matters known or reasonably available to the organization" is a clear violation of Rule 57.03(b)(4).

C. Defendant does not satisfy its duty to prepare its representative to testify as to matters known or reasonably available to the organization by stating plaintiff can take the deposition of eight fact witnesses none of which are identified as a corporate designee

Respondent contends its identification of eight alleged fact witnesses to decedent, Irwin Reif's, fall eliminates the need to produce a corporate designee that is properly prepared to testify as to matters known or reasonably available to the organization. Such an argument finds no support in the plain language of Rule 57.03(b)(4).[1] Moreover, this argument undermines one of the primary purposes of Rule 57.03(b)(4), which is to permit a party to take the deposition of an opposing

[1] Rule 57.03(b)(4) provides that taking a corporate designees deposition "does not preclude taking a deposition by any other procedure authorized in these rules." Mo. R. Civ. P. 57.03(b)(4).

corporation's representative at a time when the party taking the deposition knows that the statements made by the witness on the identified topic will be admissible against, and binding on, the corporation. Plank, 831 S.W. 2d at 929.

Respondent's position places a corporation at a distinct advantage in the discovery process. Respondent's position would allow a corporation "to deceitfully select at trial the most convenient answer presented by a number of finger-pointing witnesses at the depositions." Taylor, 166 F.R.D. at 361. Truth suffers. Id. Rule 57.03(b)(4) is designed to avoid the possibility that several officers and managing agents 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, 432-433 (5th Cir. 2006); 8A Charles A. Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure §2103, at 33 (2d ed. 1994). Respondent's contention that identification of fact witnesses eliminates the need to prepare a corporate designee "as to matters known or reasonably available to the organization" should be rejected.

D. Defendant's corporate designee did nothing to prepare to testify as to matters known or reasonably available to the organization concerning Deposition Topic No. 3

Respondent contends defendant satisfied its obligation to answer questions regarding Deposition Topic No. 3. Ms. Stroh testified that she had no knowledge concerning the design or placement of the electrical outlet plug. (A125). Ms. Stroh

also testified that "she did not try to find out why the plugs were located where they were." (A125). Ms. Stroh did nothing to prepare to "testify as to matters known or reasonably available to the organization." Mo.R.Civ.P. 57.03(b)(4). Respondent's contention that Ms. Stroh provided all the information available to defendant on the design and placement of the electrical outlet plug is without support in the record.

E. Respondent's attempt to distinguish the cases cited by Relator fails ILS

Respondent contends that the cases cited by Relator in her brief are factually dissimilar to the present case. Specifically, Respondent cites Berwind Property Group, Inc. v. Environmental Management Group, Inc., 233 F.R.D. 62 (D. Mass. 2005) and Barron v. Caterpillar, Inc., 168 F.R.D. 175 (E.D. Pa. 1996) as illustrative of the dissimilarity between the cases cited by Relator and the present case. In Berwind, Supra, the corporate designee gave deposition testimony after reviewing corporate files related to the transaction, consulting with inside and outside counsel, and was found to have answered the questions based on the best corporate information available. In the present case, in preparation for her deposition Ms. Stroh did nothing to determine the corporate information available on either deposition topic.

Similarly, in Caterpillar, Supra, the deponent testified based on the information that was available to the organization. In the present case, Ms. Stroh did nothing to determine what information was available to the organization in preparation for her deposition.

II. RESPONDENT'S CONTENTION RELATOR SHOULD NOT BE ABLE TO TAKE A CORPORATE DESIGNEE DEPOSITION BECAUSE IT MIGHT LEAD TO THE DISCOVERY OF DEFENSE COUNSEL'S MENTAL IMPRESSIONS AND TRIAL STRATEGY IS MISPLACED

(Response to Argument C. of Respondent's Brief)

Respondent contends that requiring an organization to testify about its knowledge of how decedent, Irwin Reif, fell when there are eight alleged witnesses to the event might lead to the discovery of defense counsel's mental impressions and trial strategy. As noted in Relator's Brief, defendant did not raise the work-product doctrine, attorney-client privilege or any other privilege before Respondent and there is nothing in the record to support its present claim of privilege. Moreover, such a blanket assertion of privilege undermines Rule 57.03(b)(4)'s requirement that a corporate designee testify as to matters known or reasonably available to the organization.

Respondent's argument could be raised by every organization confronted with a Rule 57.03(b)(4) deposition. Respondent's position is that requiring a corporation to take a position on an event implicates the work-product and attorney-client privileges. In other words, if more than one witness or document is involved, privilege is implicated. Such an argument would provide an organization a shield to the discovery process that an individual deponent lacks and would undermine the truth seeking purpose of discovery. In fact, Respondent's position, if adopted, would completely eliminate Rule 57.03(b)(4) as a discovery device. Individual

depositions of corporate employees would be all that remains. This is not the law, however, nor should it be the law.

It is not literally possible to take the deposition of an organization. Instead, the information sought must be obtained from natural persons who speak for the organization. Brazos River Authority, 469 F.3d at 433. A corporate designee does not give her personal opinion, "but presents the corporation's 'position' on the topic." Id. In order to arrive at the corporation's 'position' on a topic, an organization has the duty to prepare the deponent by utilizing the information known or reasonably available to the organization, whether from documents, current or past employees or other sources. Taylor, 166 F.R.D. at 361. According to Respondent, preparing a deponent to testify from difference sources of information necessarily implicates the work-product doctrine and the attorney-client privileges. As noted above, this position undermines, and, in effect, eliminates Rule 57.03(b)(4) as a discovery device.

Defense counsel did not object to the deponent answering questions based upon the work-product doctrine, attorney-client privilege, or any other privilege. Ms. Stroh was not asked about any information she received from defense counsel. Ms. Stroh was asked what she did to comply with Rule 57.03(b)(4)'s requirement to be prepared to testify as to matters known or reasonably available to the organization. Ms. Stroh admitted she did nothing to determine the organization's knowledge regarding Deposition Topics 1 and 3.

Such woeful lack of preparation is a clear violation of Rule 57.03(b)(4) and Respondent erred in refusing to sustain 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 2,752 words, excluding the cover, this certification and the appendix as determined by Microsoft Word software; and
2. That the CD 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 7th day of June, 2008, to:

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

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