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No. SC97959

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. KEANNA MILLER, Relator, vs. THE HONORABLE SCOTT A. MILLIKAN, JUDGE OF THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, 22ND JUDICIAL CIRCUIT OF MISSOURI, Respondent.	)	Circuit Court of the City of St. Louis, Missouri Case No. 1722-CC10694 Division 9

BRIEF AND ARGUMENT OF THE RESPONDENT

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ESURANCE PROPERTY & CASUALTY
INSURANCE COMPANY

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STATEMENT OF FACTS

The underlying action concerns an insurance dispute between Relator and Esurance Property & Casualty Insurance Company ("Esurance"). Relator filed suit against Esurance on June 29, 2017 and the parties conducted written discovery. On August 22, 2018, Relator filed a "Notice of Video Recorded Corporate Representative Deposition," seeking to conduct the depositions of Esurance's corporate representative concerning a list of five topics contained in the notice. A copy of the August 22, 2018 notice is attached hereto as Exhibit A. Due to the scope of the five topics, Esurance identified two corporate designees to provide testimony: Anthony Romano and Dean Chalk. Mr. Romano was deposed on August 31, 2018. On September 12, 2018, Relator filed an additional "Notice of Video Recorded Corporate Representative Deposition," expanding the scope of the original notice with an additional topic. A copy of the September 12, 2018 notice is attached hereto as Exhibit B. In order to expedite the conclusion of the corporate representative depositions, Esurance did not object to the improper expansion of the scope of the deposition and produced Mr. Chalk for his deposition on October 2, 2018.

On October 29, 2018, Esurance filed an Amended Answer and Counterclaim for Declaratory Judgment. As a practical matter, the amended pleading added only one new issue to the case: several misrepresentations made by Relator during the claim process that were first discovered during Relator's August 29, 2018 deposition. Relator subsequently requested another corporate representative deposition concerning the new issues raised in Amended Answer and Counterclaim for Declaratory Judgment. Esurance advised Relator

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that it would produce a corporate representative to testify concerning the new issues raised in the amended pleading.

Between November 8, 2018 and April 12, 2019, Relator filed eight independent documents, styled "Third Notice of Video Recorded Corporate Representative Deposition", "Fourth Notice of Video Recorded Corporate Representative Deposition", "Fifth Notice of Video Recorded Corporate Representative Deposition", and various amended permutations of these notices. Copies of the corporate representative deposition notices filed between November 8, 2018 and April 12, 2019 are attached hereto as Exhibits C – J. In several of the notices, Relator sought to conduct discovery concerning the performance reviews of Paul Morris, the original claim handler assigned to Relator's claim. *See, e.g.,* Exhibit J.

Esurance objected to renewed examination of its corporate representative on topics that could and should have been raised during the corporate representative depositions in August 2018 and October 2018. In August 2018, Relator already knew that Paul Morris was the Esurance employee assigned to handle her claim. Esurance's amended pleading did not place Paul Morris' performance at issue. On August 22, 2019, Esurance deposed David Knieriem, Relator's expert concerning claims handling practices. During his deposition, Mr. Knieriem testified that he had no problem with the handling of the claim during the "first day or two," while the claim was being handled by Paul Morris. In fact, Mr. Knieriem testified that, until the handling of the claim was transferred from Paul Morris to Esurance's Special Investigations Unit, he did not believe there was any evidence of vexatious conduct on the part of Esurance. Mr. Knieriem testified that his objections to

the handling of Relator's claim occurred only after the file was transferred from Paul Morris. Accordingly, Plaintiff's claim that Esurance acted in a vexatious manner does not include any action or inaction on the part of Paul Morris, making any inquiry into his performance reviews completely irrelevant.

Respondent entered an Order on May 3, 2019 imposing a single limitation to Relator's third attempt at deposing Esurance's corporate representative.

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STANDARD OF REVIEW

The writ of prohibition functions to "confine judicial activities within the limits of cognizable authority, preventing actions in want or excess of the court's jurisdiction." *State ex rel. Martin v. Peters*, 649 S.W.2d 561, 563 (Mo. App. W.D. 1983). The trial court's exercise of discretion regarding discovery issues should be disturbed only when the trial court is deemed to have abused its discretion." *State ex rel. Humane Soc'y of Mo. v. Beetem*, 317 S.W.3d 669, 672 (Mo.App. 2010). Trial courts have a broad discretion in discovery matters and that discretion is abused only when the exercise of discretion amounts to an injustice. *Creighton v. Jackson*, 879 S.W.2d 639, 641 (Mo. App. W.D. 1994).

To put it another way, a trial court abuses its discretion in administering the rules of discovery when its discovery-related order "is clearly against the logic of the circumstances, is arbitrary and unreasonable, and indicates a lack of careful consideration." *State ex rel. Missouri State Board of Pharmacy v. Administrative Hearing Commission*, 220 S.W.3d 822, 825 (Mo.App. 2007). When the subject matter of a discovery dispute is within the scope of discovery, then discretion only runs to questions of whether the discovery requested is outweighed by a privacy interest or would be burdensome. *Id*. The trial court is presumed to have ruled correctly and the burden is on the party seeking prohibition to show that the trial court exceeded its jurisdiction. *State ex rel. Health Midwest Development Group v. Daugherty*, 965 S.W.2d 841, 844 (Mo. banc 1998); *State ex rel. Martin*, 649 S.W.2d at 563.

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ARGUMENT

I. Judge Millikan's Order Barring Certain Areas Of Inquiry From Esurance's Rule 57.03(B)(4) Deposition Notice Was Not An Abuse Of His Discretion And Did Not Violate Missouri Rule Of Civil Procedure 56.01(B)(1) Or Supreme Court Authority

The discovery process' purpose is to give parties access to relevant, non-privileged information while reducing expense and burden as much as is feasible. *State ex rel. Ford Motor Company v. Messina*, 71 S.W.3d 602, 606 (Mo. banc 2002). The circuit court must ascertain that the process does not favor one party over another by giving it a tactical advantage: " 'The discovery process was not designed to be a scorched earth battlefield upon which the rights of the litigants and the efficiency of the justice system should be sacrificed to mindless overzealous representation of plaintiffs and defendants.' " *Id*. A circuit court has broad discretion in controlling and managing discovery. *Id*. at 607.

Rule 57.03(b)(4) governs the depositions of corporate designees and provides in relevant part:

> 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…The persons so designated shall testify as to matters known or reasonably available to the organization.

In the underlying action, Esurance did, in fact, respond to Relator's August 22, 2018 Rule 57.03(b)(4) notice by identifying two designees to testify as to the five topics identified by

Relator. The witnesses testified broadly concerning the investigation into and handling of Relator's insurance claim. The depositions included testimony concerning the involvement of claim handler Paul Morris.

At the conclusion of the corporate representative depositions, Relator concluded that she wanted another bite at the apple and sought to re-depose Esurance concerning issues that either fell within the scope of the first corporate designee deposition notice or should have been raised during the August 2018 and October 2018 depositions. Essentially, Relator believes she is entitled to issue an unlimited number of corporate designee deposition notices, identifying an unlimited number of topics upon which examination is requested.

In order to avoid cumulative, duplicative and harassing discovery, Esurance requested the entry of a protective order under Rule 56.01(c), which provides in pertinent part:

> **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> ***
>
> (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
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> ***
>
> (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

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Specifically, Esurance requested that any subsequent corporate designee deposition be limited to only those issues newly raised in its amended pleading filed after the August 2018 and October 2018 depositions of Anthony Romano and Dean Chalk. Respondent agreed and imposed certain limitations concerning the scope of Relator's new list of topics to be raised in a second round of corporate designee depositions.

Relator contends that Respondent abused his discretion by imposing certain restrictions on the topics that could be raised during a second round of corporate designee depositions pursuant to a second deposition notice containing an entirely new list of topics to be addressed. Relator cites to a handful of cases that provide no support for her position. In *State ex rel. Plank v. Koehr*, 831 S.W.3d 549 (Mo. banc 2008), the Court concluded that the trial court abused its discretion on quashing entire corporate designee deposition notices, effectively precluding the plaintiffs from taking any corporate designee depositions of the defendants. Unlike in *Plank*, not only did Relator conduct two depositions of corporate designees under her original Rule 57.03(b)(4) notice, Respondent entered an order allowing Relator to conduct a second round of corporate designee depositions, with a small number of limitations as to the permissible scope of inquiry during those depositions.

Relator further misinterprets *Plank*, suggesting that it stands for the proposition that a party, as a matter of right, may issue multiple corporate designee deposition notices and conduct multiple corporate designee depositions, without limitation. In *Plank*, the Court held that a party did not waive its right to conduct a corporate designee deposition simply because employees previously deposed in their individual capacities had testified

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concerning the topics identified in a Rule 57.03(b)(4) notice. The Court concluded that the order quashing the deposition notice failed to identify why the corporation should be excused from the requirements of Rule 57.03(b)(4).

In the present case, Esurance did not seek to be excused from producing a corporate representative. It has already produced two representatives and has been ordered to produce representatives concerning additional topics. Instead, it merely sought some protection from the cost and hardship of Relator's attempts to conduct repetitive and duplicative discovery. Respondent did not abuse his discretion by exercising limiting the scope of Relator's second corporate designee deposition notice under Rule 56.01(c).

Relator's reliance on *State ex rel. Reif v. Jamison*, 271 S.W.3d 549 (Mo. banc 2008), is also misplaced. In *Reif*, the Court concluded that a corporation does not comply with the requirements of Rule 57.03(b)(4) by designating a witness that cannot address certain topics because the witness lacks personal knowledge concerning the topic. *Id*. at 551. Instead, a corporation must produce a representative to testify concerning the corporation's knowledge of the topic. *Id*. The Court did not address a litigant's attempt to conduct multiple corporate representative depositions under multiple notices.

Relator has failed to explain how the minimal limitation imposed by the Respondent constitutes an abuse of discretion. Under Rule 56.01(c), it is within the discretion of the trial court to impose certain limitations to the discovery process in order to protect the parties from annoyance, oppression, hardship and expense. Relator has not identified any authority supporting her position that she is unlimited to an unlimited number of corporate representative depositions on an unlimited number of topics, so long as they are relevant

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or that it is an abuse of discretion to merely limit the scope of inquiry in a second corporate designee deposition notice.

Further, any discovery concerning the performance reviews of Paul Morris is completely irrelevant to the pending lawsuit between the parties. During his August 22, 2019 deposition, Relator's expert, David Knieriem, addressed the actions of Paul Morris, testifying that:

> Number one, that the initial claims investigation, the first day or two, I don't have a major issue with that, because I mean basically they got the claim, called them up, got a statement from the insured, which is what he's supposed to do.

See Deposition of David Knieriem, attached hereto as Exhibit K, p. 40, line 14 – p. 41, line 7. The "first day or two" mentioned by Mr. Knieriem is the only time period during which he noted Paul Morris had any meaningful involvement with the claim at issue in this case. In fact, Mr. Knieriem testified that his opinions concerning the handling of Relator's claim did not begin until the claim was transferred to Anthony Romano in Esurance's Special Investigations Unit. *See* Exhibit K, p. 41, lines 2 – 17. Indeed, Mr. Knieriem testified that, prior to the date that Esurance transferred Relator's claim from Paul Morris to the Special Investigation Unit, he did not believe there was any evidence of vexatious conduct in the handling of Relator's claim. *See* Exhibit K, p. 46, lines 6 – 20.

Relator seeks a writ of prohibition to conduct untimely discovery on a single topic that Relator's own expert has identified as being irrelevant to the pending dispute between Relator and Esurance. Given the lack of probative value of the discovery requested and the harassing nature of Relator's repeated corporate designee deposition notices, Esurance

requests that the preliminary writ of prohibition be quashed and that Relator's Petition for Writ of Prohibition be denied in its entirety.

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CONCLUSION

The limitations on Relator's Rule 57.03(b)(4) notice contained in Respondent's May 3, 2019 Order are intended to protect Esurance from annoyance, oppression, hardship and expense and are not clearly against the logic of the circumstances, arbitrary and unreasonable, and indicative of a lack of careful consideration. In imposing minor restrictions concerning the scope of discovery, Respondent did not exceed his jurisdiction, act in excess of it, or abuse the wide discretion afforded him in administering discovery. There is no basis for issuing a writ of prohibition in this matter and the Court should quash its preliminary writ of Prohibition and deny issuance of a preliminary writ of prohibition.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of December, 2019 the foregoing was served via the Court's electronic filing system.

/s/ Michael D. Cerulo
Attorneys for Esurance
Property & Casualty
Insurance Company

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CERTIFICATE OF COMPLIANCE

The undersigned certifies pursuant to Rule 84.06(c) that: (1) Respondent's Brief includes the information required by Rule 55.03; (2) Respondent's Brief complies with the limitations contained in Rule 84.06(b); and (3) Respondent's Brief contains 2,739 words, excluding the cover, certificate of service and compliance and signature block.

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