IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. KEANNA MILLER Relator, v. THE HONORABLE SCOTT A. MILLIKAN Respondent.	)	Cause Number: SC79959

Court's note: This is an incorrect case number. The correct case number is SC97959.

RELATOR'S BRIEF

Respectfully submitted,

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JURISDICTIONAL STATEMENT

This brief is in support of a preliminary writ of prohibition entered September 5, 2019. This Court has jurisdiction to issue original remedial writs pursuant to Article V, Section 4.1 of the Missouri Constitution.

This Court's review is to determine whether Respondent abused his discretion in limiting proposed deposition topics, and whether Relator may suffer irreparable harm if relief is not granted.

STATEMENT OF FACTS

Relator awoke on the morning of May 16, 2017 to find that her car had been stolen. It had been recovered but was burned and a total loss. Relator was covered for vehicle damage under a policy of insurance issued by Esurance Insurance Company. When Esurance would not pay for her loss, Relator filed suit on June 29, 2017 for damages pursuant to contract with Defendant Esurance, including a count for vexatious refusal to pay insurance proceeds.

Relator served an interrogatory asking for the name and address of any person taking her statement and Defendant Esurance identified certain documents rather than answer more specifically. (Exhibit 1) Defendant's employee identified in the document was its claims adjuster, Paul Morris. (Exhibit 2) No address for Morris was provided and it was assumed that he was an employee of Esurance.

Relator filed notice to take a 57.03(b)(4) deposition of Esurance, and defendant produced two witnesses. (Exhibit 3) Dean Chalk testified on October 2, 2018 as to some topics in the notice. He testified that Paul Morris was terminated after June of 2017 for performance related issues. (Exhibit 4, p12)

Following the deposition, Relator served requests to produce on Esurance, seeking performance reviews and portions of the personnel file of Paul Morris. Judge Michael Stelzer overruled Esurance's objections and ordered production of the documents. (The Morris documents) (Exhibit 5)

On October 29, 2018, Esurance filed its Amended Answer and Counterclaim for Declaratory judgment. This case was subsequently assigned to Judge Millikan for further proceedings and trial was scheduled for August 12, 2019.

After receiving the Morris documents, Relator served a 57.03(b)(4) deposition notice to explore the issues raised by Esurance's amended answer and Paul Morris' background as its claims adjuster. (Exhibit 6) Esurance moved to quash the deposition (Exhibit 7) which Relator opposed. (Exhibit 8) Respondent sustained the motion and quashed the deposition on February 19, 2019. (Exhibit 9)

Relator attempted to comply with the February 19, 2019 order by dividing the topics into two 57.03(b)(4) deposition notices, her amended 4th and 5th deposition notices. Esurance argued an oral motion to quash or for protective order as to the 4th notice, which required a witness to testify regarding "The employment of Paul Morris by Defendant, including the number of case/claims handled for Defendant, performance reviews, and Plaintiff's claim." (Exhibit 10) Respondent barred any questions as to Morris' performance reviews. (Exhibit 11) Relator sought extraordinary relief in the form of a writ from the Missouri Court of Appeals, Eastern District which was denied. (Exhibit 12) No direct appeal lying, this writ followed.

POINT RELIED ON

JUDGE MILLIKAN'S ORDER BARRING CERTAIN AREAS OF INQUIRY FROM RELATOR'S 57.03(B)(4) DEPOSITION NOTICE IS AN ABUSE OF HIS DISCRETION, IN DIRECT OPPOSITION TO AND VIOLATIVE OF MISSOURI RULE OF CIVIL PROCEDURE 56.01(B) (1) AND THE SUPREME COURT CASE OF STATE EX REL. PLANK V. KOEHR, 813 S.W.2D 926 (MO. BANC 1992).

ARGUMENT

JUDGE MILLIKAN'S ORDER BARRING CERTAIN AREAS OF INQUIRY FROM RELATOR'S 57.03(B)(4) DEPOSITION NOTICE IS AN ABUSE OF HIS DISCRETION, IN DIRECT OPPOSITION TO AND VIOLATIVE OF MISSOURI RULE OF CIVIL PROCEDURE 56.01(B) (1) AND THE SUPREME COURT CASE OF STATE EX REL. PLANK V. KOEHR, 813 S.W.2D 926 (MO. BANC 1992).

Standard of Review

This Court may issue a writ of prohibition: (1) to prevent the usurpation of judicial power when the trial court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted. It is Relator's burden to establish that the circuit court acted in excess of its authority. State ex rel. Cullen v. Harrell, 567 S.W.3d 633, 637 (Mo. banc 2019).

Prohibition is appropriate to review a trial court's order in discovery proceedings because it is an abuse of discretion to refuse to permit discovery of matters which are relevant to the lawsuit, reasonably calculated to lead to admissible evidence, and which are neither work product nor privileged. State ex rel. Plank v. Koehr, 831 S.W.2d 926 (Mo.

banc 1992).

Argument

Generally speaking, it is an abuse of discretion to prohibit discovery of matters relevant to the lawsuit and reasonably calculated to lead to the discovery of admissible evidence. State ex rel. Southwestern Bell Publications v. Ryan, 754 S.W. 2d 30, 32 (Mo. App. 1988.) Rule 57.03(b)(4) makes mandatory that a corporation *shall* name a witness to testify as to requested topics in a deposition notice, in part to place corporations and individual litigants on equal footing. State ex rel. Reif v. Jamison, 271 S.W.3d 549, 551 (Mo. banc 2008.) Defendant did not claim nor did Respondent find that the topic of inquiry sought was protected from discovery by either work product or the attorney/client privilege or that the topic was not reasonably calculated to lead to admissible evidence.

A protective order is the proper remedy when a party believes it should not comply with a discovery request. State ex rel. Plank v. Koehr, 813 S.W.2d 926, 928 (Mo. banc 1992.) Defendant was already obligated to produce a witness regarding issues raised by its amended answer filed after the initial corporate representative depositions, and there was no hardship in producing a witness to testify as to all of the topics related to Morris. In fact, Judge Millikan allowed Relator to inquire into some of the areas pertaining to Morris. Absent a privilege or hardship, Respondent's order barring inquiry as to Morris' performance reviews violates the mandatory language of Rule 57.(b)(4). Id. The termination of the claims adjuster is relevant to his handling of Relator's claim.

The circumstances surrounding the firing of Esurance's claims adjuster is reasonably calculated to lead to the discovery of admissible evidence in a claim for

vexatious refusal to pay insurance proceeds because Esurance's state of mind is directly at issue and is only evidenced by the actions of its employees. Rather than claim privilege, the only complaints made by Esurance were that it was unduly burdensome to produce a witness to testify about Morris' employment at all, and that Relator was seeking an "impermissible second bite at issues that should have been raised during prior corporate representative depositions." (Exhibit 7)

Esurance did not provide any support for the proposition that multiple 57.03(b)(4) depositions are not permitted, and research reveals no such case. Nothing in Rule 57.03 limits the number of depositions to which a party must submit. This is logical given the dynamic nature of litigation. This Court acknowledged that many of the deposition topics before it were likely duplicative of previous deposition notices but declined to limit the subsequent deposition inquiries in Plank, belying the existence of a *per se* rule limiting the number of depositions.

Research reveals no limitation to a single deposition of a corporate party or designee. A corporation is entitled by rule 57 to produce several witnesses in response to a deposition notice. It is often the case that corporate witness testimony overlaps, or that an issue arises in a deposition or as here, in the pleadings and discovery, which makes further inquiry necessary. The trial court has discretion to limit a party's depositions where it appears that inquiry will cause undue hardship. Defendant has never alleged undue hardship in producing a witness here. Given that a witness was required to testify as to other facts of Morris' employment, it cannot.

As the Answer to this writ demonstrates, Relator made multiple attempts to craft a deposition notice to satisfy Defendant. Defendant chose to produce two witnesses

responsive to the initial notice, one in August and another in October 2018. Relator first learned that Morris had been fired at the October 2, 2018 deposition, as Defendant never supplemented its interrogatory answer that Morris was its employee. (Exhibit 2) Defense counsel did not permit any discussion of Morris' actions in the August 2018 deposition.

Defendant is presumably tongue in cheek in its Answer to the Writ petition alleging that Morris' performance reviews should have been raised during the August or October deposition notices, because Relator did not even know that Morris had been fired, let alone the reasons therefore until after the October deposition. Respondent recognized that this is relevant and thus did not bar all inquiry into Morris' employment in the third corporate witness deposition. Such action makes the shielding of the performance reviews, allegedly the reason for Morris' termination, more curious.

Defendant's statement of David Knieriem's testimony omits key facts. While it is true that Relator's expert does not fault the claim handling by Morris in the first two days of handling the claim, this does not make inquiry into Morris' termination irrelevant. It also does not address Morris' involvement after that time.

Knieriem only testified as to specific actions by Morris early in the claim process. Morris was still involved in Relator's claim until at least June 23, 2017 per the claim notes. (Exhibit 13) Knieriem testified that he believes the referral to SIU was not proper, which was done with Morris' input. (Respondent's Answer exhibit K, page 41).

Knieriem's opinion or lack thereof is inconsequential to the relevance of Morris' performance reviews. Knieriem can only testify as to insurance industry claims practices, not whether Defendant's actions were vexatious. The jury must make that determination, and "(d)irect and specific evidence of vexatious refusal is not required and 'the jury may

find vexatious delay upon a general survey and a consideration of the whole testimony and all the facts and circumstances in connection with the case.'" Dhyne v. State Farm Fire and Cas. Co., 188 S.W.3d 454 (Mo. banc 2006) *citing* DeWitt v. American Family Mutual Ins. Co., 667 S.W.2d 700, 710 (Mo. banc 1984).

As noted by this Court in Dhyne, evidence of vexatious refusal may include actions taken after a lawsuit ensues and the policy limits are paid. Thus, Defendant's behavior during discovery in failing to reveal that Morris had been fired at all until some months after the event occurred and then only in a deposition rather than by supplementing interrogatory answers calls into question its credibility when it gives a reason for firing Morris while hiding proof thereof.

Without a finding of undue hardship or other issue requiring protection of Defendant or that the testimony sought was shielded from disclosure by privilege, Respondent abused his discretion in barring the inquiry sought. The barred inquiry is, at very least, reasonably calculated to lead to admissible evidence as the reason that Defendant terminated the claims adjuster handling Relator's claim could bear on the claim handling itself. Defendant's prolonged effort to shield this information from discovery tends to support the proposition that it will be harmful to Defendant.

Relator will suffer irreparable harm if the inquiry is not allowed. As the case now stands, Defendant may offer evidence to explain the absence of Morris' testimony from the case- he is no longer an employee due to unrelated factors. Even without such evidence, a factfinder may well wonder why Defendant would fire its claims adjuster and not promptly disclose such act. Defendant is poised to blame Morris as a rogue actor which it fired. Relator will be unable to contest this contention without discovery and will

be unable to rebut the allegation that Morris was not fired due to his handling of Relator's claim.

CONCLUSION

Respondent erred in barring deposition inquiry into the claims adjuster's performance reviews as set forth above. The inquiry was not subject to a claim of privilege and because Defendant was obligated to produce another corporate witness on other topics relating to Morris, there was no hardship making a protective order necessary or proper.

For the reasons set forth above, Relator Keanna Miller prays this Court make permanent its Order of Prohibition directing Respondent not bar certain topics from deposition inquiry and for such other and further relief as this Court deems reasonable and proper.

Pursuant to Missouri Rule of Civil Procedure 84.06 (c), I certify that this brief complies with the limitation contained in Rule 84.06 (b) and contains **2354** words. Original was signed by the filer.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that an exact copy of the following was served by this court's eFiling system on the 7th day of November, 2019.

/s/ Spencer E. Farris