

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FILED

JAN 30 1995

U. S. DISTRICT COURT
E. DIST. OF MO.
ST. LOUIS

WILLIAM R. GAFFEY,

Plaintiff,

vs.

Case No. 91-1938 (C) (CAS)
(HLM)

PETER MONTAGUE and
ENVIRONMENTAL RESEARCH FOUNDATION,

Defendants.

MEMORANDUM AND ORDER

This matter is before the Court on William Gaffey's ("Plaintiff") complaint against Peter Montague and Environmental Research Foundation ("Defendants"). The case is before the undersigned for disposition of all discovery motions. [28]. One such motion is currently pending--the Motion of Non-Party Dan R. Bishop to Quash a Subpoena pursuant to Fed.R.Civ.P. 45(c)(3)(A)(iv). [70].

Rule 45(c)(3)(A) provides that, "[o]n timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it... (iv) subjects a person to undue burden." Rule 45(c)(3)(A)--and clause (iv) in particular--was designed to track Fed.R.Civ.P. 26(c), the principal protective order provision applicable in federal discovery. Fed.R.Civ.P. 45 Advisory Committee Notes to 1991 Amendments. Rule 26(c) permits the court to issue protective orders prohibiting depositions upon a showing of "good cause," which exists when justice requires the protection of a "party or a person from annoyance, embarrassment, oppression, or undue burden or expense." Rule 26(c).

The person requesting a protective order or the quashing of a subpoena must make a specific demonstration of facts in support of the request as opposed to conclusory or speculative statements about the harm which will be suffered if the requested deposition is taken. See Frideres v. Schlitz, 150 F.R.D. 153, 155 (S.D.Ia. 1993). Protective orders prohibiting depositions are rarely granted; however, a deposition which poses a direct threat to the witness' health and life is an undue burden. See id.¹

In support of his motion, Mr. Bishop explains that he is suffering from prostate cancer which has spread widely through his bone marrow. (Motion, ¶ 2). He is on weekly chemotherapy, is receiving Fentanyl, described as a morphine-like painkiller, and is in a wheelchair after suffering stress fractures of his lower extremities. (Id.) In support of his motion, Mr. Bishop submits the letter of his treating physician, who writes, in relevant part:

[Mr. Bishop] is on a significant amount of morphonoid analgesic specifically receiving Fentanyl patch subcutaneously on a continuous basis. He supplements this with additional

¹ In Frideres, supra, the district court granted a protective order to a non-party witness who suffered from a life-threatening inflammatory bowel disease directly aggravated by stress. It is to be noted, that the deposition sought was certain to cause the witness stress--the underlying lawsuit was brought by the witness' adult sister who was suing other family members for alleged sexual abuse which occurred when the sister was a child. Moreover, the district court allowed the depositions of treating physicians and provided in its order that the parties could apply for relief from the protective order after those depositions. In the instant case, Mr. Bishop's doctor writes that, "[Mr. Bishop's] ability to perform adequately in a subpoena deposition is somewhat in question," and notes his concern with the potential stress to Mr. Bishop which might be caused by a deposition. There is no indication, however, that the doctor's concern for Mr. Bishop's ability to perform cannot be accommodated and that the possibility of stress cannot be reduced by the parties' cooperative planning.

analgesics. He is on weekly chemotherapy with all of his (sic) attendant side effects. In my judgment, his ability to perform adequately in a subpoena deposition is somewhat in question. In addition, I think it places an undue amount of stress on this patient who is in [an] extreme life threatening situation in regard to treatment for an aggressive widely metastatic malignancy.

Mr. Bishop is clearly gravely ill. In response, Defendants have indicated their willingness to accommodate Mr. Bishop's medical and health limitations and have requested to speak with his physician in an effort to schedule a deposition in such a manner that would cause Mr. Bishop the least amount of stress. See Deines v. Vermeer Manuf. Co., 133 F.R.D. 46, 49 (D.Ks. 1990) (requiring deposition of ill non-party to be taken in such a manner that permitted witness to have short recesses whenever anxiety or frustration affected his ability to respond to counsel's inquiries).

Therefore, based upon a review of the record, this Court will deny the motion to quash, but will direct the parties and Mr. Bishop's counsel to agree upon a reasonable and appropriate manner of taking Mr. Bishop's deposition which will accommodate his medical and health limitations. Further, it is to be specifically noted that in ruling upon this motion, the Court takes no position as to the admissibility at trial of any deposition testimony given by Mr. Bishop.

Accordingly,

IT IS HEREBY ORDERED that Non-Party Dan Bishop's Motion to Quash Subpoena is DENIED. [70].


MARY ANN L. MEDLER
UNITED STATES MAGISTRATE JUDGE

Dated this 30th day of January, 1995.

LERITZ, PLUNKERT & BRUNING, P.C.

ATTORNEYS AT LAW
ONE CITY CENTRE
SUITE 2001

ST. LOUIS, MISSOURI 63101

(314) 231-9600
FAX: (314) 231-9460

J. D. LERITZ
(1908 - 1987)

JOSEPH L. LERITZ
THOMAS J. PLUNKERT*
ANTHONY B. BRUNING*
JAMES C. LERITZ
CHRISTOPHER E. MCGRAUGH
KATHLEEN M. THOMPSON
CHRISTOPHER P. LERITZ
EDWARD H. ROTH
OF COUNSEL

* ALSO LICENSED IN ILLINOIS

FAX COVER SHEET

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