

establish or alter the limits on the number of depositions and may also limit the length of depositions pursuant to the authority granted by Rule 26.02(a). Either side shall have the right to move under Rule 26.03 to limit the number and/or scope of any depositions scheduled by the other side.

Exhibit 1 to Affidavit of Alfred Stanbury dated April 10, 2007 (hereinafter “Stanbury Aff. ¶ __ and/or Ex. __”).

- That amounted to a rejection of defendants’ attorney Dietz’ argument that the amended scheduling order should cap at ten the number of depositions that could be taken without leave of court.
- On March 5, 2007, plaintiff served a second set of interrogatories and document requests by mail.
- On March 6, 2007, plaintiff noticed the depositions of Jim Johnson and Kathy Jaschke, and those depositions were taken on March 21 and 22, 2007. Stanbury Aff. Ex. 2.
- On March 15, 2007, plaintiff’s deposition was taken.
- On March 23, 2007, plaintiff noticed the depositions of Doug Meyer and Gary Clepper for March 30, 2007. Stanbury Aff. Ex. 3.
- On March 26, 2007, defendants’ paralegal Feuerhake phoned plaintiff’s attorney and left a message in which she declared that the Johnson and Jaschke depositions would have to be rescheduled because attorney Dietz was unavailable on March 30th. Stanbury Aff. ¶ 5 and Ex. 4.
- On March 28, 2007, plaintiff’s attorney phoned paralegal Feuerhake and left a phone message in which he criticized the leaving of a message declaring an attorney’s unavailability without at the same time proposing an alternative date. Stanbury Aff. ¶ 5.
- On March 29, 2007, plaintiff’s attorney succeeded in reaching paralegal Feuerhake by phone and was told that attorney Dietz was available on April 5th. Stanbury Aff. ¶ 5.
- A short while later and before plaintiff’s attorney had a chance to call back and

accept or reject the proposed date of April 5th, paralegal Feuerhake phoned to say that April 5th would not work because attorney Dietz had told her it would not allow him enough time to prepare the two deponents. Stanbury Aff. ¶ 5. Paralegal Feuerhake proposed scheduling the Meyer and Clepper depositions for April 9th or 10th. Stanbury Aff. ¶ 5 and Ex. 4.

- Plaintiff's attorney thereupon noticed the Meyer and Clepper depositions for April 5th but moved the respective starting times from 9:00 A.M. and 10:15 A.M. to 2:00 P.M. and 3:15 P.M. "to allow for time to prepare the deponents." Stanbury Aff. Ex. 5.

- Despite the fact that all discovery was to be commenced in time to be completed by April 22, 2007, *see* Stanbury Aff. Ex. 1 at ¶ no. 2 (First Amended Scheduling Order), Defendant's Request for Production of Documents was served by mail on March 29, 2007. Stanbury Aff. Ex. 5a.

12. On Friday, March 30, 2007, plaintiff's attorney noticed the depositions of Brian Grundtner, Tom Engh, Terry Noonan, and Jerry Auge for April 10th. Stanbury Aff. Ex. 6.

- On Monday, April 2, 2007, attorney Dietz sent an email to plaintiff's attorney in which he said:

I am not available for any depositions in the week of April 9-13. Brian Grundtner is in Iraq. Terry Noonan is not available the morning of April 19. Jerry Auge is not available on the 20th. I am available most days for the week of April 16-20. We are not sure of Tom Engh's availability because he is out of the office this week. Please contact me with alternative dates for these depositions.

Stanbury Aff. Ex. 7.

- On April 2, 2007, paralegal Feuerhake asked plaintiff's attorney if it would be possible to reschedule the Clepper deposition to 1:00 P.M. on April 5th (from 3:15 P.M.). Stanbury Aff. Ex. 8. Plaintiff's attorney responded that he would agree to that if he could start the Meyer deposition at, *e.g.*, 11:45 A.M. Stanbury Aff. Ex. 9. On April 3d, paralegal Feuerhake confirmed that the Meyer and Clepper depositions could be taken

at 11:45 A.M. and 1:00 P.M., respectively. Stanbury Aff. Ex. 11.

- After receiving attorney Dietz' April 2d email (Stanbury Aff. Ex. 7), plaintiff's attorney faxed and mailed the following letter to attorney Dietz:

Dear Mr. Dietz:

As far as I am concerned, the depositions of Messrs. Engh, Noonan, and Auge will be taken as scheduled on April 10, 2007, your email of this date to the contrary notwithstanding. Last Monday, Ms. Feuerhake left a phone message in which she simply declared that the Meyer and Clepper would have to be rescheduled because you would not be available on March 30th. When I spoke with her on March 29th, she proposed taking those depositions on April 5th but phoned shortly thereafter to say that April 5th would not work because you would not have enough time to prepare the deponents. I nevertheless rescheduled the Meyer and Clepper depositions for April 5th but changed the times to 2:00 P.M. and 3:15 P.M. so as to provide you with time to prepare the deponents. Those amended deposition notices were faxed in the afternoon of March 29th, as was a letter from Ms. Feuerhake in which she said:

This letter is a follow-up to our conversations today regarding the depositions of Doug Meyer and Gary Clepper which were originally scheduled for March 30, 2007. As you know from my voicemail to you on Monday, March 26, 2007 and from our discussions today, Mr. Dietz is not available on March 30, 2007 and the depositions need to be rescheduled.

At this time, we are proposing either Monday, April 9th or Tuesday, April 10th for the depositions of Mr. Meyer and Mr. Clepper. Please advise if either of these dates will work.

That clearly meant that you would be available on April 9th or April 10th, so on March 30th I appropriately scheduled the depositions of Messrs. Grundtner, Engh, Noonan, and Auge for April 10th. Now, strangely enough, you say that you (but not those deponents) are 'not available for any depositions in the week of April 9-13' and suggest, imprecisely, that you will be available 'most' days for the week of April 16-20. In a sense I guess that is good to know since I have already planned to schedule additional depositions for that week in the order I wish to take them, and under the circumstances it now appears that I probably will be forced to seek leave of court to take depositions beyond the discovery completion deadline of Sunday, April 22d.

Sincerely,

Stanbury Aff. Ex. 10.

- *After* the Meyer and Clepper depositions were completed on April 5, 2007, attorney Dietz declared that he and Engh, Noonan, and Auge would not attend the depositions scheduled to be taken on April 10th, that any deposition subpoena served in the future should be accompanied by a *per-diem* check, and if plaintiff's attorney did not like it, he should "bring a motion." Stanbury Aff. ¶ 15.

ARGUMENT

I Defendant Must Be Ordered To Appear Before The Court To Show Cause As To Why He Should Not Be Held In Contempt For Requiring Ramsey County Employees Engh, Noonan, And Auge To Disobey Duly Served Subpoenas.

This is not a close call. The subpoenas were duly served in a way that was proposed by attorney Dietz himself after the hearing of plaintiff's motion to modify the scheduling order on December 11, 2006. Plaintiff's attorney described his understanding of attorney Dietz' proposal in his March 6, 2007 letter to attorney Dietz, *to wit*:

I understood you to say that you would accept service of the deposition subpoenas on behalf of deponents still employed by Ramsey County and that each such subpoena need not be accompanied by a *per-diem* check. If that is incorrect, please advise.

Plaintiff's attorney was never told that he had misunderstood attorney Dietz, and, moreover, the correctness of plaintiff's attorney's understanding was subsequently confirmed by the fact that four Ramsey County employees (Johnson, Jaschke, Meyer, and Clepper) have complied with subpoenas served in the way described. Minn. Stat. § 588.01, Subd. 3(8), is clear.

Constructive contempts are those not committed in the immediate presence of the court, and of which it has no personal knowledge, and may arise from any of the following acts or omissions:

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(8) disobedience of a subpoena duly served,

And right there on the front of each subpoena are the following words in all caps: “NOTE: FAILURE TO OBEY A SUBPOENA WITHOUT BEING EXCUSED IS A CONTEMPT OF COURT.” *See, e.g.*, subpoenas within Stanbury Aff. Ex. 6. Plaintiff’s attorney did not excuse anybody. On the contrary, he wrote in pertinent part as follows in his April 2, 2007 letter to attorney Dietz:

As far as I am concerned, the depositions of Messrs. Engh, Noonan, and Auge will be taken as scheduled on April 10, 2007, your email of this date to the contrary notwithstanding.

Attorney Dietz has never claimed that Engh, Noonan, and Auge could not, let alone would not, attend their respective depositions on April 10th. Nor did attorney Dietz object *in writing* or otherwise to the production of the materials designated in the subpoenas *duces tecum*. *See* Minn. R. Civ. P. 45.04(b) (emphasis added). In his April 2, 2007 email to plaintiff’s attorney, attorney Dietz claimed only that he himself would not be available during the week of April 9-13, a transparent fabrication since his paralegal had written the following only four days before: “At this time, we are proposing either Monday, April 9th or Tuesday, April 10th for the depositions of Mr. Meyer and Mr. Clepper.” Plaintiff’s attorney reacted to attorney Dietz’ blatant fabrication as follows in his April 2, 2007 letter to attorney Dietz:

[Ms. Feuerhake’s proposal] clearly meant that you would be available on April 9th or April 10th, so on March 30th I appropriately scheduled the depositions of Messrs. Grundtner, Engh, Noonan, and Auge for April 10th. Now, strangely enough, you say that you (but not those deponents) are ‘not available for any depositions in the week of April 9-13’ and suggest, imprecisely, that you will be available “most” days for the week of April 16-20.

Attorney Dietz did not respond to that or anything else that was said in plaintiff’s attorney’s April 2, 2007 letter and, obviously, did not move for any kind of protective order under Minn. R. Civ. P. 26.03. Instead, he chose to wait until the Meyer and

Clepper depositions were finished on April 5th before announcing, off the record, of course, that he and Engh, Noonan, and Auge would not attend the depositions scheduled to be taken on April 10th, that any deposition subpoena served in the future should be accompanied by a *per-diem* check, and if plaintiff's attorney did not like it, he should "bring a motion."

The court has now been provided with sufficient reason to require defendants' attorney Dietz to appear before it and show cause as to why he should not be held in constructive civil contempt, and if a determination requires the court to *voir dire* defendant's attorney Dietz, that should be done too.

II. The First Amended Scheduling Order Must Be Modified So As To Enable Plaintiff To Complete His Discovery Plan, And Ramsey County Employees Engh, Noonan, And Auge Must Be Ordered To Attend Depositions On A Date Set By The Court

In opposing plaintiff's previous motion to modify the scheduling order, defendants argued that there was no need to depose anybody other than defendants Schacht and MacMillan. Then, after withdrawing their opposition to the motion before it was heard, defendants took to arguing that plaintiff should not be allowed to take more than 10 depositions without leave of court. In what amounted to a rejection of that argument, the court ruled that each side could take as many as 20 depositions without leave of court.

By purposely delaying the Meyer and Clepper depositions by six days and then refusing to produce Engh, Noonan, and Auge for their scheduled depositions on April 10th, attorney Dietz went behind the court's back to accomplish what he failed to persuade the court to do, *i.e.*, he has effectively capped the number of plaintiff's depositions at six and, *inter alia*, denied plaintiff the opportunity to re-depose defendants Schacht and MacMillan. Before the motion hearing began back on December 11, 2006, attorney Dietz proposed withdrawing defendants' opposition to plaintiff's previous motion to modify the scheduling order if defendants could re-depose

plaintiff, to which plaintiff's attorney responded that he would agree to that if, correspondingly, plaintiff could re-depose defendants Schacht and MacMillan. Attorney Dietz agreed to that and has since re-deposed plaintiff, but now, because the instant motion will not be heard until two days after the present discovery completion deadline, plaintiff has been effectively denied the opportunity to re-depose Schacht and MacMillan in the order he had planned. Minn. R. Civ. P. 26.04 (Sequence and Timing of Discovery) provides:

Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

In the Advisory Committee Note--1975 to Rule 26.04, it is said:

The proposed amended rule eliminates the former provision in Rule 30 establishing a priority for discovery to the party first giving notice of discovery. Under the amended rule the court may establish priority between the parties by order, otherwise discovery will take place as properly noted in the notice of discovery without regard as to who gave notice first. The pendency of one form of discovery will not operate to delay or otherwise extend the use of other forms of discovery or similar forms of discovery if the timing is not inherently inconsistent.

Clearly, attorney Dietz wanted to postpone the Meyer and Clepper depositions from March 30th to April 10th and the Engh, Noonan, and Auge depositions from April 10th to the week of April 16-19, but plaintiff's attorney agreed only to postpone the Meyer and Clepper depositions to April 5th and thus thwarted attorney Dietz' assumption that a postponement of the Meyer and Clepper depositions to April 10th would force plaintiff to take the Engh, Noonan, and Auge depositions in the week of April 16-19 and leave plaintiff with little to no time to take any additional depositions. So, clearly, attorney Dietz opted to act in contempt of court by requiring Engh, Noonan, and Auge to disobey duly served subpoenas so as to effectively shut down plaintiff's discovery plan. Defendants cannot be permitted to profit from their attorney's

misconduct. The court, accordingly, should amend the First Amended Scheduling Order as proposed by plaintiff, specifically:

All motions which seek to amend the pleadings or add parties must be served by June 15, 2007, instead of May 8, 2007.

All discovery shall be commenced in time to be completed by April 22, 2007, except depositions may be taken through May 31, 2007.

All non-dispositive motions and supporting documents, including those which relate to discovery, shall be filed and the hearing thereon completed by June 22, 2007, instead of May 15, 2007.

All dispositive motions shall be filed and the hearing thereon completed by June 22, 2007, instead of May 15, 2007.

The parties shall submit a Joint Statement of the Case pursuant to Minn. Gen. R. Prac. 112 on or before July 29, 2007, instead of June 22, 2007.

Plaintiff's and defendants' respective jury instructions, verdict, witness list, and exhibit list shall be filed on or before August 8, 2007, instead of July 8, 2007.

Plaintiff also asks the court, after it has amended the present scheduling order, to set the date on which Engh, Noonan, and Auge shall attend their depositions and produce the materials commanded by the subpoenas *ad testificandum/duces tecum* which were duly served on them on March 30, 2007.

III. Defendants' Attorney Dietz' Refusal To Permit Subpoenaed Discovery Warrants An Award Of Costs And Attorney's Fees.

Where, as here, defendants' attorney Dietz advised Ramsey County employees Engh, Noonan, and Auge to disobey the subpoenas that were duly served on them on March 30, 2007, and thereby forced plaintiff to bring the motion at bar, plaintiff is entitled to an award of the costs and reasonable attorney's fees under Minn. R. Civ. P. 37.01(d)(1), which provides in pertinent part:

If the motion (to compel discovery) is granted, . . . the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or

attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including reasonable attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified or that other circumstances make an award of expenses unjust.

As and for the reasonable expenses, including attorney fees, incurred as a result of attorney Dietz' misconduct, plaintiff requests \$4,780.00, consisting of 12 hours of his attorney's time @ \$350 preparing the instant motion (including an estimated 4.0 hours preparing plaintiff's reply papers) plus an estimated 1.5 hours of his attorney's time @ \$350 appearing at the hearing of the instant motion plus the \$55 motion filing fee. Stanbury Aff. ¶ 16.


CONCLUSION

For the foregoing reasons, the court should issue an order requiring defendants' attorney David Dietz to appear before the court to show cause as to why he should not be held in civil contempt for his willful disobedience of duly served subpoenas, and the court should modify the First Amended Scheduling Order along the lines proposed by plaintiff, set the date on which Ramsey County employees Engh, Noonan, and Auge must attend their depositions, and award to plaintiff his costs and reasonable attorney's fees in the amount of \$4,780.

Respectfully submitted,

STANBURY LAW FIRM P.A.

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Alfred Stanbury
A.I.N. 190457
2209 St. Anthony Parkway
Minneapolis, MN 55418
(612) 789-5060
ATTORNEY FOR PLAINTIFF