



STATE OF WISCONSIN

CIRCUIT COURT
Branch 9

DANE COUNTY

STATE OF WISCONSIN,)	
)	
Plaintiff,)	Case No. 04-CV-1709
)	Unclassified – Civil: 30703
v.)	
)	
ABBOTT LABORATORIES, et al.,)	
)	
Defendants.)	

**STATE OF WISCONSIN’S REPLY IN SUPPORT OF
MOTION FOR ENTRY OF ROUND 3 CASE MANAGEMENT ORDER**

The State moved for entry of a Round 3 Case Management Order (“CMO”) that is identical to the previously-entered CMO, other than changes negotiated by the parties. The Round 3 Defendants oppose one provision of the proposed (and previous) CMO, the “completeness” provision that governs how the parties present deposition testimony. Specifically, the proposed CMO (and the previous two CMOs¹) provide that “[o]ther than deposition testimony necessary for ‘completeness,’ each party will read or play deposition testimony that supports its case in its own case (or rebuttal).” (Proposed Case Management Order, ¶ 5(f), attached to Pltf.’s Motion.) This provision is also consistent with how the parties presented deposition testimony in the Pharmacia trial.

The Round 3 defendants ask the Court to now reverse course and force the parties to “read or play deposition testimony that supports [the *opposing* party’s] case in its own case,” above and beyond testimony necessary for completeness. The Round 3 defendants fail to inform

¹ See Ex. 1, Case Management Order, Mar. 17, 2014, ¶ 5(f) at 7; Ex. 2, Round 2 Case Management Order, Dec. 12, 2014, ¶ 5(f) at 7.

the Court not only about the Round 1 & 2 CMOs and the practice in the Pharmacia trial, but also that the Court has *already* decided this issue and rejected the same arguments that the Round 3 Defendants make here. The Round 3 defendants have provided no legitimate reason for the Court to *reverse itself* in the final stretch of this case.

ARGUMENT

The Wisconsin statutes provide that the judge has “control over the mode and order of interrogating witnesses and presenting evidence.” Wis. Stats. § 906.11(1). *See also Neider v. Spoehr*, 41 Wis. 2d 610, 617-18, 165 N.W.2d 171, 175 (1969) (The right to cross-examine witnesses “is not without limitations, and the extent of the manner ... can be controlled by the trial court so that the trial proceeds in an orderly and fair manner.”) It is completely within the Court’s discretion to have the parties cross-examine witnesses in the same fair, effective, and orderly manner as they did in the Pharmacia trial.

In the Pharmacia trial, consistent with the provision at issue, other than deposition testimony necessary for “completeness,” each party presented deposition testimony that supported its case in its own case or its rebuttal case.² Accordingly, Pharmacia presented in its

² MR. DODDS: The State is going to play ... some video clips. And I just want to alert the Court to the fact that we’re going to be playing other excerpts from the same witnesses in our case in chief. We had some discussion about possibly just including our excerpts with the State’s[.] [F]or their own reasons ... [t]hey’ve declined to do that which is their strategic prerogative. I didn’t want the Court to be surprised when our case in chief comes and we’re going to be playing some additional clips from the same witness.

THE COURT: That’s fine under the completeness rule. I presume that’s the idea here.

MR. DODDS: Well, we have some testimony that we would want to present anyway. We just –

THE COURT: Okay.

MR. DODDS: – thought it might be good to do it all in one; but that’s no[t] how we’re going to do it.

Ex. 3, *Wisconsin v. Pharmacia*, trial trans., February 6, 2009, at 7:1-20.

own case its cross-examination of the State's deposition witnesses, and the State presented in its rebuttal case its cross-examination of Pharmacia's deposition witnesses.

Specifically, in addition to its live witnesses, the State presented eight witnesses by deposition—Cannon, Staver, Engel, Kennally, Erick, Warren, Beimfohr, and Davis. Then, in its case, Pharmacia presented its deposition cross-examination (and deposition direct) of five of the State's deposition witnesses—Kennally (live cross and direct), Erick, Warren, Beimfohr, and Davis, in addition to Pharmacia's direct of its live witnesses and two more witnesses by deposition (Morgan and Duzor). Finally, in its rebuttal case, the State presented its deposition cross-examination of Duzor and its deposition re-direct of Beimfohr.

The Round 3 defendants have offered no criticism of the timing of cross-examinations in the Pharmacia trial nor have they suggested that either party's right to cross-examine was impaired. Indeed, Pharmacia itself never suggested its cross-examination rights were impaired.

Subsequent to the Pharmacia trial, the Round 1 defendants moved the Court to change course and allow a party to play deposition testimony supporting its case in the other party's case³—just as the Round 3 Defendants request here. After hearing argument on the issue,⁴ the Court rejected the request, holding that the “rule of completeness should be the rule,” and to do otherwise would “hamstring” a party by allowing the other side to choose when to “put torpedoes into [the other side's] case.”⁵ The Court provided that if a special circumstance arose at trial warranting an exception, a party could raise it with the Court at that time:

I think the rule of completeness should be the rule. If you think that there's some reason why we should do something beyond that in the trial, you can certainly raise it, but I'm not going to hamstring the plaintiffs by allowing you to choose

³ See Ex. 4, Initial Trial Defs.' Consolidated Resp. to the State's Motion for Entry of a Proposed Case Management Order, January 28, 2014, at 6-7.

⁴ See Ex. 5, Motion hearing, January 30, 2014, at 43:22 – 45:22

⁵ *Id.* at 45:24 – 46:6.

when you're going to put torpedoes into their case from your witnesses that they're reading what they think is important to their case.

* * * *

... I don't think it's fair to either side to be able to slide in what is a key part of their case into the presentation, and the orderly presentation of the other side's case. If there's a specific reason to do it other than ... some strategic advantage, I think it should be just the rule of completeness. That's how we do it in regular trials. It's nothing unusual.

(Ex. 5, Motion hearing, January 30, 2014, at 45:24 – 46:18.)

The defendants do not address the Court's ruling, and therefore have not explained why the Court was incorrect in its reasoning. For this reason alone, the Round 3 Defendants' request should be denied. Regardless, the arguments they set forth, in addition to being a repetition of the arguments already rejected, have no merit.

First, the Round 3 defendants argue that by continuing to use the "completeness" provision, "State seeks an *unfair advantage* at trial." (Defs. Resp. at 1) (emphasis added). But the rule, obviously, applies to *both* the State and the Round 3 Defendants, just as it applied to both the State and Pharmacia in the previous trial. *See, supra*, at 3.

Second, the Round 3 Defendants argue that the "State proposes to *limit* cross-examination of witnesses testifying at trial by deposition," Defs. Resp. at 1 (emphasis added), relying on various Wisconsin cases that deal with the *scope* of cross-examination.⁶ (*Id.* at 3-4.) However, the "completeness" provision does not affect the *scope* of cross-examination,⁷ only the *timing*. As the Court already held, under the "completeness" provision:

⁶ The Round 3 Defendants rely on the following cases, all of which deal with the *scope* of cross-examination: *Watson v. State*, 219 N.W.2d 398, 403 (Wis. 1974); *Schueler v. City of Madison*, 183 N.W.2d 116, 122 (Wis. 1971); *Boiler v. Cofrances*, 166 N.W.2d 129, 134 (1969); and *McClelland v. State*, 267 N.W.2d 843, 847 (Wis. 1978).

⁷ In any event, even the scope of cross-examination is left to the "sound discretion of the trial judge." *Boller v. Cofrances*, 42 Wis. 2d 170, 181, 166 N.W.2d 129, 134 (1969).

You're going to get your opportunity to defend your case and put in whatever you need to give context to that witness through the deposition, even if it's a bit duplicative in order to remind the jury who this person is.

(Ex. 5, Motion hearing, January 30, 2014, at 46:6-10.)

Third, The Round 3 Defendants argue that having a party play its cross-examination in its own case somehow renders the cross-examination completely ineffectual. They rely on three cases that they suggest deal with the “timing” of cross-examination at trial—*State v. Apilando*, 79 Haw. 128, 900 P.2d 135 (1995), *as amended* (Aug. 31, 1995), *State v. Saporen*, 205 Minn. 358, 285 N.W. 898 (1939), and *California v. Green*, 399 U.S. 149, 159. (Defs. Br. at 3-4.) But none of these cases does. Instead, they deal with the effects of the “delay” in cross-examining a witness between the time an *out-of-court* statement is made and the time the witness is *subsequently* cross-examined about the statement *at trial*. *Apilando*, 79 Haw. at 138, *Saporen*, 205 Minn. at 361-62, *Green*, 399 U.S. at 158-59. These cases have nothing to do with the situation here as the pre-recorded cross-examinations the parties will play at trial were all conducted *contemporaneously* with the pre-recorded direct testimony—*i.e.*, there was no “delay.”

All three cases upon which the Round 3 Defendants rely deal with a very specific situation—the admissibility of an out-of-court statement from a party's own witness who, at the time of trial, had “forgotten” making the out-of-court statement, and therefore the party attempted to offer the out-of-court statement of its own witness as substantive evidence at trial.⁸ These three courts considered whether (subsequent, “delayed”) cross-examination *at trial* of the out-of-court statement would remedy the inherent unreliability of statements given *out-of-court*.

⁸ *See, e.g., Apilando*, 79 Haw. at 130, 134 (“the videotaped interview was presented in lieu of the complainant's direct testimony, as part of the prosecution's case-in-chief” because “the complainant testified that she could not remember what she had told Detective Bright during the interview”).

Thus, the “delay” in cross-examination referred to in the language the Round 3 Defendants quote from these cases is a wholly different “delay.” Indeed, when the entire quote is included (as opposed to the strategically-edited quote presented to the Court by the Round 3 Defendants, Defs. Br. at 3), the inappropriateness of the quote is clear:

[B]elated cross-examination is not cross-examination at all because the passage of time destroys the defendant’s opportunity to subject the *out-of-court statement* to an *immediate challenge* to determine its truthfulness and credibility.

Apilando, 79 Haw. at 138 (quotations omitted) (emphasis added). The other quotes the Round 3 Defendants present to the Court are similarly inapposite:

The chief merit of cross examination [of an out-of-court statement] is not that at some future time [*i.e.*, at trial] it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot [*i.e.*, when the out-of-court statement is made].

Saporen, 205 Minn. at 362 (quoted in Defs. Br. at 3):

[T]he main danger in substituting subsequent [cross-examination *at trial*] for timely cross-examination [of the *out-of-court* statement] seems to lie in the possibility that the witness’ “false testimony is apt to harden and become unyielding to the blows of truth ... as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth.”

Green, 399 U.S. at 159 (quoting *Saporen*, 205 Minn. at 362) (quoted, in part, in Defs. Br. at 4).

Given that *pre-recorded* testimony is at issue here, there is obviously no “danger” of the witness “hardening” over time between making a statement and being cross-examined on it. The Round 3 Defendants’ reliance on this line of cases is misplaced, at best.

Fourth, defendants argue that their proposed method is more “efficient” because playing a cross-examination in a party’s own case would entail “duplicative testimony []to provide the necessary context for the witness’s testimony on direct examination.” (Defs. Br. at 4.) The Court already dismissed any concern about duplicative testimony, when (as mentioned above)

the Court held that each side will have the “opportunity to defend [its] case and put in whatever [it] need[s] to give context to that witness through the deposition, *even if it’s a bit duplicative* in order to remind the jury who this person is.” (Ex. 5, Motion hearing, January 30, 2014, at 46:6-10) (emphasis added).

Moreover, *defendants’* proposal would also entail “duplicative” testimony. The defendants explained that under their proposal, the cross and direct of the same deposition witness would be played at different times:

Pursuant to Wis. Stats. § 906.11(2), the parties agree that for witnesses presented at trial by deposition in the party’s respective case in chief, cross-examination will be limited to the scope of the direct examination played or read to the jury. All other testimony which a party seeks to offer to support its case from the designated witness will be read or played in the party’s own case (or rebuttal).

(Ex. 2 to Def. Resp., email from Koski to Eberle, 3/15/2016, at 1.) If, for example, a defendant played cross-examination testimony of a designated witness in the plaintiff’s case-in-chief, as the Round 3 Defendants propose, and *then* played “other testimony which a party seeks to offer to support its case from the designated witness ... in the party’s own case,” the same need would exist to play “duplicative” testimony “in order to remind the jury who this person is.”

Finally, defendants’ proposal for cross-examining plaintiff’s *rebuttal* deposition witnesses has nothing to do with the *timing* of cross-examination, and thus nothing to do with the “completeness” provision. Instead, the Round 3 Defendants’ proposal concerns the *scope* of cross-examination. And they propose to *expand* the scope:

If a witness is offered by deposition for the first time in the Plaintiff’s rebuttal case, Defendants[’] cross-examination of said witness *will not be limited* to the scope of the direct.

(*Id.*) (emphasis added). Cross-examination of *rebuttal* witnesses is normally limited to the scope of the questions asked during the direct rebuttal examination:

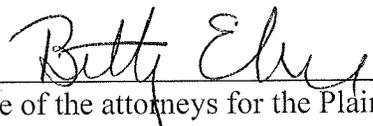
This court agrees and concludes that the trial court properly exercised its discretion in controlling the evidence admitted in rebuttal by limiting Kochiu's cross-examination of the State's rebuttal witness to the scope of direct examination.

State v. Kochiu, 231 Wis. 2d 239, 604 N.W.2d 305 (Ct. App. 1999). The Round 3 Defendants do not explain why the Court should allow them open-ended cross-examination of the State's *rebuttal* witnesses. If a defendant could cross examine a rebuttal witness on any subject and raise new issues, the plaintiff would be entitled to offer its own evidence on the new subjects, and the trial would go on indefinitely.

CONCLUSION

The Round 2 defendants have failed to offer a legitimate reason for the Court to reverse itself on the timing of cross examination or to expand the scope of cross-examination of rebuttal witnesses. For the foregoing reasons, the State requests that the Court enter the State's proposed Round 3 Case Management Order, attached to its motion.

Dated this 4th day of April, 2016.


One of the attorneys for the Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of the State of Wisconsin's Reply in Support of Motion for Entry of Round 3 Case Management Order and Affidavit of Betty Eberle with exhibits to be electronically served on all counsel of record by transmission to LexisNexis File & Serve this 4th day of April, 2016.



Betty Eberle