

(Crooks Aff., Ex. A) (Judge Eich had previously denied a request from Pfizer to quash its deposition on the same topics.) The notice of deposition stated that Merck's deposition would take place in Madison, Wisconsin on May 1, 2006.

On April 19, Merck asked Judge Eich for a protective order to change the place of the deposition to Philadelphia, Pennsylvania. (Crooks Aff., Ex. C) The issue was briefed and a telephonic hearing was held on April 25. On April 27, Judge Eich issued his decision, denying Merck's request for a protective order: "I conclude that, because Merck maintains an active sales staff in Wisconsin, it is "transacting business in person" in the state—including the City of Madison—within the meaning of §804.05(3)(b)1, *Stats*. As a result, the deposition was properly noticed in Madison." (Eberle Aff., Ex. A, April 27, 2006, Decision & Report of Discovery Master, "Eich Decision," at 2)

Judge Eich rejected Merck's argument that federal case law—that holds that the deposition of a corporation through its officers should ordinarily be taken at the corporation's principal place of business—should be used to "interpret" the Wisconsin's statute on the ground that there is no federal statute that is similar to the relevant Wisconsin statute. (Eich Decision, at 3-5) In a footnote, Judge Eich also rejected Merck's application for Judge Eich to use his discretionary power to grant a protective order because "no evidence was presented on that point, and very little argument was directed that way." (Eich Decision, at 5, n.4)

II. Judge Eich Correctly Held that Under the Wisconsin Statutes, The Proper Place for the Deposition of Merck's Corporate Designee is Madison.

Wisconsin's statute governing the location of depositions is plain and clear and precisely on point: A party may be compelled by notice to give a deposition in Wisconsin if any of three things apply:

Any party may be compelled by notice ... to give a deposition at any place within 100 miles from the place where that party resides, is employed or transacts

business in person, or at such other convenient place as is fixed by an order of the court....

Wis. Stat. § 804.05(3)(b)(1). Of course, a corporate party can only speak through its agents, and hence, another provision of the statute states that a corporate designee is to be treated as if it were the corporate party:

If a deponent is an officer, director or managing agent of a corporate party, or other person designated under sub. (2)(e), the place of examination shall be determined as if the deponent's place of residence, employment or transacting business in person *were that of the party*.

Wis. Stat. § 804.05(3)(b)(6) (emphasis added). Merck is the party; it does not dispute that it transacts business in person in Madison through its sales force; and thus Merck can be compelled by notice to produce its corporate designee for deposition in Madison. Judge Eich confirmed this straightforward reading of the statute:

[Section] 804.05(3)(b)1, *Stats.*, plainly allows a noticed deposition to be held within 100 miles from the place where the party "transacts business in person." And subsection 6, which deals with depositions of corporate designees, is to the same effect: it states that the location will be determined as if the designee's "place of residence, employment or transacting business in person" was the same as the corporation's; *in other words the designee's deposition is properly located wherever the corporation transacts such business*.

(Eich Decision, at 5) (emphasis added).

The history of the statute is consistent with Judge Eich's ruling. The predecessor statutory language was limited in application to a *resident* party: "Any party *who is a resident of this state* may be compelled by notice ... to give his deposition at any place within the county of his residence, or within 30 miles of his residence" Wis. Stat. § 804.05(3)(b)(1) (1975-76 version) (emphasis added) (attached as Eberle Aff., Ex. B). Under the 1975-76 statute, the location of a *non-resident* defendant was defined by another statute that stated that a party could compel a non-resident defendant to give a deposition in Wisconsin *only* if the non-resident

defendant was personally served here; otherwise the defendant had to be deposed at its residence. Wis. Stat. § 804.05(3)(b)3 (1975-76 version). Under the former statute, Merck would have to be deposed at its residence, *i.e.*, its headquarters in New Jersey. Thus, the old version of the Wisconsin statute was, in fact, in line with the federal common law governing deposition location of corporate designees.

The amended version of the same statute, by contrast, provides a party wide latitude in bringing a deponent to Wisconsin: “*Any party* may be compelled by notice ...to give a deposition at any place within 100 miles from the place where the party resides, *is employed or transacts business in person*” Wis. Stat. § 804.05 (3)(b)(1) (emphasis added). Thus, *any party* (not just resident parties, as the previous statute read) may be compelled to give a deposition at any place within 100 miles from the place where the party *transacts business in person* (not just its residence). Thus, by deliberate act, the Wisconsin statutes were amended to expand the ability of litigants to bring non-residents who transact business into Wisconsin to be deposed, departing from federal common law.

Moreover, Judge Eich’s interpretation of the corporate designee provision is in accord with these changes in the statute. It cannot be disputed that Merck, as a party, can be compelled to give a deposition in Wisconsin. But the only way for Merck to give a deposition is through an “officer, director or managing agent of [Merck], or other person designated under sub. (2)(e).” If the corporate designee provision were interpreted to exempt these same representatives of Merck from giving a deposition in Wisconsin, the amendments to the statutes would be gutted. Under Merck’s interpretation, a non-resident *individual* defendant who transacts business in person could be compelled to give a deposition in Madison, whereas non-resident *corporate* defendants would be exempt. This simply does not make sense.

Before discussing Merck's appeal of Judge Eich's rejection of its arguments based on federal law and Judge's Eich exercise of discretion, Wisconsin first addresses Merck's argument that was *not* raised before Judge Eich—that the statute should be read *backwards* so that the deposition should take place at the place of residence, employment, or transacting business in person *of the corporate designee*. None of the arguments—old or new—has merit.

A. The Wisconsin Statute Is Clear that the Corporate Designee's Particulars Are Irrelevant and the Deposition Location Is Determined with Respect to the Corporate Party.

According to Merck's new argument—never raised before Judge Eich (Crooks Aff., Ex. E, April 24, 2006 Merck Letter Brief to Judge Eich)—the Court must consider *Merck's* place of residence, employment or transacting business in person as if it were that of the *corporate deponent*—*i.e.*, the corporate designee's place of residence, employment or transacting business in person is the relevant factor for the location of the deposition. This reading of the statute, however, is contrary to plain English, contrary to the reading of Judicial Council Note interpreting the statute (as shown below), and contrary to the reading of the statute by Judge Eich. Further, the article upon which Merck relies is based on a *former* version of the statutes governing the location of depositions. Finally, Merck's new position is in direct opposition to Merck's previous position taken before Judge Eich that the “deposition of a corporation through its officers or directors must normally be taken at the principal place of business” (Crooks Aff., Ex. E, at 3) Merck's new argument fails for numerous reasons.

First, since the argument was not presented to Judge Eich, it is waived. *See Pinczkowski v. Milwaukee County*, 276 Wis.2d 520, 540-541, 687 N.W.2d 791, 801 (Wis. App. 2004) (argument not raised below is waived). This Court authorized the parties to bring exceptions to Judge Eich's decisions; the appeal procedure is not an opportunity to make new arguments:

Exceptions to any decision made by the SDM may be taken to this Court. The Court has full authority to modify or set aside the ruling of the SDM if the ruling is based on an erroneous exercise of discretion or other error of law. The Court shall review any findings of fact under the clearly erroneous standard provided by Wis. Stat. § 805.06(5)(b) and shall review issues of law de novo.

Stipulation and Order of Reference to Special Discovery Master, ¶5.

Second, the 1976 law review article upon which Merck relies, discusses an *old version* of the relevant statutes, which as discussed above, did not compel non-resident defendants to give depositions in Wisconsin. Further, the law student¹ who wrote the article (which concerned all of Chapter 804) simply read this provision backwards. The 1975-76 version of the statute governing the location of corporate designee's deposition stated:

If a deponent is an officer, director or managing agent of a corporate party, or other person designated under sub.(2)(e), the place of examination shall be determined as if the residence of the deponent were the residence of the party.

Wis. Stat. § 804.05 (3)(b)6 (1975-76 version). The law student began by stating ambiguously that “the deponent’s residence *becomes* the residence of the party for the purposes of determining where the deposition may be taken.” Patricia Grazcyk, *The New Wisconsin Rules of Civil Procedure: Chapter 804*, 59 Marq. L. Rev. 463, 495 (1976) (emphasis added). From this she incorrectly concludes that an Illinois defendant corporation could force a plaintiff to depose a corporate designee in Florida. (Wisconsin knows of no case law or statute *under any jurisdiction* that would support a right for a non-resident defendant to force a deposition in a third-party state.)

¹ Although Merck states that the law review article, which covered all of Chapter 804, was “prepared with the assistance of two members of the Judicial Council Committee,” Merck br. at 5, the article simply acknowledges “the comments and criticisms” of one member and acknowledges that another member granted the author permission to incorporate portions of his Judicial Council Notes and his unpublished monograph.

In the student's backwards reading, the relevant factor is where the corporate designee lives. However, the Judicial Council Committee's Note discussing this version of the section clearly states that the residence of the deponent is *irrelevant*—it “is to be considered as if it were the residence of the party”:

Finally, Subsection (3)(b)6 mandates the place of examination if a deponent is an officer, director or managing agent of a corporate party, or other person designated under Section (2)(e). In such case, the residence of the deponent *is to be considered as if it were* the residence of the party.

Judicial Council Committee's Note, Judicial Counsel Collection, Rules of Civil Procedure Committee, Wisconsin State Law Library, Folder 7 of 7, Document 15 (emphasis added) (attached as Eberle Aff., Ex. C). Under the correct reading of the 1976 statute, regarding the example above, the residence of the Florida deponent “is to be considered as if it were” the residence of the Illinois defendant corporation, and the deposition would take place in Illinois.

The reading of the statute in the Judicial Council Committee's Note that the designee's residence is irrelevant comports with Judge Eich's reading of the current statute: the “designee's deposition is properly located wherever the *corporation* transacts such business.” (Eich Decision, at 5) (emphasis added). Merck has deemed the interpretation followed by the Judicial Council Committee and Judge Eich “tortured.”²

² Merck's backward interpretation makes the statute internally inconsistent. If the corporate designee provision were interpreted to make the place of examination of designee be the *designee's* place of residence, employment or transacting business in person, then the designee is simply being treated as a *non-party witness*, who gives a deposition at his or her place of residence, employment or transacting business in person, pursuant to Wisconsin Statute Section 804.05(3)(b)4. However, another provision of the subsection provides that designees are *not* non-party witnesses: in “this subsection, the terms “defendant” and “plaintiff” include officers, directors and managing agents of corporate defendants and corporate plaintiffs, or other persons designated under sub. (2)(e), as appropriate.” Wis. Stat. § 804.05(3)(b)5. Thus, treating designees as non-party witness contradicts Wis. Stat. § 804.05(3)(b)5.

Third, Merck insists its new reading of the statute must be so, despite the clear language to the contrary, because otherwise the Court would have to assign the corporation's place of residence, employment, or conducting business in person to the individual deponent, and contends that "a corporation can have no 'place of employment' and is not normally spoken of as having a 'place of residence' or a place of 'conducting business in person.'" (Def. Br. at 5-6) On the contrary, the "residence of a corporation [is] at its principal place of business." *F. F. Mengel Co. v. Village of North Fond Du Lac*, 25 Wis.2d 611, 615, 131 N.W.2d 283 (Wis. 1964), and the 1975-76 statute explicitly referred to "the residence of the [corporate] party." Wis. Stat. § 804.05(3)(b)(6) (1975-76 version). The other two options are exactly what they purport to be.³ There is nothing confusing about the fact that the statute allows Wisconsin to compel by notice Merck's corporate designee deposition in one of three places: at Merck's principal place of business, where it employs people, or where it transacts business in person—admittedly in Madison. Wisconsin has chosen Madison.⁴

Indeed, under Merck's new reading of the statute, if Merck's corporate designee transacted business in person in Hawaii, Merck could force the deposition to take place in Hawaii. Merck's reading of the statute provides for ridiculous outcomes and is contrary to the

³ Moreover, the language "that of" in the statute is simply shorthand for repeating the list of three options: the place of examination shall be determined as if the deponent's place of residence, employment or transacting business in person were *the party's place of residence, employment or transacting business in person*. With this simple observation, Merck's argument falls apart.

⁴ Finally, Merck's backwards interpretation would be unworkable. The Wisconsin statutes states that a notice of depositions "shall state the time and *place* for taking the deposition Wis. Stat. § 804.05(2). When a party issues a notice of a corporate designee deposition under Wis. Stat. § 804.05(2)(e), it does not know who the corporation will subsequently designate as the deponent. Thus, if the place of deposition were controlled by the residence of the corporate designee, the place would be a mystery until the corporation designated the deponent and then informed the other party where the deponent lived, worked, and transacted business in person.

changes in the statutes that unequivocally expanded the ability of parties to take depositions of non-resident defendants in Wisconsin.

B. Federal Law Holding that the Deposition Should Take Place at Merck's Principal Place of Business Is Not Persuasive Because the Federal Law Is Not Based on a Statute Similar to the Wisconsin Statute.

Judge Eich correctly rejected Merck's argument that federal case law holding that corporate designees should be deposed at the corporation's primary place of business should be used to "interpret" Wisconsin's statute governing deposition locations. (Eich Decision, at 3-5)

As Judge Eich recognized, where a Wisconsin civil procedure rule is based on a federal rule, "decisions of the federal courts, to the extent they show a pattern of construction, are considered persuasive authority." *See, Neylan v. Vorwald*, 124 Wis.2d 85, 99, 368 N.W.2d 648 (1985). However, as Merck itself concedes, *there is no specific federal rule governing the location of depositions*. (Eich Decision, at 4)

Merck pins its entire argument that federal law should be used to interpret the Wisconsin statutes on one Judicial Council note which states that the section governing the location of depositions had been "amended to conform to the territorial scope of deposition notices and subpoenas to the 100-mile provision of Rule 45(d), F.R.C.P., as amended in 1985." Judicial Council Note to Wis. Stat. § 804.05 (1994). As Judge Eich pointed out:

The Federal rule, which has since been renumbered Rule 45 (c)(3)(a), deals with protection of persons subject to subpoenas, and directs courts to quash subpoenas which, among other things, "require[] a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person..."

(Eich Decision, at 4) Judge Eich concluded that the connection between the federal law governing subpoenas and Wisconsin's statutes governing the location of depositions was "tenuous," and rejected using case law interpreting the federal subpoena statute as persuasive authority in interpreting the Wisconsin statute:

The statutes are, however, significantly different and, more importantly, the Judicial Council note suggests by its very language that the legislature was not adopting the federal rule in its entirety—or even substantially—but rather was importing the quoted excerpt only to describe “the territorial scope of deposition notices” in terms of the 100-mile limitation set forth in the rule. It thus seems to me that the connection between §805.05(3) and F.R.C.P. 45 is so tenuous that it would be inappropriate to consider the cited cases as persuasive precedent.

(Eich Decision, at 4-5)

Judge Eich noted that the 1985 amendment to Wis. Stat. § 804.05(3)(b) simply changed the territorial scope of the rule from 30 to 100 miles. (Eich Decision, at 4, n.2) Merck now claims that Judge Eich erred because he overlooked the fact that the Wisconsin statute also borrowed the “transacts business in person” language from the federal subpoena statute.

However, Judge Eich *did* address this issue:

I note also that, while Merck cites three district court cases (and one court of appeals case) for the proposition that, under Rule 45, corporate-designee depositions are to be held at or near the corporation’s home offices, it does not indicate whether there was any claim—or any ruling—in any of those cases with respect to the “regularly transacts business” language, which is at the heart of the instant dispute.

(Eich Decision, at 5, n.3) Even if Judge Eich had not addressed this issue, Merck still does not explain how the federal interpretation of “transacts business in person”⁵ would affect the outcome of this appeal since Merck has not disputed that it transacts business in person in Wisconsin through its sales force in Wisconsin, nor has it stated what that interpretation should

⁵ Further, Merck has cited no authority for the highly-unlikely idea that a *phrase* in a Wisconsin statute that is based on federal language should be interpreted in accord with federal law, as opposed to a Wisconsin *rule or statute* that is based on a federal statute. Moreover, the phrase in the federal law is “*regularly* transacts business in person” as opposed to “transacts business in person.” There is no doubt that the two phrases would be interpreted differently.

be—other than to simply state that its corporate designees should not be compelled to give a deposition in Wisconsin as under federal law.⁶

Moreover, since federal law holds that the deposition of a corporation through its officers and agents should ordinarily be taken at its principal place of business, and Merck's principal place of business is in *New Jersey*—and Merck asked Judge Eich to order the deposition in Pennsylvania—this entire argument is irrelevant. Merck's argument clearly misled Judge Eich into thinking that its headquarters were in Pennsylvania:

Defendant Merck seeks a protective order quashing a notice setting a deposition in Madison, Wisconsin, for a Merck corporate designee, who works and resides at Merck's headquarters in Pennsylvania.

* * * *

Merck, whose business is headquartered in Pennsylvania

(Eich Decision, at 2, 3) Merck's failure to clear up this misunderstanding is inexcusable.

C. Merck Has Offered No Grounds for a Protective Order.

Merck has offered no grounds upon which Judge Eich could have granted a protective order. Wisconsin Statute Section 804.01(3)(a) states: "Upon motion by a party . . . and for good

⁶ State legislatures have a much greater interest than the federal government in compelling defendants to come to their own forums. Thus it is not surprising that even in states that do not have a specific statute governing the location of corporate designee depositions, such as Louisiana, state courts have ruled that corporate designee depositions must be taken as if the corporation were being deposed:

The residence of a corporate designee for the purposes of a deposition of the corporation is not germane to the issue of the place for taking of this deposition. La. C.C.P. arts. 1436 and 1442. The witness which Haynes seeks to depose is Liberty Mutual Insurance Company.

Haynes v. United Parcel Service, Inc., 839 So.2d 1287, 1288, 37, 457 (La. App. 2 Cir. 2003). Additionally, contrary to Merck's representation, Montana does not have provision governing deposition locations similar to that of Wisconsin. (Merck Br. at 9)

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” “The burden of establishing ‘good cause’ is on the party seeking the protective order.” *Earl v. Gulf & Western Mfg. Co.*, 123 Wis.2d 200,208, 366 N.W.2d 160, 164 (Wis. App. 1985) (citing *Vincent & Vincent, Inc. v. Spacek*, 102 Wis.2d 266,272, 306 N.W.2d 85, 88 (Wis. App. 1981)).

Merck has not met its burden. An “objection that discovery is . . . unduly burdensome must be supported by affidavits or offering evidence revealing the nature of the burden and why the discovery is objectionable.” *Wagner v. Dvyvit Systems, Inc.* 208 F.R.D. 606,610 (D. Neb. 2001). Merck is asking for a protective order but did not provide an affidavit to Judge Eich specifying the special circumstances why it, as opposed to every other foreign corporation, is entitled to protection from the clear mandate of the statute and why the burden should be shifted to the Wisconsin taxpayers.

Merck cannot argue that producing a corporate designee *pursuant to statute* is an “undue burden.” Merck transacts business in person in Wisconsin, and thus falls within the statute. In fact, Merck amply avails itself of the benefits of transacting business in Wisconsin, making many millions off its drug sales to Wisconsin annually. Its corporate designees, who work for a world-wide enterprise, cannot fault the Wisconsin legislature for expecting them to leave their home state on occasion in connection with the business it transacts in Wisconsin. Merck is asking this Court to go against the established intention of the legislature and in this case, force the taxpayers of Wisconsin to foot the bill for travel Merck employees do not wish to make. This is wholly unwarranted

As Judge Eich held:

Merck also argued that the language in §805.04(3)(b)1, *Stats.*—“or at such other convenient place as is fixed by an order of the court”—should result in my

granting its motion for a protective order. As the State points out, however, no evidence was presented on that point, and very little argument was directed that way.

(Eich Decision, at 5, n.4)

Finally, contrary to Wisconsin law, Merck attempts to shift the burden of establishing good cause for a protective order onto Wisconsin. It states, citing this Court, that Plaintiff has assumed the burden of traveling out of state for dozens of depositions through its own tactical choice. (Merck Br. at 11) Judge Eich addressed this issue:

It may be assumed, I am sure, that travel from Pennsylvania to Madison—which undoubtedly would involve an overnight stay—will carry some inconvenience to the designee (as would locating the deposition in Pennsylvania inconvenience the State, at least to some degree—recognizing, of course, that the choice of the forum, and the election to join more than 35 defendants in a single action, was the State’s). On this record, however, I am not persuaded that the inconvenience is so great as to warrant exercising my discretion to re-locate the deposition.

(Eich Decision, at 5, n.4)

III. The Issue of the Validity of the Service of a Subpoena is Not Ripe for Appeal

Although Merck raises it in its appeal, the issue of the validity of the service of a subpoena is not ripe for appeal. Judge Eich stated: “Because I reach that conclusion [that the deposition was properly noticed in Madison under § 804.05(3)(b)1], it becomes unnecessary to consider Merck’s arguments relating to the subsequent service of a subpoena for the deposition.”

(Eich Decision, at 2, n.1 & 5) The issue of the subpoena will only be relevant if Judge Eich’s ruling regarding the deposition being properly noticed in Madison is overruled here. If that occurs, the issue can be remanded to Judge Eich. Merck cannot take exception to a ruling that was never made. See Stipulation and Order of Reference to Special Discovery Master, ¶5.

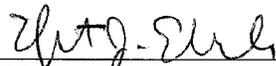
IV. Conclusion

The Wisconsin statute governing the location of depositions of corporate designees is straightforward and directly on point. Judge Eich correctly applied the statute to the instant

situation. For all of the foregoing reasons, the State of Wisconsin requests that the Court affirm Judge Eich's denial of Merck's request for a protective order.

Dated this 17th day of May, 2006.

Respectfully submitted,



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