IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA, Plaintiff, v. PURDUE PHARMA L.P., *et al.*, Defendants.	Case No. CJ-2017-816 Judge Thad Balkman

DEFENDANTS JANSSEN PHARMACEUTICALS, INC. AND JOHNSON AND JOHNSON'S RESPONSE TO STATE'S MOTION TO PRECLUDE VIDEO DEPOSITIONS OF GARY VORSANGER AND BILL GRUBB

Under 12 O.S. § 3232(A)(3)(b), "when a witness does not reside in the county where the action is proceeding, his or her deposition may be used" for any purpose at trial, *Lee v. Volkswagen of Am., Inc.*, 1984 OK 48, ¶40, 688 P.2d 1283, 1290, and is not hearsay. Since both Gary Vorsanger and Bill Grubb live out of state, Janssen is statutorily entitled to play their videotaped depositions instead of calling them in person, just as the State made extensive use of videotaped depositions in its case-in-chief.

The State's belated objection to their videotaped testimony misreads section 3232. The State says that provision does not authorize video testimony because Janssen "controls" Vorsanger and Grubb and "procured" their unavailability. But under section 3232, when a witness resides outside the county where the action is pending, video deposition testimony is allowed, period—just as it is where the witness is a party or a corporate representative. A party cannot challenge its use by claiming that another party "procured" the witness's absence. And section 3232 explicitly

and unambiguously bars the State's hearsay challenge to deposition testimony presented due to witnesses' absence from trial. It is unsurprising that the State identified no cases supporting its argument: none exist.

The State's frivolous arguments also start from the false premise that Janssen "controls" Mr. Vorsanger and Mr. Grubb and "procured" their absence. Mot. 1-2. Neither is an employee of the defendants or their subsidiaries. And Janssen did not take any measures to keep them away from Oklahoma during the trial—they live in other states of their own volition.

But it makes no difference. Because they live outside this County, Janssen is under no obligation to subpoena Mr. Vorsanger or Mr. Grubb or to prove that they are unavailable, any more than the State had to prove the unavailability of its six videotaped witnesses. This Court should deny the State's meritless motion.

I. BACKGROUND AND ARGUMENT

Janssen sent the State its deposition designations for Bill Grubb on May 1, 2019, and its designations for Gary Vorsanger on May 3, 2019. On June 25, 2019, Janssen gave the State the required notice that it intended to use the videotaped depositions of those witnesses at trial. Gary Vorsanger is a former Janssen employee who retired from the company in 2017. Vorsanger Dep. 9:16-22. Bill Grubb is an employee of Noramco, a company that Janssen sold approximately three years ago. Grubb Dep. Tr. 7:24-25, 23:15-18. Both witnesses reside outside of Oklahoma, and Janssen took no actions to keep them away from Oklahoma during the trial.

Under 12 O.S. § 3232(A)(3)(b), Janssen is allowed to use the videotaped depositions of Mr. Grubb and Mr. Vorsanger at trial because they reside outside of Cleveland County. Section 3232 lists multiple alternative scenarios in which deposition video is appropriate at trial ***in the disjunctive***:

> The deposition of a witness, whether or not a party may be used for any purpose if the court finds:
> ...
> b. That the witness does not reside in the county where the action or proceeding is pending or is sent for trial by a change of venue ***or*** the witness is absent therefrom, unless it appears that the absence of the witness was procured by the party offering the deposition

(emphasis added). The State misunderstands this disjunctive language, which permits the use of depositions in two distinct circumstances: first, where the witness "does not reside in the county"; and second, where the witness is "absent" from that county and that "absence ... was [not] procured by the party offering the deposition." *Id.* If the deponent ***resides*** outside the county, that is the end of the matter: there is no need to address the clause about ***absent*** witnesses and whether their "absence" was "procured" by a party. Indeed, that is the controlling interpretation of the Oklahoma Supreme Court. *See Lee*, 1984 OK 48, ¶40, 688 P.2d 1283, 1290 ("This statute indicates that when a witness does not reside in the county where the action is proceeding, his or her deposition may be used.").

The State's argument separately fails because Janssen did not "procure" the absence of Mr. Grubb or Mr. Vorsanger. Where a witness "has always resided" outside the relevant geographic territory, the party "***obviously*** ... did not procure his absence." *Bellamy v. Molitor*, 108 F.R.D. 1, 2 (W.D. Ky. 1983) (emphasis added) (applying Federal Rule of Civil Procedure 32).[1] Declining to *force* a witness to appear for trial through a subpoena (in this instance, a subpoena to an out-of-state witness that would be invalid to compel attendance at trial in Oklahoma) does not amount to *procuring* their absence, which requires affirmative, even wrongful, conduct. *See Hunt v. State*,

[1] Because "Oklahoma obtained its discovery code from the Federal Rules of Civil Procedure," this Court should examine "federal cases construing" the equivalent federal rule for guidance. *Hall v. Goodwin*, 1989 OK 88, 775 P.2d 291, 293.

2009 OK CR 21, ¶ 8, 218 P.3d 516, 518 ("procuring" a witness's unavailability means "wrongfully caus[ing] the absence of the witness.").

The State tries to avoid this result by arguing that Janssen cannot use the depositions unless it satisfies the hearsay exception for unavailable declarants.[2] Mot. 3. For deposition videos played under section 3232(A), the hearsay rules are "***applied as though the witness were then present and testifying***." 12 O.S. § 3232(A) (emphasis added). As the advisory committee notes for Federal Rule of Civil Procedure 32 explain,[3] that provision "eliminates the possibility of certain technical hearsay objections which are based, ***not on the contents of deponent's testimony, but on his absence from court***." In other words, section 3232(A) anticipates and rejects the very hearsay argument raised here: Because the Court must apply the Evidence Code as if Mr. Vorsanger and Mr. Grubb were "present and testifying," 12 O.S. § 3232(A), the State cannot bring a hearsay argument based on their "absen[ce] from the hearing," Mot. 3 (quoting 12 O.S. § 2804(5)).

II. CONCLUSION

Under the clear language of section 3232, because Mr. Vorsanger and Mr. Grubb do not live in Cleveland County, Janssen can present their video deposition testimony, and is under no obligation to subpoena them. This Court should deny the State's motion.

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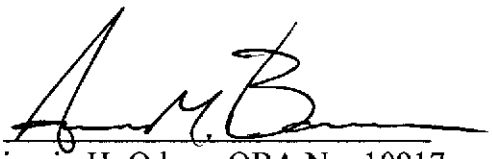
[2] Yet the State also had "not shown," Mot. 3, that *its* videotaped witnesses were unavailable before it played videos.

[3] That rule similarly permits use of deposition testimony at trial "to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying." Fed. R. Civ. P. 32(a)(1)(B).

Dated: June 26, 2019

Respectfully submitted,

By: 

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CERTIFICATE OF MAILING

Pursuant to OKLA. STAT. tit. 12, § 2005(D), this is to certify on June 26, 2019, a true and correct copy of the above and foregoing has been served via email to the following:

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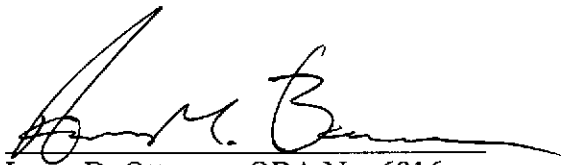

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