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Pretrial Discovery- Use of a Party's Own Deposition

Pretrial Discovery—Use of a Party's Own Deposition—*King v. International Harvester Co.*

At common law depositions were admissible in evidence in ecclesiastical and equity courts but not in trials at law unless both parties consented.[1] Today, the simple rules of the common law in this area have been entirely replaced by statutory law[2] and Rules of Court.[3] The recent Virginia case of *King v. International Harvester Co.*[4] is illustrative of the problems encountered when courts have undertaken judicial interpretation of these codifications.

In *King* the Virginia Supreme Court gave its first impression of the recently amended Rules of the Virginia Supreme Court pertaining to the use by a party of his own deposition.[5] King, the plaintiff, was a non-resident of Virginia, living in Florida both at the time he filed motion for judgment for personal injuries and at the time of the trial. During pretrial discovery, King's deposition was taken, at which time the parties, by counsel, stipulated that the deposition could be used for any purpose permitted under the Rules of Court. On the day of the trial King did not personally appear and his attorney attempted to introduce his deposition in evidence. The trial court denied the use of the deposition under rule 4:1(d)(3). The Virginia Supreme Court affirmed the lower court's decision.

It is well established that under certain circumstances the deposition of a witness, whether or not a party, may be admitted as evidence in lieu of his personal appearance.[6] In the *King* case the plaintiff relied on a provision of

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1 *See* O'Neill v. Cooles, 33 Del. 541, 140 A. 648 (1928); Reed v. Allen, 121 Vt. 202, 153 A.2d 74 (1959).

2 *See* Minder v. Georgia, 183 U.S. 559 (1902); McCollum v. Birmingham Post Co., 259 Ala. 88, 65 So. 2d 689 (1953); Setliff v. Commonwealth, 162 Va. 805, 173 S.E. 517 (1934). *See generally* 23 Am. Jur. 2d *Depositions and Discovery* § 3 (1965).

3 The following cases interpret rules of their respective courts which have codified the law regarding the use of depositions as evidence in trials at law. Edwards v. Van Voorhis, 11 Ariz. App. 216, 463 P.2d 111 (1970); Campbell v. Graham, 144 Colo. 532, 357 P.2d 366 (1960); Fishman v. Liberty Assoc., 196 So. 2d 493 (Fla. Ct. App. 1967); Powers v. Kelley, 83 Ill. App. 2d 289, 227 N.E.2d 376 (1967).

4 212 Va. 78, 181 S.E.2d 656 (1971).

5 At the time of the *King* decision, the Rule governing the use of depositions in court proceedings was designated as Va. Sup. Ct. R. 4:1(d)(3). The subsequent revision of the Rules effective March 1, 1972 resulted only in a numbering change, and the Rule can now be found at Va. Sup. Ct. R. 4:7(a)(3). Further references in this note will be to the old numbering to minimize confusion.

6 Depositions have been held admissible when the deponent died pending suit. Wright Root Beer Co. v. Dr. Pepper Co., 414 F.2d 887 (5th Cir. 1969); Derewecki v. Pennsylvania R.R., 353 F.2d 436 (3rd Cir. 1965); Franzen v. E.I. DuPont de Nemours & Co., 146 F.2d 837 (3rd Cir. 1944). When the witness was absent from

the Virginia Rules of Court which allows such use of a deposition when the witness is at a greater distance than 100 miles from the trial, or out of state. This provision, however, further provides that a deposition of the witness can not be used if the absence of the witness was procured by the party affecting the deposition.[7] The Virginia court recognized the proper use of depositions under certain circumstances,[8] but held that since no excuse for the absence appeared in the record, King was voluntarily absent and thus had "procured" his own absence. Accordingly, the deposition was excluded.

The *King* decision is significant in that its preoccupation with semantics, particularly as to the meaning of the word "procure," led to a holding which in effect excludes all party witnesses as a class from the purview of this section of the rule.[9]

Many of the cases in other jurisdictions which have dealt with the use of depositions under statutes or rules similar to Virginia's rule 4:1(d)(3)(2) have neglected to consider the meaning of the qualifying clause.[10] Those that have considered it have done so only passively and have been reluctant to find any evidence of procurement.[11] In *Weiss v. Weiner*[12] the federal dis-

the jurisdiction or beyond the prescribed distance. Perovich v. Glen Falls Ins. Co., 401 F.2d 145 (9th Cir. 1968); Williams v. Cox, 355 F.2d 667 (10th Cir. 1965); Klepal v. Pennsylvania R.R., 229 F.2d 610 (2d Cir. 1956). Witness was unable to attend the trial due to illness. Murray v. United States, 316 F.2d 29 (1st Cir. 1963); Houser v. Snap-On Tools Corp., 202 F. Supp. 181 (D.C. Md. 1962). *See generally* 8 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2146, 2147 (1970).

[7] VA. SUP. CT. R. 4:1(d)(3) provides in part:

> [T]he deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: . . . 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of this State, unless it appears that the absence of the witness was procured by the party offering the deposition. . . .

[8] 212 Va. at 84, 181 S.E.2d at 660. The use of depositions has also been allowed under VA. CODE ANN. § 8-313 (Cum. Supp. 1971). For specific cases in which depositions have been allowed in Virginia prior to the adoption of the Rules of Court, *see, e.g.*, Powell v. Manson, 63 Va. (22 Gratt.) 177 (1872) (the witness was dead); Pleasants v. Clements, 29 Va. (2 Leigh) 474 (1831) (witness could not be procured); Douglas v. McChesney, 23 Va. (2 Rand.) 109 (1823) (witness was physically unable to attend).

[9] *See* note 20 *infra*.

[10] Rule 4:1(d)(3)(2) and its counterparts in other states are similar to Rule 32 (a)(3) of the Federal Rules of Civil Procedure. *See, e.g.*, Williams v. Cox, 355 F.2d 667 (10th Cir. 1965); Campbell v. Willis, 290 F. 271 (D.C. Cir. 1923); Edwards v. Van Voorhis, 11 Ariz. App. 216, 463 P.2d 111 (1970); Campbell v. Graham, 144 Colo. 532, 357 P.2d 366 (1960); Hiltibrand v. Brown, 124 Colo. 52, 234 P.2d 618 (1951); Namerdy v. Generalcar, 217 A.2d 109 (D.C. 1966); Fishman v. Liberty Ass'n, 196 So. 2d 493, (Fla. Ct. App. 1967); Powers v. Kelley, 83 Ill. App. 2d 289, 227 N.E.2d 376 (1967); Schmitt v. Jenkins Truck Lines, Inc., 170 N.W.2d 632 (Iowa 1969); Fleming v. Atlantic Coast Line R.R., 236 N.C. 568, 73 S.E.2d 544 (1952); Reiniger v. Piercy, 77 W. Va. 62, 86 S.E. 926 (1915).

[11] *See, e.g.*, Stewart v. Meyers, 353 F.2d 691 (7th Cir. 1965). The defendants

trict court of Maryland held that "procure" refers to a situation in which a party collusively instigates or induces a witness to remove himself from the 100 mile area.[13] The Virginia court in *King* recognized this interpretation but held that if a party is to utilize rule 4:1(d)(3)(2) there must be a showing that his absence was caused by something more than a mere preference not to attend the trial.[14] Without such evidence, the absence will be deemed voluntary and thus procured by the party offering the deposition.

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were husband and wife. At the trial the husband stated that he and his wife were separated and that her last known residence was at a place more than 100 miles from the trial. The trial court allowed the deposition of the wife. This decision was upheld on appeal. In the *King* decision the court referred to this case but simply stated that the trial court was convinced that the deponent had not procured her own absence and thus distinguished *Stewart* from the case at bar. 212 Va. at 83, 181 S.E.2d at 660.

In Richmond v. Brooks, 227 F.2d 490 (2d Cir. 1955) the plaintiff's attorney offered the deposition of the plaintiff, an out-of-state resident, into evidence. The court allowed the deposition. The Virginia court also referred to this case, but pointed out that in reaching its decision the *Richmond* court concluded that the plaintiff could not afford the trip to the trial. 212 Va. at 83, 181 S.E.2d at 660.

In Weiss v. Weiner, 10 F.R.D. 387 (D. Md. 1950) the defendant was a resident of Florida while the action was brought in Maryland. The court allowed the defendant's deposition stating that "[r]ule 26(d)(3) [similar to Virginia's rule 4:1(d)(3)(2)] is . . . literally gratified unless the circumstances satisfy the court that the deponent's absence could have been said to have been *procured* by himself." *Id.* at 388. The Virginia court in referring to this case pointed out that in *Weiss* the defendant sought a continuance on the day of the trial and the court concluded that the defendant was in Florida for his health. 212 Va. at 83, 181 S.E.2d at 660.

In Ross v. Lewin, 83 N.J. Super. 420, 200 A.2d 335 (1964) the plaintiff, a California attorney, sued the defendant in New Jersey for legal fees. The court allowed the use of the plaintiff's own deposition stating that "[i]t would be a distortion of the language of R.R. 4:16-4(c) [similar to Virginia's rule 4:1(d)(3)(2)] to say that a California resident . . . had procured his absence from New Jersey, merely because he did not attend personally at the trial in New Jersey." *Id.* at 336. *See also* Hideyuki Kono v. Auer, 51 Hawaii 273, 458 P.2d 661 (1969); Perlin Packing Co. v. Price, 247 Md. 475, 231 A.2d 702 (1967); Aircraft Radio Indus. v. M.V. Palmer, Inc., 45 Wash. 737, 277 P.2d 737 (1954).

But see Vevelstad v. Flynn, 230 F.2d 695 (9th Cir.), *cert. denied*, 352 U.S. 827 (1956). Defendant, who knew the date of the trial, voluntarily left the United States and the trial court refused to allow his deposition. The appellate court upheld this decision stating that the lower court's refusal to consider the deposition may well have been in accordance with the rule, but that the deposition itself had no bearing on the ultimate issue. In Jameson v. Tully, 178 Cal. 380, 173 P. 577 (1918) the deponent had been in attendance up until one hour before her deposition was offered. The court refused to allow the deposition.

[12] 10 F.R.D. 387 (D. Md. 1950).

[13] *Id.* at 389. *See also* Stewart v. Meyers, 353 F.2d 691 (7th Cir. 1965); Richmond v. Brooks, 227 F.2d 490 (2d Cir. 1955); Hyam v. American Export Lines, 213 F.2d 221 (2d Cir. 1954).

[14] 212 Va. at 82, 181 S.E.2d at 659.

If one will indulge in further subtleties of rule construction, it may be argued that the admissibility of a party's deposition turns on the meaning of the word "absence." The term has been held to refer to absence from the 100 mile area or absence from the state.[15] Under this interpretation a party who resides in another state can hardly be said to have procured his own absence. The *King* court, on the other hand, concluded that "absence" refers to absence from the courtroom. Moreover, voluntary absence from the courtroom is enough under the *King* decision to bring the party within the meaning of the "unless clause" and preclude the use of his deposition at the trial. It has been suggested that too much has been made of this distinction; that "procure" as used in the qualifying clause should be interpreted in the same way regardless of the meaning of "absence." [16]

The *King* court emphasized that since "[t]here is no intimation in the record that plaintiff's absence was caused by illness, age, infirmity or for any reason other than his own volition" he procured his own absence.[17] If the party's absence had in fact been caused by illness, age, or infirmity there would be no need to invoke this section of the rule, for provision is made under another section for such contingencies.[18] As to any other ex-

[15] 4 A J. MOORE'S FEDERAL PRACTICE ¶ 32.05 (2d ed. 1971):

> The crux of the question is whether "absence" . . . means absence from the territory embraced within a radius of 100 miles from the place of trial or absence from the trial. If the former meaning is correct, a party who resides more than 100 miles from the place of trial, as is often the case when jurisdiction is based on diversity of citizenship, can hardly be said to have procured his own absence from the territory embraced within a radius of 100 miles from the place of trial. Under this view a party who resides more than 100 miles from the place of trial may use his own deposition as evidence at the trial. If "absence" means absence from the trial, a party who resides more than 100 miles from the place of trial may not use his own deposition as evidence at the trial unless it appears that he could not be present at the trial and that his absence is not due merely to a preference to use his deposition rather than to testify orally at the trial. *Id.* at 32-29.

In Richmond v. Brooks, 227 F.2d 490 (2d Cir. 1955) the court considered the two meanings of "absence" but decided that it referred to absence from the 100 mile area:

> [T]he language used, referring to different stages of trial *or hearing*, and obviously pointing back to the defining clause which sets forth the basic reasons for admissibility, makes it quite clear that the former is meant. *Id.* at 493.

[16] *See* Richmond v. Brooks, 227 F.2d 490, 493 (2d Cir. 1955); Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946) (dissenting opinion):

> In view of the clear intent and purpose of the rule there would be no particular reason or sense in substituting a purely arbitrary restriction for the discretionary finding as to the purpose of the absence, required by the rule itself as a condition of exclusion. *Id.* at 478 n.4.

[17] 212 Va. at 85, 181 S.E.2d at 661.

[18] VA. SUP. CT. R. 4:1(d)(3)(3):

> [T]he deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: . . . that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment....

cuses which a party may offer for his absence, these could be brought out under still another section of the same rule which provides for the use of depositions under exceptional circumstances.[19] Under the *King* decision however, an out-of-state litigant must affirmatively provide an excuse for his absence, and thus in effect is required to qualify under two sections of the rule.[20] As a result, rule 4:1(d)(3)(2), standing alone, is unavailable to the party litigants themselves.[21]

It appears that a better solution would be to allow the use of the deposition of a party when that party does in fact reside more than 100 miles from the place of trial or out of state. It should be noted that rule 4:1(d)(3) as drafted provides that if the opposition feels that a party's attendance would be in the interest of justice, he may petition the court to require the party's attendance.[22] This provision obviates the need for the narrow construction

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[19] VA. SUP. CT. R. 4:1(d)(3)(6):

> [T]he deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: . . . upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used; but on motion made before the commencement of the trial, the court may, for good cause shown, require any such witness to attend in person.

[20] The rule itself permits the use of a deposition if the deponent is out of state or at a distance greater than 100 miles from the place of trial. But as a result of the *King* court's narrow construction, a deponent party who resides out of state not only must fulfill this requirement but is further required to offer an excuse for his absence. Thus he is forced to bring himself within the purview of a second section of the rule as well (rule 4:1(d)(3)(3) if the deponent is sick or rule 4:1(d)(3)(6) should exceptional circumstances exist).

[21] In reaching its decision the Virginia Court emphasized the importance of oral testimony of witnesses before the jury, enabling the jury to observe their demeanor, appearance, candor, and behavior on the witness stand. The court also felt that if allowed to testify by deposition, the parties might abuse the privilege if it appeared that their demeanor and appearance might be harmful to their case. While this may be true in some instances, the tactical burden that is placed upon a party by his failure to appear would no doubt restrict its use. *See* Richmond v. Brooks, 227 F.2d 490 (2d Cir. 1955).

[22] VA. SUP. CT. R. 4:1(d)(3)(6). *See* cases cited note 6 *supra*. In the *King* case the plaintiff was fully examined by both parties when the deposition was taken. At that time it appeared that the burns which the plaintiff allegedly received as a result of defendant's negligence would be important to the plaintiff's case. During the course of his examination the plaintiff also failed to answer several questions. With these things in mind the defendant easily could have recognized the potential value of the plaintiff's oral testimony and appearance in open court, and, invoking rule 4:1(d)(3)(6), could have petitioned the court to require the plaintiff to appear. In ruling on this petition the court would make its discretionary decision prior to the trial and the deponent party would be absolutely apprised beforehand of the necessity for his appearance.

of rule 4:1(d)(3)(2) by the court in *King*. Such an interpretation would allow the Rules of Court to be enforced in spirit, free of the confusing complexities of over-analysis of terms, and would place no undue burden upon either party.[23]

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[23] Under the *King* decision a discretionary decision must be made as to whether the party procured his own absence. However, the fact that this decision is not made until the time of trial may place a burden on the deponent party. Under the proposed interpretation, the discretionary decision would be made prior to the trial date, and thus neither party would be placed at a disadvantage.