

GALLATIN COUNTY CLERK
OF DISTRICT COURT
JENNIFER BRANDON

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FILED

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY
BY *MB*
DEPUTY

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ALEKSANDRA M. VINOGRADOV,

Plaintiff,

vs.

MONTANA STATE UNIVERSITY -
BOZEMAN,

Defendants.

Cause No. DV-03-49

**ORDER ON PLAINTIFF'S
EMERGENCY MOTION TO
PERPETUATE TESTIMONY
PENDING APPEAL**

On May 26, 2009, Plaintiff Vinogradov filed an Emergency Motion to Perpetuate Testimony Pending Appeal in which she seeks an order pursuant to Rule 27(a) and (b), M.R.Civ.P., allowing the oral and videotaped depositions of

(1) the Bozeman Daily Chronicle's designee(s) with the most knowledge concerning the identity of individuals and organizations who viewed and/or posted comments on its website concerning Vinogradov and/or her trial; and (2) MSU's designee(s) with the most knowledge concerning the identity and production of all e-mail or other communications at any time, between Juror Brandon Comstock, and agents, employees and representatives of MSU, including Dr. Ruhul Amin and the law firm of Moulton Bellingham.

Vinogradov states her request to perpetuate testimony is made because the deadline for determination of her motion for a new trial filed on April 17, 2009, is rapidly

approaching and in order for her "to obtain the sought-after information within the time in which it could reasonably be used, Plaintiff requires the Court's order allowing the depositions within an abbreviated time." She also states that the information she seeks is to be used in further proceedings in this case and, possibly, in a separate action which she is "presently unable to bring because of the anonymity of potential tortfeasors."

With regard to the Bozeman Daily Chronicle, Vinogradov seeks production of documents and things that "concern, touch on, comment about, or otherwise relate to" postings and comments made on the Chronicle's website regarding two articles it published on March 23, 2009 and April 4, 2009, concerning Vinogradov and the trial of this matter. Her request specifically includes 1) copies of all postings made to the Chronicle's website or blog relating to the two articles; 2) the names and identities of persons and organizations that posted such comments; 3) the IP addresses associated with each comment posted; 4) the IP addresses associated with each viewer of the two articles during the period of March 23, 2009 to April 3, 2009; 5) all computer logs generated in connection with the two articles; and 6) any and all e-mail communications and other written communications that the Chronicle and its website, its agents and its employees have received or sent on or after March 23, 2009 relating to the two articles, comments on the articles, Vinogradov herself, this lawsuit or "any other articles, blogs, posts, or other media that concern, touch on, comment about, or otherwise relate to" the two articles, Vinogradov or this lawsuit. With regard to the Defendant MSU, Vinogradov seeks "the identity and production all e-mail or other communications at any

time, between Juror Brandon Comstock, and agents, employees and representatives of MSU, including Dr. Ruhul Amin and the law firm of Moulton Bellingham.”

Vinogradov asserts that the information she is seeking “could be lost if it is deleted, corrupted or moved, and it is vital to Plaintiff’s discovery of the identity of person who could have defamed her maliciously; reveal further evidence of jury misconduct; or more—all of which is properly discoverable to avoid failure or delay of justice.”

On June 3, 2009, the Bozeman Daily Chronicle filed a combined brief replying in support of its earlier motion to quash a subpoena and responding in opposition to Vinogradov’s motion to perpetuate testimony. The Chronicle argues that the documents and information which Vinogradov seeks from its representatives are protected under Montana’s Media Confidentiality Act, specifically § 26-1-902, MCA.

On June 4, 2009, Defendant MSU filed its Brief in Support of Its Objection to Plaintiff’s Emergency Motion. MSU argues that Vinogradov’s motion to perpetuate testimony should be denied because it is procedurally and substantively insufficient under the requirements of Rule 27, M.R.Civ.P.; the information she seeks is not relevant to the jury misconduct issue raised in her motion for a new trial; she already has been given sufficient opportunity to introduce evidence supporting her jury misconduct argument and has been unable to do so; and the information she seeks is privileged and protected work product from MSU and its counsel.

As stated above, Vinogradov is seeking to perpetuate testimony to be used in further proceedings in this case and, possibly, in a separate action to be filed at a later

date. Rule 27(a), M.R.Civ.P., provides for the perpetuation of testimony prior to the commencement of an action in a district court. Rule 27(a)(1) provides that

[a] person who desires to perpetuate testimony regarding any matter that may be cognizable in any district court of the state of Montana may file a verified petition in the district court in the county of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a district court of the state of Montana but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and the petitioner's interest therein, 3, the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, 4, the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

To the extent Vinogradov seeks to perpetuate testimony for purposes of a subsequent legal action, she has failed comply with Rule 27(a)(1) in that she has not filed a verified petition stating the subject matter of the expected action, the facts she intends to establish through the proposed testimony, the names or description of the person(s) she expects to be adverse parties in the expected action and the substance of the testimony which she expects to elicit from the deponents.

Vinogradov also states she wishes to perpetuate testimony for purposes of further proceedings in this action. Rule 27(b), M.R.Civ.P., governs the perpetuation of testimony in an action pending appeal and provides that

[i]f an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service

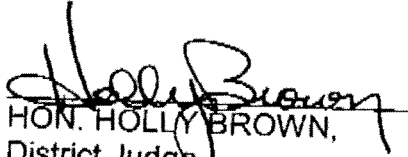
thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which the party expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

Rule 27, M.R.Civ.P. is not to be used as a substitute for discovery. The party moving to perpetuate testimony pursuant to Rule 27(b) must establish why the testimony must be perpetuated and this requires more than conclusory allegations of a risk that the testimony may become unavailable. *Scott v. Robson*, 182 Mont. 528, 533, 597 P.2d 1150, 1153 (1979). Rather, the moving party must assert facts establishing that the testimony is likely to be lost while an appeal is pending. *Scott*, 182 Mont. at 533-34, 597 P.2d at 1153.

Here, Vinogradov asserts in her motion that the testimony she seeks to perpetuate "could be lost if it is deleted, corrupted or moved" This is merely a conclusory and factually baseless allegation of a potential risk of loss and does not meet the standard required by Rule 27(b) as interpreted in *Scott*. Furthermore, while Vinogradov lists the documents and information she seeks from the deponents, she again fails to indicate the substantive content of the evidence and its relevance to this case. The Court finds that Vinogradov's Emergency Motion to Perpetuate Testimony Pending Appeal is procedurally and substantively insufficient under Rule 27(a) and (b), M.R.Civ.P., to establish that the perpetuation of the testimony is proper to avoid a failure or delay of justice. Therefore,

IT IS HEREBY ORDERED that Vinogradov's Emergency Motion to Perpetuate
Testimony Pending Appeal is DENIED.

Dated this 5th day of June, 2009.


HON. HOLLY BROWN,
District Judge

cc: E. Casey Magan./ Russell S. Waddell email
6-5-09 W. Anderson Forsythe/Gregory Murphy/Michelle Braukmann email