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EDVA Permits Plaintiff to Use Her Deposition as Trial Testimony

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It is not uncommon in litigation for parties to introduce testimony through depositions taken for use at trial. It is very uncommon, though, for a party to request to use their own deposition testimony as their trial testimony, rather than appearing as a live witness. A recent decision by EDVA Judge David Novak granting such a request illustrates the flexibility of the rules governing the use of deposition testimony at trial as well as the considerations counsel must consider when planning to offer deposition testimony at trial. Glass v. Metro. Wash. Airport Auth., Civil Action No. 1:23cv1449 (DJN), 2024 U.S.Dist. LEXIS 66062 (E.D.Va. April 10, 2024).

In *Glass*, plaintiff Susan Glass alleged she was injured when struck by a cleaning cart at Washington National Airport. Glass filed a "Motion for Leave to Conduct *De Bene Esse* Depositions," requesting leave to take the depositions of herself and her husband at an early stage of discovery in order to preserve their testimony for trial.

The Use of Deposition Testimony at Trial Under Fed. R. Civ. P. 32

Fed. R. Civ. P. 32 sets forth the procedures for admitting deposition testimony, and, as Judge Novak pointed out, the rule does not distinguish between discovery depositions and depositions taken for use at trial. Under the rule, any deposition may be admitted under specific circumstances, including if the witness resides more than 100 miles from the place of trial or cannot attend trial because of age, illness, infirmity, or imprisonment. *See* Fed. R. Civ. P. 32(a)(4). Here, the Glasses lived in Arizona, thousands of miles from the place of trial, and so easily met the rule's requirements.

The defendant objected that Susan Glass had chosen to file suit in the EDVA and so she could not take advantage of Rule 32 to admit her own deposition as trial testimony. Judge Novak swiftly knocked that argument aside, noting that, by its terms, Rule 32 allows the deposition of any witness, even a party, to be admitted into evidence.

The Court's Discretion to Exclude Deposition Testimony

Judge Novak held in *Glass* that while compliance with Rule 32 is *necessary* to admit deposition testimony, it is not *sufficient*. Rather, though Rule 32 does not mention any other requirements, Judge Novak found that admission of deposition testimony is subject to the court's discretion. Because Susan Glass and her husband were of

advanced age and it was alleged that Susan Glass had sustained a serious injury, Judge Novak concluded that she would suffer significant hardship to attend trial, justifying leave to take the Glasses' depositions for use at trial.

The Scope of the Court's Discretion

The scope of a court's discretion to exclude deposition testimony which satisfies Rule 32 appears to be a somewhat open issue. *Glass* addressed only whether the plaintiff could take a trial deposition at an early stage of the proceedings, leaving open whether the deposition could ultimately be admitted into evidence.

Similarly, many of the cases cited in *Glass* address only whether leave of court is necessary to take a deposition, rather than whether deposition testimony is admissible. For example, *Chrysler Int'l Corp. v. Chemaly*, 280 F.3d 1358, 1360-62 (11th Cir. 2002) addresses a court's discretion to exclude deposition testimony taken after the discovery deadline. It does not address the broader issue of whether a court has the discretion to exclude deposition testimony even if Rule 32 is satisfied and the deposition was taken in compliance with the court's rules.

Glass also cites two decisions from within the Fourth Circuit, but, like *Chrysler*, those cases only addressed a court's discretion to allow a trial deposition to be taken after the discovery deadline, not whether a court has discretion to exclude otherwise admissible deposition testimony. *In re Horstemeyer*, 557 B.R. 427, 432 (Bankr. D.S.C. 2016); *Patterson v. W. Carolina Univ.*, No. 2:12cv3, 2013 U.S. Dist. LEXIS 53825, at *2 (W.D.N.C. Apr. 16, 2013).

Glass also cites *Polys v. Trans-Colo. Airlines, Inc.*, 941 F.2d 1404, 1410-11 (10th. Cir. 1991) for the proposition that admission of deposition testimony at trial is subject to abuse of discretion review. An abuse of discretion standard of review, however, applies to all trial court evidentiary rulings. Further, in *Polys*, the issue on appeal was whether the appellant preserved its objection to the exclusion of deposition testimony by making an offer of proof, not whether the court has discretionary authority to exclude admissible testimony that complies with Rule 32.

Factors a Court May Consider

Glass cites one district court case, *Truth Tellers, LLC v. LeVine*, 662 F.Supp.3d 605, 620 (N.D.W.Va. 2023), which found that "courts may consider several other factors" when deciding whether to admit deposition testimony which complies with Rule 32. These factors include "the circumstances relating to the witness's absence, the surprise to opposing counsel, evidentiary rules, and the longstanding preference of federal courts to have live testimony over recorded testimony." Rule 32, however, already encompasses several of these factors, requiring, for example that a proponent show that it did not procure the deponent's absence and that deposition testimony must be admissible if the deponent were present and testifying. *See* Fed. R. Civ. P. 32(a)(4)(B); 32(b).

The *Truth Tellers* factors that go beyond Rule 32's requirements thus appear limited to considering "surprise to opposing counsel" and "the longstanding preference of federal courts to have live testimony over recorded testimony." Surprise to opposing counsel, however, is already addressed by the rules of discovery and a court's pretrial procedures and orders. Further, neither *Truth Tellers*, nor any of the cases it cites, rely on the federal courts' preference for live testimony as grounds for excluding deposition testimony. This factor may thus be merely restating that a court will look to the reasons for a witness' absence in deciding whether to admit deposition testimony at trial.

Takeaways for Litigants

The chief takeaway for any litigant from Judge Novak's decision in *Glass* is that compliance with Rule 32 does not ensure admission of deposition testimony at trial. Parties should make sure to take depositions of witnesses who will not appear at trial during the discovery period and put opposing counsel on notice of the intent to use a deposition as trial testimony.

In out-of-the-ordinary situations, including, as in *Glass*, where counsel seeks to use the deposition of their own client as trial testimony, counsel intending to introduce deposition testimony at trial should raise the issue early and provide specific evidence showing the basis for the deponent's unavailability to testify live at trial. Counsel should also consider alternatives to deposition testimony, such as live remote testimony from the witness' location. Post-pandemic, courts and jurors are much more familiar and comfortable with videoconferencing technology, making remote testimony easier and more effective than even a few years ago.

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