United States District Court
Southern District of Texas
FILED
MAR 2 2 2002
Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

MARK NEWBY, et. al., Plaintiffs, VS. ENRON CORPORATION, et. al. Defendants.	Civil Action No. H-01-CV-3624 Houston, Texas March 18, 2002 2:20 p.m.
PAMELA M. TITTLE, on behalf of herself and a class of persons similarly situated, et. al., Plaintiffs, VS. ENRON CORPORATION, an Oregon Corporation, Defendants.	Civil Action No. H-01-3913 Houston, Texas March 18, 2002 2:20 p.m.

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MELINDA HARMON

IN-CHAMBERS TELEPHONE CONFERENCE

PROCEEDINGS RECORDED BY STENOGRAPHIC MEANS,
TRANSCRIPT PRODUCED FROM COMPUTER-AIDED TRANSCRIPTION

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1 APPEARANCES:

2

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1 APPEARANCES

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9 COURT REPORTER:

10 GAYLE L. DYE, CSR, RDR, CRR
515 Rusk, Room 8018
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(713) 250-5582
12

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1 PROCEEDINGS
2 March 18, 2002
3 THE COURT: Hello. Can you all tell me who you are
4 and then always tell me who you are so the court reporter
5 doesn't get too confused.
6 MR. HOWES: Certainly, Your Honor. This is Paul
7 Howes at Milberg, Weiss in San Diego.
8 THE COURT: Yes.
9 MS. HODGES: Also on the line Helen Hodges, Your
10 Honor. Good afternoon.
11 THE COURT: Good afternoon.
12 MR. JACONETTE: James Jaconette, Milberg, Weiss in
13 San Diego for Regents.
14 THE COURT: All right.
15 MR. GREENBERG: Roger Greenberg here in Houston for
16 the Regents.
17 THE COURT: Okay.
18 MR. PLATT: Clyde Platt in Seattle for the Tittle
19 Plaintiffs.
20 THE COURT: All right.
21 MS. KATZ: Sharon Katz in New York for Arthur
22 Andersen.
23 THE COURT: All right.
24 MR. FIGEL: And Reid Figel and David Ross in
25 Washington, DC, for Nancy Temple.

1 THE COURT: All right.
2 Ms. Hodges, why don't you proceed.
3 MS. HODGES: Your Honor, I think Mr. Drumheller and
4 Mr. Ramzel are also on the line for Arthur Andersen
5 MR. RAMZEL: We are.
6 THE COURT: Oh, okay. I'm sorry.
7 Okay.
8 MS. HODGES: Your Honor, this is Helen Hodges, and
9 I am -- I'm on a cell phone, and I apologize. I was away
10 when I learned you could have this call so quickly. Thank
11 you for hearing us.
12 This morning we filed and served a very short
13 paper where we submitted attached to my declaration a proof
14 of service on Ms. Temple in the Wilt action. We had faxed
15 that to Mr. Hansen's office Friday afternoon, that is, the
16 proof of service itself; and we'd ask that you make a factual
17 finding pursuant to the 5th Circuit's order from Friday
18 afternoon that Ms. Temple was served in the Wilt action; and
19 we would further ask you to then order Ms. Temple to appear
20 for her deposition in Houston at a time to be chosen by Paul
21 Howes and Clyde Platt on this call.
22 THE COURT: All right.
23 Any response?
24 MR. FIGEL: Your Honor, yes. Reid Figel on behalf
25 of Nancy Temple. Putting aside the service -- or the claimed

1 service in the Wilt case, we don't think that the service,
2 assuming that it happened, is sufficient to require
3 Ms. Temple to appear pursuant to the Milberg, Weiss notice of
4 deposition.
5 Our argument is based on Supreme Court
6 precedence that holds that in one case in which -- which is
7 later consolidated with another does not, essentially, merge
8 all of the parties.
9 Ms. Temple is not a party in the Regents case.
10 We don't believe that the notice to Ms. Temple in that case
11 and the fact that she was served in Wilt would be a
12 sufficient basis to require her to appear in Houston for a
13 deposition.
14 THE COURT: And did you tell me the Supreme Court
15 precedent you're relying on?
16 MR. FIGEL: Yes, Your Honor. Johnson versus
17 Manhattan Railway Company. The cite is 239 US 479. And Your
18 Honor, I think the better way to proceed is we'd like to have
19 a better opportunity to brief this point for the Court.
20 MS. HODGES: Your Honor, it's Helen Hodges. If I
21 may inquire whether counsel for Ms. Temple denies that
22 Ms. Temple was served in the Wilt action.
23 MR. FIGEL: Your Honor, I apologize. This is Reid
24 Figel. I, basically, got to Washington about 1:30 and first
25 learned about this hearing at 3:00. Mr. Hansen is

1 unavailable in California. He was in court this morning. I
2 don't know whether we will contest the service or not.
3 THE COURT: Have you seen the actual document?
4 MR. FIGEL: Yes, we have.
5 THE COURT: And you don't know whether you're going
6 to contest it or not?
7 MR. FIGEL: I'm sorry, Your Honor. I am not in a
8 position -- I haven't spoken to our client to confirm whether
9 or not she was served; but Your Honor, I don't believe that's
10 going to be the dispositive point because even assuming that
11 she's been served, I don't believe that that would confer
12 jurisdiction on the Court in the Regents case to require her
13 to appear for a deposition.
14 THE COURT: Well, don't you think that the point is
15 what the 5th Circuit asked -- or ordered me to do, and that
16 is, make a finding of whether she had been served or not?
17 MR. FIGEL: Yes, Your Honor. And I think we can
18 get to the finding point rather quickly, but there is still
19 an issue as to what the legal consequences of that finding
20 would be.
21 Our position is, Your Honor, that that would
22 not -- service in the Wilt case would not, essentially, make
23 her a party in the Regents case.
24 MS. HODGES: Your Honor, it's Helen Hodges.
25 THE COURT: Yes.

1 MS. HODGES: It seems to me that if she was served
2 in Wilt which has been consolidated into Newby -- and even if
3 it weren't consolidated -- certainly it gives the Court
4 jurisdiction over the individual. So, I'd request you to
5 order her to appear.
6 MR. GREENBERG: And this is Roger Greenberg. It
7 does say in the 5th Circuit's opinion that if Ms. Temple was,
8 indeed, served, then she is a party by virtue of the
9 consolidation and can, therefore, be ordered to appear in
10 Houston, Texas, for a deposition.
11 THE COURT: Well, that's how I read it, too; and
12 they even tell me I can do that without -- that I can issue a
13 new order. The 5th Circuit tells me that, I think, from
14 reading this.
15 MR. FIGEL: Your Honor, Reid Figel again on behalf
16 of Ms. Temple.
17 THE COURT: Yes.
18 MR. FIGEL: I think it would be reading too much
19 into the 5th Circuit's order to conclude from that sentence
20 that she is a party for the purposes of the Regents case.
21 That issue was not presented to them.
22 If the Court were to interpret it that way,
23 I'd like to have an opportunity to submit papers to explain
24 why we think that's not the appropriate reading and that
25 couldn't have been what the 5th Circuit intended.

1 THE COURT: Well, assume with me that Ms. Temple
2 has been served in the Wilt case. If the -- if the attorney
3 in the Wilt case asked me -- noticed her deposition, would
4 she not have to show up for her deposition?
5 MR. FIGEL: I believe if she was properly served in
6 accordance with the rules by counsel in the Wilt case, yes,
7 Your Honor could order her to appear; but that has not
8 happened, Your Honor.
9 MR. HOWES: But Your Honor, as Mr. Greenberg --
10 this is Paul Howes in San Diego. As Mr. Greenberg just read
11 to you, as far as the 5th Circuit is concerned, if she was
12 served in Wilt, she is a party by virtue of the
13 consolidation. I think the 5th Circuit has no question about
14 that.
15 MR. FIGEL: Again, Reid Figel for Ms. Temple. I
16 just think given that that issue was not briefed or argued to
17 the 5th Circuit, that would be a quite aggressive reading of
18 the 5th Circuit's order; and before the Court were to take
19 that interpretation, we'd like the opportunity to brief the
20 issue.
21 THE COURT: Tell me that cite again to the Supreme
22 Court case. I seem to -- I was trying to pull it up but I
23 must have written something wrong.
24 MR. FIGEL: Your Honor, it's 289 --
25 THE COURT: Oh, okay. 289. All right. All right.

1 Excuse me.
2 MR. FIGEL: 479.
3 THE COURT: Excuse me. All right.
4 MR. FIGEL: Your Honor, I also believe that the 5th
5 Circuit continues to follow this case.
6 THE COURT: Well, if it's the Supreme Court, I sure
7 hope they do.
8 MR. FIGEL: I can give you a 5th Circuit cite also,
9 Your Honor, if that will be helpful.
10 THE COURT: Okay. Well, that's okay. I finally
11 found this one.
12 MR. FIGEL: If I might, Your Honor, could I direct
13 the Court's attention to a particular passage?
14 THE COURT: Certainly. Tell me where it is. I'm
15 looking at it on the screen right now.
16 MR. FIGEL: If Your Honor's screen has key notes
17 four and five, there's a paragraph that begins "The District
18 Court, as shown in his opinion, was in doubt." So, that
19 would be on page 496 towards the bottom.
20 THE COURT: Okay. I've got it. Just give me a
21 second.
22 MR. FIGEL: And the specific portion, Your Honor,
23 is the part of the paragraph that begins, "Under the Statute
24 28, United States Code, Section 734."
25 THE COURT: All right. I've got it. I see it.

1 So, you're just talking about that one
2 sentence? Is that the idea?
3 MR. FIGEL: Well, that's the general principle,
4 yes, Your Honor.
5 THE COURT: All right. So, then what's the 5th
6 Circuit case?
7 MR. FIGEL: I'm going to -- I'll just spell the
8 first and the last name.
9 THE COURT: Okay. I just need the cite. Just give
10 me the cite. Give me the cite.
11 MR. FIGEL: Oelze versus the Commissioner of
12 Internal Revenue. And the cite is 723 F2d 1162.
13 THE COURT: Okay.
14 Okay. Well, that's a case in which the
15 question was who had -- one of the parties had standing to
16 appeal the dismissal of a party in another case that had been
17 consolidated with his case. Isn't that right?
18 MR. FIGEL: That's correct, Your Honor. But the
19 principle that we're citing these cases for is that
20 consolidation doesn't merge the cases, a party to one action,
21 a party to the other.
22 THE COURT: Well, okay, I agree with you. I think
23 both cases do say that, but I don't think that's what we're
24 doing here. I think in a situation where we have a large
25 number of cases that have been consolidated and a lead

1 Plaintiff has been appointed to take care of the matters
2 involved in all the cases that would be -- I mean, I'm
3 certain that the Plaintiff in the -- in this case in which
4 Ms. Temple has actually been named as a party would be quite
5 interested in taking her deposition.
6 And I'm sure if he were on the conference
7 call, he'd be all for it; and I don't think that we should --
8 especially since we got a lead Plaintiff who is, essentially,
9 doing the work of all these other lawyers in an effort to
10 have everything be done in an efficient manner, I don't think
11 that the general rule that one party doesn't become another
12 party for another case would make it improper to allow the
13 noticing of the deposition by the attorneys in one case,
14 especially since it's -- they're the lead Plaintiff -- the
15 lead counsel in the case, do that on behalf of someone else.
16 So, I find that this document that I'm looking
17 at that was provided to me would show that on March the 7th,
18 2002, at 10:40 a.m., Nancy A. Temple was served by delivering
19 to and leaving with the above-named person a copy of the
20 complaint at 33 West Monroe Street, Chicago, Illinois 60603.
21 So, she was -- I find that she was served with
22 the complaint and that, having been served with the
23 complaint, she is subject to having her deposition taken on
24 notice in Houston, Texas.
25 So, now, when do you want to take it?

1 Are you all still awake?
2 MR. HOWES: Yes, Your Honor. We will take it --
3 Clyde, do you have a suggestion?
4 MR. PLATT: Any time this week, Paul.
5 MR. CAMPBELL: Your Honor, this is Justin Campbell.
6 I joined the hearing late, and I am available this week any
7 time.
8 MS. KATZ: This is Sharon Katz. If the parties are
9 going to schedule this, I would ask them to take into account
10 that the MDL hearing is taking place this week in Tucson and
11 some of us need to travel there on Wednesday and will be out
12 Thursday. So, I'm wondering if the parties could just
13 discuss what would be an appropriate time and then get back
14 to the Court and report on that.
15 MR. CAMPBELL: Let's set it right now, Your Honor.
16 THE COURT REPORTER: Who is this?
17 THE COURT: This is Mr. Campbell.
18 MS. KATZ: I would request that accommodation be
19 made for those of us who have to be in Arizona. If it could
20 be done at the end of the week, I would appreciate that.
21 MR. FIGEL: Your Honor, on behalf of Ms. Temple,
22 given the Court's findings that Ms. Temple is within the
23 jurisdiction of the Court, we still believe that her
24 deposition would have to be conducted in accordance with the
25 rules; and under the rules, there's a requirement that notice

1 be given to all parties in a reasonable time for scheduling;
2 and I don't believe that a deposition this week would give
3 all parties reasonable notice.
4 MR. CAMPBELL: This is Justin Campbell, Your Honor.
5 I believe where we are procedurally is that a notice that was
6 duly given with appropriate notices of postponements that had
7 been agreed to scheduled this deposition for last Thursday,
8 the 14th, and that that proceeding simply has been stayed.
9 And so, I certainly think that as a matter of
10 courtesy and practical logistics we have to have some form of
11 notice to people; but in terms of some kind of notice within
12 the rules, I think we're already there because the proceeding
13 on the 14th has simply been stayed.
14 MR. ROSS: Your Honor, this is David Ross; and
15 unless -- Rule 30(b)(1) is clear that every party must be
16 given reasonable written notice; and unless the Plaintiff can
17 assure the Court, Your Honor, that every Plaintiff in every
18 case that has been consolidated before the Court has been
19 given written notice -- and that includes, Your Honor, under
20 the rules people that have not yet entered an appearance.
21 They're still entitled to be given notice.
22 They must be given reasonable written notice,
23 and I don't believe the Plaintiff is ready to say today that
24 they have complied with that obligation under the federal
25 rules. So, at a minimum they must schedule enough time so

1 that all parties, whether it be through their counsel or if
2 they have not entered an appearance by mailing it to them --
3 and that, obviously, requires a few days. Every Defendant
4 must be given reasonable written notice of this deposition.
5 And since not all parties have entered an
6 appearance, I highly doubt that the Plaintiff is able to
7 represent that at this point they have complied with that
8 obligation. It's not possible to go forward this week and
9 comply with the notice requirements of Rule 30(b).
10 MS. HODGES: Your Honor, this Helen Hodges.
11 THE COURT: Yes.
12 MS. HODGES: As Justin just said, we did give
13 notice to everybody. In fact, all the parties were in the
14 deposition -- were in Houston last week for the Thibaut
15 deposition and were prepared to go forward with Ms. Temple's
16 deposition last Thursday.
17 Your Honor, I assure you we can fax out this
18 afternoon a notice to everyone in these cases and set the --
19 set the deposition for this Friday and thereby accommodate
20 Ms. Katz's request that we not do it on Thursday.
21 MR. FIGEL: Your Honor, Reid Figel on behalf of
22 Ms. Temple. I just don't think that would constitute
23 reasonable notice.
24 THE COURT: Why not?
25 MR. FIGEL: Well, first of all, there are certain

1 parties who haven't entered an appearance. Second of all,
2 three days' notice for most busy lawyers just isn't enough
3 time to make themselves available to come to Houston for a
4 deposition.
5 And if Ms. Temple is -- if all parties are not
6 given notice, then we're going to be back before Your Honor
7 in two or three weeks with a bunch of lawyers who claim they
8 didn't have notice and a reasonable opportunity to attend,
9 and Ms. Temple is going to be forced to come back to be
10 deposed a second time.
11 THE COURT: Under the circumstances of this case, I
12 think three days' faxed notice is ample notice to the parties
13 of this deposition; and therefore --
14 MR. ROSS: Your Honor, we would then request --
15 this is David Ross -- that it be made clear on the
16 certificate of service exactly who -- when notice is being
17 provided by name who that notice is on behalf of so that we
18 can ensure after we see it that, in fact, every party that's
19 named has been given notice. In effect, if the Plaintiff can
20 do that, fine. If not, we can then figure out how to
21 proceed.
22 MS. KATZ: Your Honor, it's Sharon Katz. I hope
23 you can hear me.
24 THE COURT: Yes.
25 MS. KATZ: I just want to add to that since the

1 Court is finding that the service under Wilt somehow affects
2 or impacts upon the Court's jurisdiction here and the ability
3 to order Ms. Temple's deposition, I think that the request
4 that Ms. Temple's counsel is making actually makes a great
5 deal of sense because that means there are a number of many
6 new individuals who were not parties to the case at the time
7 that the original notice was sent out by the Newby Plaintiffs
8 and at the time that the original order was entered, people
9 who are now parties who were not parties at that time.
10 THE COURT: Can that be done?
11 MS. KATZ: I'm sorry?
12 THE COURT: I'm asking can that be done. Is it a
13 problem to put who the party is who is being noticed?
14 MS. KATZ: I assume it can be done. I think the
15 request is to the Plaintiffs to do that.
16 MS. HODGES: Your Honor, it's Helen Hodges. We'll
17 make our best efforts to notify everyone who is a named
18 party. If there is a person who is a named party, say, for
19 example, in the Wilt action who has not -- not retained
20 counsel, we'll do our best to get the notice to that person
21 individually as soon as possible.
22 THE COURT: All right.
23 MR. ROSS: Your Honor, this is David Ross again.
24 If they don't have fax numbers for those people -- assuming
25 it gets faxed out today, three days' notice, if they don't

1 have fax numbers for these people and have to mail it to any
2 of them, Your Honor, then setting the deposition for Friday
3 is simply not reasonable. These people presumptively under
4 the federal rules are going to take three days to even get
5 it.
6 THE COURT: All right. Well, we'll have to cross
7 that bridge when we come to it.
8 MR. ROSS: Thank you, Your Honor.
9 THE COURT: All right, thank you.
10 MS. HODGES: Thank you, Your Honor.
11 MR. FIGEL: Just so we're clear, what time is the
12 deposition notice for and where?
13 MR. HOWES: At 9:00 o'clock on Friday at the
14 Houstonian.
15 THE COURT: 9:00 o'clock, Friday, Houstonian. All
16 right. All right. Thank you all. Good-bye.
17 (Proceedings concluded at 2:40 p.m.)
18
19 C E R T I F I C A T E
20
21 I certify that the foregoing is a correct transcript
22 from the record of proceedings in the above-entitled matter.
23
24 3/19/02 _____
25 Date Gayle L. Dye, CSR, RDR, CRR