

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 19-cv-00901-NRN

MICHAELLA LYNN SURAT,

Plaintiff,

v.

RANDALL KLAMSER, in his individual capacity, and
CITY OF FORT COLLINS, a municipality,

Defendants.

**PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR PROTECTIVE ORDER
REGARDING DEPOSITION OF PLAINTIFF [DOC. 87]**

Plaintiffs, through counsel Helen Oh, David Lane, and Andrew McNulty, hereby submit the following Response to Defendant Klamser's Motion for Protective Order Regarding Deposition of Plaintiff [Doc. 87], and state as follows:

CERTIFICATE OF CONFERRAL UNDER D.C.COLO.LCivR 7.1

Counsel for Defendants, Mark Ratner, conferred with Plaintiff's counsel and Plaintiff opposes Defendant's requested relief.

A. Fed. R. Civ. P. 26(c) Requires a Showing of Good Cause to Sequester a Witness, Deponent, or Potential Deponent From Attending a Deposition.

Federal Rules of Civil Procedure 26(c)(1)(E) governs protective orders and the designation of persons who may be present while a deposition is being conducted. The rule provides that the "court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1).

Under Rule 26(c), the “good cause” standard is “highly flexible, having been designed to accommodate all relevant interests as they arise.” *Rohrbough v. Harris*, 549 F.3d 1313, 1321 (10th Cir. 2008). This is the same “good cause” standard as stated in the parties’ Protective Order [Doc. 75 ¶ 11]. The “good cause” standard is “not met by conclusory statements.” *Henderlong v. Allstate Ins. Co.*, Civ. Action No. 08-cv-01377-CMA-MEH, 2009 U.S. Dist. LEXIS 3450 at *3 (D. Colo. Jan. 13, 2009). Rather, the party seeking a protective order must make “a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.” *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n. 16 (1981).

Fed. R. Civ. P. 30(c) provides that “[t]he examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615.” Under Fed. R. Evid. 615, a witness may be excluded from hearing the testimony of others to discourage “fabrication, inaccuracy, and collusion.” Fed. R. Evid. 615 advisory committee’s note to 1988 amendments. Rule 30(c) was amended in 1993 “to make it clear that deposition witnesses are not subject to sequestration as a matter of course.” *Conrad v. Bd. Of Johnson County Kan. Comm’rs*, Civ. Action No: 00-2277-DJW, 2001 U.S. Dist. LEXIS 16210, at *1 (D. Kan. Sep 17, 2001). The 1993 Advisory Committee Notes explain the purpose of excepting Rule 615 as follows:

[T]he revision addresses a recurring problem as to whether other potential deponents can attend a deposition. Courts have disagreed, some holding that witnesses should be excluded through invocation of Rule 615 of the evidence rules, and others holding that witnesses may attend unless excluded by an order under Rule 26(c)(5). The revision provides that other witnesses are not automatically excluded from a deposition simply by the request of a party. Exclusion, however, can be ordered under Rule 26(c)(5) when appropriate; and, if exclusion is ordered, consideration should be given as to whether the excluded witnesses likewise should be precluded from reading, or being otherwise informed about, the testimony given in the earlier depositions.

Fed. R. Civ. P. 30 advisory committee’s note to 1993 amendments.

The District Court of Colorado has reaffirmed that “witness sequestration is not available as a matter of right in pretrial depositions.” *EEOC v. JBS USA, LLC*, Civ. Action No. 10-cv-02103-PAB-KLM, 2012 U.S. Dist. LEXIS 37095, at * 8 (D. Colo. Mar. 20, 2012) (denying motion for protective order to sequester intervenors from attending the pretrial depositions of other intervenors because “tactical considerations such as a desire to secure the independent recollection of witnesses or avoid the tailoring of testimony are *per se* not compelling and will not justify exclusion.”). Moreover, “witnesses, and particularly parties, have a presumptive right to participate in pretrial depositions.” *Visor v. Sprint/United Mgmt. Co.*, Civ. Action No. 96-K-1730, 1997 U.S. Dist. LEXIS 14086, at *7 (D. Colo. Aug. 15, 1997). The moving party must demonstrate good cause for exclusion, and “[t]his is true regardless of whether [Plaintiff] is a party or nonparty.” *Id.* at 9.

In *Conrad*, the court denied plaintiff’s motion for a protective order which sought to prevent two witness deponents – a director of the defendant county health department and a health department employee – from attending each other’s depositions. *Conrad*, Civ. Action No: 00-2277-DJW, 2001 U.S. Dist. LEXIS, at *3-5. The plaintiff argued that sequestration was necessary because of the highly factual nature of the case and the risk that the witnesses might be affected by each other’s testimony. *Id.* at 3. The court found that the plaintiff did not establish good cause, because the plaintiff “failed to make a specific showing of harm that would justify sequestration.” *Id.* The court further reasoned that almost all cases are fact intensive, and the plaintiff “offered no particular facts that would lead the Court to conclude that these witnesses cannot be trusted to tell the truth or that their attendance at each other’s depositions will affect their testimony.” *Id.* at 4; *see also Radian Asset Assur., Inc. v. College of the Christian Bros.*, No. CIV 09-0885 JB/DJS, 2010 U.S. Dist. LEXIS 137137 (D.N.M. Nov. 24, 2010).

B. Plaintiff Has Demonstrated Good Cause For Her Parents' Attendance of Her Deposition.

Ms. Surat's deposition is scheduled for a full day on March 12, 2020. She again seeks her parents' presence for emotional support, but this time, at her own deposition. When Ms. Surat was slammed face-first to the ground by Defendant Klamser, she had just turned twenty-two years old. Throughout her challenging and emotional criminal trial as well as her ongoing civil case, Ms. Surat's parents have been her beacon of light, encouragement, and validation. *See Ex. 1, Declaration of Surat.* She wishes for her parents to be present at her deposition because she will be forced to recount a traumatic and painful experience, which is itself incredibly difficult, but it will also be hours-long and in response to an adverse party's questioning. The presence of her parents will "provide [her] with comfort, strength, and reassurance during a stressful and emotional all-day deposition." *Id.* Emotional support is especially important for individuals who have been victims of violence. *See also Commonwealth v. Harris*, 409 Mass. 461, 470, 567 N.E.2d 899 (1991) (Discussing the important role of victim advocates and explaining that they "generally help [victims] to cope with the realities of the criminal justice system and the disruption of personal affairs . . . during a time of personal trauma."). Ms. Surat suffered serious physical and emotional injuries when Defendant Klamser threw her to the ground. Similar to the support victim advocates provide, Ms. Surat's parents wish to provide emotional support for their daughter who will have to recount her painful experience and reopen old wounds.

C. Defendant Has Failed to Show Good Cause to Sequester Plaintiff's Parents from Plaintiff's Deposition.

Following *Conrad*, *JBS*, and *Visor*, the moving party that seeks to sequester a witness or potential deponent from attending a deposition bears the burden of demonstrating good cause. As such, the moving party must make a specific showing of harm that would justify sequestration.

See Conrad, Civ. Action No: 00-2277-DJW, 2001 U.S. Dist. LEXIS, at *3. Defendant asserts that Ms. Surat's parents should not be allowed to attend her deposition because non-parties are "not necessarily entitled to attend private depositions," and plaintiff's reason of wanting emotional support is "insufficient to overcome the presumption that members of the public do not have a right to be present at depositions." [Doc. 86]. Despite these claims, Defendant makes no specific (or any) showing of harm that would justify the sequestration of Plaintiff's parents from her deposition. More specifically, Defendant does not allege that any annoyance, embarrassment, oppression, or undue burden would befall Defendant if Plaintiff's parents are able to attend her deposition. For these reasons, Defendant has not demonstrated good cause.

Defendant also makes no showing of how the testimony of Ms. Surat's parents may be materially affected by the testimony of their daughter. To the contrary, there is little risk that Plaintiff's parents' deposition attendance would "materially affect the quality of the testimony in the case" because Ms. Surat and her parents have already discussed, over the past two and a half years, what happened to Ms. Surat at the hands of Defendant Klamser. *JBS USA, LLC*, Civ. Action No. 10-cv-02103-PAB-KLM, 2012 U.S. Dist. LEXIS at *9-10. Like the intervenors in *JBS*, it is difficult to imagine any collusion or fabrication of testimony when Ms. Surat's parents deeply understand and have repeatedly heard – through seeing Ms. Surat after the incident, hearing her describe what occurred, and watching viral video footage – all of Ms. Surat's injuries from the incident. In balancing the interest of the parties, considering the absence of injury to Defendant Klamser and Ms. Surat's interest in having emotional support while she is deposed about a traumatic experience, this court should deny Defendant's Motion for Protective Order and allow Ms. Surat's parents to be present at her deposition.

CONCLUSION

For the reasons above, Defendants' Motion For Protective Order Regarding Deposition of Plaintiff should be denied.

DATED this 9th day of March 2020.

KILLMER, LANE & NEWMAN, LLP

s/ Helen Oh

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CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2020, I filed the foregoing via the CM/ECF system, which will send notice to the following:

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