

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
LEXINGTON DIVISION  
CIVIL ACTION CASE NO. 5:09-cv-00244-KSF

*filed electronically*

C. MARTIN GASKELL

PLAINTIFF

V.

**MOTION IN LIMINE TO PREVENT PLAINTIFF FROM  
INTRODUCING PORTIONS OF DISCOVERY DEPOSITIONS  
TAKEN OF KEITH MACADAM, STEVE ELLIS, JEFFREY OSBORN,  
TIMOTHY KNAUER AND JAMES KRUPA FOR ANY OTHER PURPOSE  
THAN IMPEACHMENT OF THE WITNESSES**

UNIVERSITY OF KENTUCKY

DEFENDANT

\*\* \*\* \* \*\* \* \*\* \* \*\* \* \*\* \*

Comes the Defendant, University of Kentucky, by counsel, and requests the Court to prohibit the Plaintiff from introducing portions of discovery depositions taken of Keith MacAdam, Steve Ellis, Jeffrey Osborn, Timothy Knauer and James Krupa for any other purpose than impeachment of the witnesses. As grounds for this Motion, the Defendant submits the following:

In his First Amended Witness List, Plaintiff identifies Keith MacAdam, Steve Ellis, Jeffrey Osborn, Timothy Knauer and James Krupa as witnesses whose testimony will be introduced to the jury by reading excerpts from their depositions. Keith MacAdam and Steve Ellis were members of the Advisory Committee which had no authority to make any hiring decisions for the University but was authorized to make recommendations for the position of Observatory Director. They are not parties to this lawsuit nor are they agents or designated representatives of the University.

Jeffrey Osborn and James Krupa are biologists in the University of Kentucky's Department of Biology, and the Plaintiff plans to introduce testimony from these witnesses by

reading portions of their depositions. Finally, Timothy Knauer was the candidate who was hired for the Observatory Director position, and the Plaintiff has also identified him as a witness who will be introduced to the jury by reading excerpts from his discovery deposition. The biologists had no authority to make any hiring decision for Observatory director but were merely asked to provide their thoughts on the scientific integrity of lecture notes which the Plaintiff publicized on his web site. Clearly, none of these individuals are parties but mere witnesses in this case.

Federal Rule of Civil Procedure 32 provides that at trial, all or part of a deposition may be used against a party if the following conditions are met: (a) the party was present or represented at the taking of the deposition or had reasonable notice of it; (b) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and (c) the use is allowed by Rule 32(a)(2) through (8).

None of the depositions of Keith MacAdam, Steve Ellis, Jeffrey Osborn, Timothy Knauer or James Krupa meet the requirements of Fed. R. Civ. P. 32(a). They are all local witnesses who are available to testify at trial. They are not parties, agents or designees of the University because they had no decision making power without approval from a higher authority. A managing agent is an employee who has the discretion to make decisions for the corporation or employer without approval and authorization from a higher authority.<sup>1</sup>

Testimony by deposition is less desirable than oral testimony and should ordinarily be used as a substitute only if the witness is unavailable to testify in person.<sup>2</sup> Depositions may only be used where a witness is unavailable or where exceptional circumstances necessitate their use, and depositions cannot substitute at trial for the witness themselves.<sup>3</sup> Since these witnesses are available to testify at trial and do not meet any of the requirements of Fed. R. Civ. P. 32, the Plaintiff should be prohibited from reading excerpts from these witnesses' discovery depositions.

---

<sup>1</sup> Young & Associates Public Relations, LLC v. Delta Airlines, Inc., 216 F.R.D. 521 (D. Utah, 2003).

<sup>2</sup> Salsman v. Witt, 466 F. 2d 76 (10<sup>th</sup> Cir. 1972).

<sup>3</sup> G.E.J. Corporation v. Uranium Aire, Inc., 311 F. 2d 749 (9<sup>th</sup> Cir. 1962).

Respectfully submitted,

**BAKER, KRIZ, JENKINS, PREWITT & JONES, PSC**  
PNC Bank Plaza, Suite 710  
200 West Vine Street  
Lexington, Kentucky 40507-1620  
Telephone: (859) 255-6885, Ext. 114  
Facsimile: (859) 253-9709  
E-Mail: bkriz@bakerkriz.com

s/BARBARA A. KRIZ  
*Counsel for Defendant, University of Kentucky*

**CERTIFICATE OF SERVICE**

I hereby certify that on **December 22, 2010**, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following: Francis J. Manion, Geoffrey R. Surtees and Edward L. White, III.

s/Barbara A. Kriz  
Attorney for Defendant  
Baker, Kriz, Jenkins, Prewitt & Jones, P.S.C.  
200 West Vine Street, Suite 710  
Lexington, Kentucky 40507-1620  
Telephone: (859) 255-6885, Ext. 114  
Facsimile: 859-253-9709  
E-mail: [bkriz@bakerkriz.com](mailto:bkriz@bakerkriz.com)  
*Counsel for Defendants*

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
LEXINGTON DIVISION  
CIVIL ACTION CASE NO. 5:09-cv-00244-KSF

*filed electronically*

C. MARTIN GASKELL

PLAINTIFF

V.

**PROPOSED ORDER**

UNIVERSITY OF KENTUCKY

DEFENDANT

\*\* \*\* \* \*\* \* \*\* \* \*\* \* \*\* \*

On Motion of the Defendant, University of Kentucky, to preclude the Plaintiff from introducing deposition testimony from Keith MacAdam, Steve Ellis, Jeffrey Osborn, Timothy Knauer and James Krupa rather than calling these witnesses to testify live before the jury, the Court having reviewed the Motion and being otherwise sufficiently advised, it is hereby ORDERED that the Motion is SUSTAINED. Since none of these witnesses are parties or agents of the University of Kentucky for purposes of the issues in this case and because none of these witnesses meet the requirements of Fed. R. Civ. P. 32, the Plaintiff is hereby prohibited from introducing evidence from these witnesses by reading excerpts from their discovery depositions to the jury.

ENTERED this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
HON. KARL S. FORESTER, JUDGE  
UNITED STATES DISTRICT COURT  
LEXINGTON DIVISION

