

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

KATHERINE DAVIS,
Guardian for Carla Lewis

PLAINTIFF

v.

No. 4:13-cv-589-DPM

OLD DOMINION FREIGHT LINE
and MELVIN HOWZE

DEFENDANTS

ORDER

Davis's life-care expert, Sarah Moore, is very sick. A few months ago, the Court said that Moore's testimony can go to the jury. *No. 67*. Because Moore's health is not good, the parties have agreed to pre-record her trial testimony.

Old Dominion and Howze want to exclude from that recording any reference, including "impressions" and "inferences," to Moore's sickness. *No. 68 at 2*. They say Moore's fragile condition is unfairly prejudicial if not irrelevant. FED. R. EVID. 401 & 403. Davis agrees that Moore's health can't change Moore's opinion. But she says the parties can't avoid the visual toll that stage-four cancer and chemotherapy have taken on Moore's body. And Davis must, she argues, explain to the jury why Moore is testifying by pre-

recorded video, or else the jury will wonder why Moore avoided coming to court.

Old Dominion and Howze's motion, No 68, is granted in part and denied in part. Moore's appearance is likely to foster impressions and inferences about her health; those can't reasonably be avoided. But Davis must keep Moore's health out of the spotlight – Moore's expert opinion, not her health, is the issue. If Moore is not at trial, the Court will explain her absence to the jury without mentioning Moore's health problems. The recording is not the place to do that. On all other points, respect and reasonableness should carry the parties through.

So Ordered.

D.P. Marshall Jr.
D.P. Marshall Jr.
United States District Judge

20 October 2015