

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

BARBARA McDANIEL-SHARP,)
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 Plaintiff,)
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 v.)
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 WAL-MART STORES, INC.,)
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 Defendant.)
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Case No. 11-2518-CM

MEMORANDUM AND ORDER

This matter is before the court on defendant Wal-Mart Stores, Inc.’s motion for a modification of the scheduling order and extension of time for the designation of Dr. Bernhardt’s deposition (Doc. 49). Defendant asks that the time for designation of Dr. Bernhardt’s deposition be extended to February 26, 2013, and the deadline for counter-designations and objections be extended to February 28, 2013. Plaintiff filed a response opposing defendant’s motion.

This case is set for trial on the court’s March 4, 2013 trial docket. Defendant’s designated expert, Dr. Bernhardt, was expected to be at trial and to testify regarding plaintiff’s physical condition, injuries, causation, and damages. Defendant’s motion states that Dr. Bernhardt is a material witness and has an unexpected and unavoidable conflict with the week of March 4, 2013. This conflict will force defendant to be out of the country and will preclude him from testifying in court.

Under the current scheduling order (Doc. 20), the deadline for completion of discovery in this case was May 14, 2012. The scheduling order also states that deposition designations must be completed and filed by twenty-one days before trial, or February 11, 2013. Counter-designations and objections are due by fourteen days before trial, or February 18, 2013. Defendant states that Dr. Bernhardt is available for videotaped trial deposition on February 22, 2013. Defendant thus asks to

depose Dr. Bernhardt pursuant to Local Rule 30.3, and asks for an extension of the deadlines for designations, counter-designations, and objections to Dr. Bernhardt's deposition testimony.

Plaintiff's counsel argues that defendant's proposed extension—and the fact that plaintiff's counsel would have only two days to review the transcript and the designations to make counter-designations and objections—imposes a hardship upon plaintiff's counsel.

Local Rule 30.3 states the general rule that “[t]he deposition of a material witness not subject to subpoena should ordinarily be taken during the discovery period.” Under Federal Rule of Civil Procedure 16(b)(4), the court may modify a scheduling order only for good cause. Under Local Rule 30.3, there is a presumption of good cause for altering a deadline on depositions. *Sithon Maritime Co. v. Holiday Mansion*, No. 96-2262-KHV, 1999 WL 66216, at *2 (D. Kan. Feb. 8, 1999). This presumption arises when a material witness has agreed to appear for trial, but later becomes unavailable or refuses to attend. *Id.* Further, “[a] party can generally show good cause to modify a scheduling order . . . when it is ‘necessary to depose a potential witness whose testimony may not otherwise be obtainable for trial.’” *Id.* (quoting *Dixon v. Certaineed Corp.*, No. 94-2310-GTV, 1996 WL 635781, at *1 (D. Kan. Oct. 29, 1996)).

In this case, Dr. Bernhardt is a material witness, had agreed to attend trial to testify, and is now unavailable to do so. Thus, the presumption of good cause applies and defendant's motion to modify the scheduling order and for an extension of time is granted. The court does not find that plaintiff's counsel will suffer any hardship by this decision. However, the court will extend the deadline for designation of Dr. Bernhardt's deposition to February 26, 2013, and give plaintiff an extra day beyond the extension requested by defendant, to March 1, 2013, to make counter-designations and objections.

IT IS THEREFORE ORDERED that Wal-Mart Stores, Inc.'s Motion for a Modification of the Scheduling Order and Extension of Time for the Designation of Dr. Bernhardt's Deposition (Doc. 49) is granted.

IT IS FURTHER ORDERED that the scheduling order is modified to reflect an extension of time for the designation of Dr. Bernhardt's deposition testimony to February 26, 2013, and the deadline for counter-designations and objections to March 1, 2013.

Dated this 8th day of February, 2013, at Kansas City, Kansas.

_s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge