

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

AMY ZUELSDORF, on behalf of  
Adam Cook, et al.,

Petitioners,

vs.

Civil Action 2:14-mc-0015  
Judge Frost  
Magistrate Judge King

WANDA OILER,  
et al.,

Respondents.

OPINION AND ORDER

This matter is before the Court on the *Verified Petition of Amy Zuelsdorf and Bobbie Jo Cook, Co-Administrators of the Estate of Adam L. Cook, Deceased, for an Order Granting Them Permission to Perpetuate Testimony of Wanda Oiler and Tod Hagins, M.D., Doc. No. 1* ("Petition"). For the reasons that follow, the *Petition* is **DENIED**.

Petitioners Amy Zuelsdorf and Bobbi Jo Cook ("petitioners"), Co-Administrators of the Estate of Adam L. Cook, Deceased ("the Estate") allege that Adam Cook was arrested and transported to the Jefferson County, Ohio Jail ("jail") on June 23, 2013. *Petition*, p. 1. According to petitioners, Mr. Cook died of diabetic ketoacidosis ("DKA") because he did not receive the medical care he needed to treat his Type 1 diabetes and alcohol withdrawal. *Id.*<sup>1</sup> Petitioners allege that the jail's staff's deliberate indifference to Mr. Cook's serious

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<sup>1</sup>Petitioners represent that DKA is a "well-known complication of Type 1 diabetes[.]" *Id.* at 3.

medical conditions as well as the jail's policies and procedures and jail staff training resulted in Mr. Cook's death. *Id.*

Petitioners represent that they intend to file a lawsuit pursuant to 42 U.S.C. § 1983 against Jefferson County ("the County"), Fred Abdalla, the County's Sheriff, and Tod Hagins, M.D., the jail's medical director, in their official capacities, as well as "several members of the Jail's staff in their individual capacities because each of them caused and/or contributed to Mr. Cook's death." *Id.* at 1-3. Petitioners seek to depose Wanda Oiler, the jail's nurse, and Dr. Hagins before instituting this anticipated litigation.<sup>2</sup>

Rule 27 of the Federal Rules of Civil Procedure permits a person to take the deposition of another person under certain circumstances before a lawsuit is filed. More specifically, Rule 27 provides the following:

A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show:

(A) that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought;

(B) the subject matter of the expected action and the petitioner's interest;

(C) the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it;

(D) the names or a description of the persons whom

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<sup>2</sup>Petitioners represent that counsel for Dr. Hagins, Craig G. Pelini, Esq., does not oppose the requested deposition. *Petition*, p. 8.

the petitioner expects to be adverse parties and their addresses, so far as known; and

(E) the name, address, and expected substance of the testimony of each deponent.

Fed. R. Civ. P. 27(a)(1). A court must issue an order for examination if the petitioner satisfies the court "that perpetuating the testimony may prevent a failure or delay of justice[.]" Fed. R. Civ. P. 27(a)(3).

Rule 27 applies "to situations where, for one reason or another, testimony might be lost to a prospective litigant unless taken immediately, without waiting until after a suit or other legal proceeding is commenced." 8A Wright, Miller & Marcus, Fed. Prac. and Proc., § 2071 (3d Ed. West Group 2014) (citations omitted). See also *Ash v. Cort*, 512 F.2d 909, 911 (3rd Cir. 1975) ("Rule 27 properly applies only in that special category of cases where it is necessary to prevent testimony from being lost."). For instance, courts have granted petitions to perpetuate testimony "when a witness is aged or gravely injured and in danger of dying or there are geographical constraints;" courts commonly deny petitions to perpetuate testimony in cases that do not present these special circumstances. *In re Somerville*, No. 08-CV-206-JBC, 2008 U.S. Dist. LEXIS 49877, at \*9-10 (E.D. Ky. June 20, 2008) (collecting cases); *In re Boland*, 79 F.R.D. 665, 667 (D. D.C. 1978) (denying petition to perpetuate testimony where "[t]here is no evidence that the testimony of persons with knowledge of the material facts relevant to petitioner's proposed lawsuit will be unavailable after a complaint is filed"). Accordingly, permitting discovery to "enable a person to fish for some

ground for bringing suit" is an abuse of Rule 27. 8A Wright, Miller & Marcus, Fed. Prac. and Proc., § 2071 (3d Ed. West Group 2014). See also *In re Boland*, 79 F.R.D. at 668 (denying petition to perpetuate testimony because the petitioner's claim rested "only on the basis that the relief is needed to permit her to draw a proper complaint" and Rule 27 "'is not a method of discovery to determine whether a cause of action exists; and, if so, against whom action should be instituted'" (quoting *Petition of Gurnsey*, 223 F. Supp. 359, 360 (D.D.C. 1963)); *Petition of Ferkauf*, 3 F.R.D. 89, 91 (S.D.N.Y. 1943) ("[R]ule 27 was not intended to be used as a discovery statute; its purpose was not to enable a prospective litigant to discover facts upon which to frame a complaint.").

In the case presently before the Court, petitioners purport to comply with the requirements of Rule 27(a)(1)(A) - (E). See *Petition*, pp. 3-7. However, nowhere in the *Petition* do petitioners identify the "special circumstances" that might serve to justify this pre-litigation discovery. See, e.g., *Ash*, 512 F.2d at 912 "[Rule 27] is available in special circumstances to preserve testimony which could otherwise be lost."). In other words, petitioners do not describe what testimony may be lost if the depositions of Nurse Oiler and Dr. Hagins do not proceed at this juncture. See *Biddulph v. United States*, 239 F.R.D. 291, 293 (D.D.C. 2007) ("To satisfy the court that the testimony is needed to protect against a failure or delay of justice, the great weight of authority requires the petitioner to show that there is a risk of loss of the desired testimony."). Instead, petitioners explain that they need these depositions in order "to

correctly evaluate all of the causes of action" petitioners may have against Nurse Oiler and Dr. Haggins in his individual capacity, *Petition*, pp. 2, 8, and, specifically, "to determine whether, in addition to claims of deliberate indifference, a claim of a cover-up and concealment should be brought against Nurse Oiler[,]" *id.* at 6. However, as discussed *supra*, Rule 27 is not appropriately utilized simply to gather facts in order to determine what causes of action to pursue. *See, e.g., In re Boland*, 79 F.R.D. at 668; *Petition of Ferkauf*, 3 F.R.D. at 91. Moreover, petitioners concede that they are presently aware of at least some of their proposed claims against different individuals or entities. *Petition*, pp. 1-3 (identifying possible defendants in connection with a forthcoming federal action pursuant to Section 1983 asserting a claim for deliberate indifference to a serious medical need). Based on the present record, petitioners have sufficient information to initiate a lawsuit; presumably, they could move to amend their complaint should discovery disclose a basis for additional claims.

Petitioners further argue that the grant of the *Petition* to take the depositions would serve judicial economy because Nurse Oiler and/or Dr. Haggins would be less likely to defend against a claim that is supported by their deposition testimony. *Petition*, pp. 2, 8. This Court disagrees. Far from serving judicial economy, permitting petitioners to depose Nurse Oiler and Dr. Haggins at this juncture runs the risk of duplicative discovery, *i.e.*, multiple depositions of the same two deponents. Moreover, the Court finds that the grant of the *Petition* risks prejudice to Nurse Oiler who does not appear to be

represented by counsel at this time. See *Petition*, p. 7 ("Further with the exception of Dr. Hagins, in his individual capacity and Nurse Oiler, all of the above [individuals] are represented by attorney Monica Waller of Lane, Alton & Horst. Dr. Hagins is represented in his individual capacity by attorney Craig G. Pelini."). But see *Petition*, p. 11 (certificate of service advising that Attorney Waller represents, *inter alios*, Nurse Oiler). For all of these reasons, the Court is not satisfied that the requested testimony "may prevent a failure or delay of justice[.]" Fed. R. Civ. P. 4(a)(3).

**WHEREUPON**, the *Verified Petition of Amy Zuelsdorf and Bobbie Jo Cook, Co-Administrators of the Estate of Adam L. Cook, Deceased, for an Order Granting Them Permission to Perpetuate Testimony of Wanda Oiler and Tod Hagins, M.D.*, Doc. No. 1, is **DENIED**.

May 12, 2014

s/Norah McCann King  
Norah M<sup>c</sup>Cann King  
United States Magistrate Judge